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S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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405	Krishnamma Boyee v. Gopal Rao	**24**	485
411	Srinivasa Aiyangar v. Cunniappa Chetty ...	**24**	895
4[illegible]5	Ratnaswami Chetty v. Ratnammal	**24**	135
418	Subba Naidu v. Venkatrama Naidu	**23**	528

(D).—(1914) MADRAS WEEKLY NOTES, FOR APRIL-MAY 10TH.

Page of (1914) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1913-14. V.	P.
309	Uthami Chettiar v. Juthu Nagaswami Iyer ...	23	241
310	Numberumal Chettiar v. Krishnajee	22	919
314	Madurathachi v. Chokalinga Pillai	23	324
316	Srinivasa Iyengar v. Cundasawmy Naicker ...	23	544
317	Singamusetti Venkatiah v Bopalla Chirranna ...	23	425
318	Bila Sanyasi Naidu v. Agnihotram Venkata Charyulu ...	23	96
319	Seshappier v. Subramania Chettiar	23	174
322	Adiraja Chetty v. Vittil Bhatta ...	23	540
323	Ramanadhan Pattar v. Achuta Varier ...	23	753
323	Srinivasachariar v. Gopalan ...	23	424
324	Assistant Sessions Judge of North Arcot v. Ramaswami Asari ...	22	991
327	Natesa Gramani v. Tangavelu Gramani ...	23	102
329	Kanakammal v. Panchapakesa Udayar ...	23	82
333	Secretary of State for India v. Santuraja Shetty ...	21	432
339	Nazareth v. Jaffer Meghji Shet ...	23	523
340	Segu Rowther v. Alagappa Chetty	22	834
344	Mittadar Venkoba Royer v. Mittadar Kadiriappa Gounder ...	23	614
345	Tungala Mallanna v. Gothumukkala Ramaraju ...	23	531
346	Abdul Latiff Saheb v. Bathula Bibi	23	530
347	Secretary of State for India v. Sankarapandian Pillai ...	23	727
348	Yellammal v. Ayyappa Naick ...	22	870
351	Subroya Iyer v. Moulvi Kadar Rowthu ...	23	725
352	Govindarajulu Mudali v. Emperor	23	208
352	Palani Chetti v. Rathina Chetti ...	24	597

Page of (1914) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
354	Kasthuri Renga Iyer v. Venkatrama Iyer ...	24	280
356	Nanjaya Mudali v. Shanmuga Mudali ...	22	555
363	Narayana Iyer v. Emperor ...	24	153
367	Vegoti Chengiah v. Putta Ramudu	23	553
368	Ramaswami Naidu v. Venkataramanjulu Naidu ...	23	572
372	Srinivasa Iyengar v. Tirumalai Chetty ...	23	99
373	Venkatanarasimharayudu v. Venkata Rangayya Appn Row ...	22	972
374	Rangappa Kolakka Thoja Udayar v. Kulandai Ayal ...	23	881
376	Subbaraya Reddiar v. Rajagopala Reddiar ...	23	570
379	Saripaka China Mahadeva Vazulu v. Mathura Suryaprakasam ...	24	204
382	Nandamuri Anandayya v. Emperor	25	630
385	Ananthanarayana Iyer v. Athimuthu Iyer ...	25	74
387	Bodi Muthayya v. Kavari Kodandaramayya ...	23	594
388	Aleman Rama Rao v. Secretary of State ...	24	904
394	Karappana Koundan v. Kandaswami Kovandan ...	23	730
396	Prati Appala Raju v. Mutharaju Surpa Raju ...	25	628
397	Arthur Henry Forbes v. Maharaja Bahadur Singh ...	23	332
405	Lala Birj Lal v. Inda Kunwar ...	23	715
411	Bakhtawar Begam v. Husaini Khanam ...	23	355
417	Peria Aiya Ambalam v. Shunmugasundaram ...	22	615
426	Vaddadi Jagannadha Bhupathi Deo Garu v. Paddala Appalasawmy...	23	576

(E).—1 LAW WEEKLY, FROM 27TH MARCH TO 24TH APRIL, 1914.

Page of Vol. 1 L. W. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
329	Latchmana Naidu v. Geddanna Naidu ...	24	377

Page of Vol. 1 L. W. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
333	Venkata Narasimharayudu v. Venkata Rangayya Appa Row ...	22	972

(E).—1 LAW WEEKLY, 1914—*concld.*

Page of Vol. 1 L. W. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.	Page of Vol. 1 L. W. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
336	Narayana Sastrigal v. Mangalathammal ...	23	764	394	Duraiswami Chetty v. Govindu Chetty ...	23	377
338	Appala Raju v. Surappa Raju ...	25	628	398	Hyder Ali Sahib v. Hussain Raza Sahib ...	24	316
339	Aleman Rama Rao v. Secretary of State for India ...	24	904	403	Narasimhachariar v. Krishnamachariar ...	23	909
350	Chokkalinga Pillai v. Mahalingam Pillai ...	24	383	410	Karia Koundan v. Raghava Reddi	23	520
351	Valluri Basavayya v. Peruri Kistna Brahmam ...	23	219	412	Ramanujachariar v. Hodgsonpet Danarakshaka Nidhi Ltd. ...	24	44
355	Nandamuri Anandayya, *In re* ...	25	630	414	Chidambaram Pillai v. Muthammal	23	524
360	Meenatchi Ammal v. Manicka Chetty ...	24	918	416	Palaniandi Chetty v. Kambaraya Chetty ...	24	87
363	Mr. R. G. Orr v. Meyyappa Chetty	24	935	419	Venkatasubbaiyar v. Subbarathinam Aiyar ...	23	607
369	Narayana Aiyar v. Sankaranarayana Aiyar ...	24	940	428	Penamucha Anandaraju v. Nadimpalli Venkataraju ...	24	519
371	Sudala Muthu Moopan v. Sankara Narayana Aiyar ...	24	879	431	Raghunathasami Iyengar v. Janaki Ammal ...	23	923
372	Athalur Malakondiah v. Thatha Lakshminarasimhulu Chetty ...	23	134	433	Kochu Rabia v. Abdurahman ...	24	106
376	Peria Krishnasami Naik v. Aiyappa Naik ...	24	924	438	Venkata Subba Rao v. Yenumula Mallu Dora Garu ...	23	942
379	Andalammal v. Narasimharaghavachariar ...	24	927	440	Kunhammad v. Kunhammad ...	23	946
381	Narayana Nadan, *In re* ...	23	479	443	Venkata Kumara Mahipati Surya Rao v. Subbayamma Rao ...	24	484
389	China Mahadeva Vayulu v. Suryaprakasam ...	24	204	446	Ratnasawmi Chetty v. Ratnammal	24	135

Table 6

NAGPUR JUDICIAL COMMISSIONER'S COURT.

10 NAGPUR LAW REPORTS, FOR APRIL-MAY, 1914.

Page of Vol. 10 N. L. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.	Page of Vol. 10 N. L. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
51	Balu Bai v. Tanu Bai ...	24	808	74	Ramdayal v. Motiram ...	24	863
60	Dhansingh v. Ganpat ...	24	850	76	Ganpatrao v. Jangia ...	24	866
64	Fagwa v. Budhram ...	24	855	78	Zingu v. Gosawi ...	24	868
72	Nagorao v. Nago ...	24	831				

Table 7

OUDH JUDICIAL COMMISSIONER'S COURT.

(A).—17 OUDH CASES, FROM MARCH TO MAY, 1914.

Page of Vol. 17 O. C. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.	Page of Vol. 17 O. C. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
68	Sher Bahadur v. Ganga Bakhsh Singh ...	22	293	134	Sita Ram v. Haidar Khan ...	25	138
86	Metai Singh v. Ajudhya Singh ...	24	223	138	Nanhe Mal v. King-Emperor ...	25	363
90	Sukhnandan v. Lachhman Prasad	24	286	142	Indar Dat v. King-Emperor ...	24	604
92	Lalla v. King-Emperor ...	24	975	148	Deputy Commissioner of Bahraich v. Raja Ram ...	24	119
94	Raja Ram v. Rani Itraj Kunwar...	24	137	150	Ram Shankar v. Nanik Prasad ...	24	32
99	Lieutenant E. G. A. Prins v. Messrs Murray & Co., Ld. ...	23	935	153	Bisheshar Bakhsh Singh v. Debi Bakhsh Singh ...	25	121
105	Abdul Rahman v. Kale Khan ...	23	943	157	Aziz-ul-Haq v. *Musammat* Mariyam Bibi ...	24	45
108	Dilipat Singh v. Kashi Nath ...	24	542				
120	Amir Begam v. Khwaja Saiyed Badr-ud-din Husain ...	23	625				

(B).—1 OUDH LAW JOURNAL, FOR APRIL-MAY, 1914.

Page of Vol. 1 O. L. J. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.	Page of Vol. 1 O. L. J. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
191	Bhola v. Sheo Darshan Singh ...	24	109	248	Raja Rudra Pratab Sahi v. Ram Baran Pathak ...	24	790
193	Som Nath v. Ram Bilas ...	24	113	249	Amir Begam v. Badr-ud-din Husain	23	625
196	Razawand Singh v. Dukchhor ...	24	116	261	Thakur Maharaj Singh v. Lachhman Das ...	24	871
200	Kesri Mal v. King-Emperor ...	24	590	263	Bisheshwar Din v. Ahmad Ali ...	24	874
204	Sitaramji v. Jadunath Singh ...	24	72	271	Bans Gopal Pande v. King-Emperor ...	24	951
218	Ramanand Singh v. King-Emperor	24	595	273	Bhikhari v. Manager, Court of Wards, Hissa ...	24	780
223	Deputy Commissioner, Bahraich v. Raja Ram ...	24	119	275	Lachhman Prasad v. Ram Tirath Das ...	24	781
225	Aziz-ul-hak v. Mariyam Bibi ...	24	45	276	Kallu v. Sundar Lal ...	24	783
236	Manager, Court of Wards, Esanagar Estate v. Suraj Bali ...	24	778	278	Ram Dutt v. Court of Wards, Ajodhya Estate ...	24	784
238	Ram Harakh v. King-Emperor ...	24	172	281	Suraiya Qadr v. Qudsia Begam ...	24	643
242	Inayat Ullah v. Amanat Husain ...	24	350	319	*Musammat* Punni v. Chet Ram ...	24	640
244	Suraj Bakhsh Singh v. Raghubar Singh ...	24	28				
246	Ram Din v. Ram Bharose ...	24	759				

Table 8

PUNJAB CHIEF COURT.

(A).—15 PUNJAB LAW REPORTER, FROM APRIL TO JUNE, 1914.

No. of Vol. 15 P. L. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
97	Banwari Lal v. Emperor ...	22	748
98	Wasakhi v. Emperor ...	22	752
99	*Musammat* Sukhan v. Narain Singh	22	792
100	Jagan Nath v. Badhawa Singh ..	22	795
101	Sangham Lal v. Municipal Committee of Delhi ...	22	824
102	Anant Ram v. Damodar Das ...	22	797
103	*Musammat* Husaina v. *Musammat* Shah Nur ...	22	785
104	Lalji Das v. Chet Ram ...	22	829
105	Akbar v. Tabu ...	22	805
106	Allah Ditta v. *Musammat* Farz Bibi	23	395
107	Mir Afzal Ali v. Mir Aman Ali ...	23	397
108	Shera v. Hayat Muhammad ...	23	525
109	Bhagwan Das v. Shiv Dial ...	22	811
110	Sardar Muhammad v. Amir Chand	23	276
111	Diwan Singh v. Bishna ...	23	940
112	Ghulam Muhammad v. Karam Singh ...	23	483
113	Lal Singh v. Crown ...	24	833
114	Thakar Das v. Ram Das ...	23	950
115	Ralla v. *Musammat* Atti ...	24	841
116	Bulaki Mal v. Duni Chand ...	22	837
117	Ram Chand v. Sham Parshad ...	22	851
118	Ganga Ram v. Narain Das ...	22	955
119	Baldeo Singh v. Mohan Singh ...	22	855
120	*Musammat* Khanam Nur v. Hayat Khan ...	22	660
121	Miran Baksh v. Nathu ...	22	944
122	Shi Gopal v. *Musammat* Amba Devi ...	22	846
123	Lal Khan v. Crown ...	24	856
124	Ram Das v. Mehr Dad ...	22	896
125	Emperor v. Bishen Singh ...	22	987
126	Abdul Haq v. Emperor ...	22	1006
127	*Musammat* Amir Begam v. *Musammat* Begam ...	22	861
128	Basawa Singh v. Natha Singh ...	23	151
129	Allah Ditta v. Gauhra ...	23	127
129*a*	Hukam Chand v. *Musammat* Jindo Bai ...	23	109
130	Hakikat Rai v. Ram Saran Das ...	23	154
131	Gobind Ram v. Suraj Kaur ..	24	470
132	Akbar Ali v. *Musammat* Allah Di	22	2
133	Milkhi v. Ram Das ...	24	477
134	Wazir Ali v. Mahbub Ali ...	22	412
135	Phuman Shah v. Chhanga ...	23	299
136	Mula Mal v. Churanji Lal ...	23	726
137	*Musammat* Gosia Begam v. Umed Ali ...	23	541
138	Crown v. Shibban ...	23	688
139	Fazl Ahmad v. Crown ...	23	696
140	Kirpa Ram v. Jai Chand ...	23	445
141	Ram Lal v. Crown ...	24	958
142	Mahala v. Crown ...	*To be reported.*	
143	Muhammad Bakhsh v. Chhanga	25	59
144	Miraj Din v. Dilbagh Rai ...	25	51
145	*Musammat* Jainan v. Rulia ...	25	43
146	Pir Bakhsh v. Hira Lal ...	25	26
147	Jindu Ram v. Hussain Bakhsh ...	24	100
148	Budal v. Kirpa ...	23	211
149	Nasir Din v. Balla Mal ...	25	719
150	*Musammat* Amir Begam v. Sardar Muhammad Ismail Khan ...	25	723
151	Sher Muhammad v. Ali Muhammad ...	25	715
152	Amir Shah v. Jetha ...	23	908
153	Phuman Shah v. Chhanga ...	23	299
154	Ahmad Bakhsh v. Emperor ...	24	971
155	Mohan Malik v. Crown ...	24	348
156	Bhagat Singh v. Sher Singh ...	24	212
157	Punna Lal v. Seth Cowsji ...	23	919
158	Muhammad Hayat v. Narsingh Dass ...	25	717
159	Ganda Singh v. Gulab Singh ...	25	724
160	Surju Mal v. Asram ...	23	451
161	Balia v. Crown ...	*To be reported.*	
162	Sawan Singh v. Mothu ...	23	817
163	Natha Singh v. Ishar Singh ...	23	458
164	Chhabil Das v. Chandar Bhan Hooja ...	23	508
165	Mr. Alister West v. Beni Pershad	24	236
166	Administrator-General of Bengal v. Lala Das ...	24	669
167	Charanjit Singh v. Bishen Singh	23	462
168	Rattu Ram v. Crown ...	25	343
169	Abdul Manan v. Shahbaz ...	*Not reportable.*	
170	*Musammat* Nihal Kaur v. Bhagwan Singh ...	24	962
171	Ram Singh v. Daulat Singh ...	23	550
172	Rajwali v. Crown ...	24	842
173	Gokhu Mal v. Firm of Ram Rakha Mal ...	24	883
174	Gobind Ram v. Hakim ...	24	880
175	Bassa v. *Musammat* Amir Bibi ...	24	893
176	Dalip Singh v. Munshi ...	24	894
177	Mutsaddi Singh v. Narain ...	24	894

(A).—15 PUNJAB LAW REPORTER, 1914—*concld.*

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178	Wazir Singh v. Jhanda Singh ...	**24**	898	186	Amar Das v. Sukh Dial ...	**25**	511
179	Mam Chand v. Budh Ram ...	**24**	902	187	Amar Singh v. Sadhu Singh ...	**23**	970
180	Hafiz Anwar Ali v. Ram Sarup ...	**24**	903	188	Khoja v. Chuhru ...	**24**	682
181	Bholar v. Crown ...	**24**	947	189	Bishen Singh v. Inder Singh ...	**24**	684
182	Giyan Singh v. Crown ...	**24**	948	190	Dhian Singh v. Santa Singh ...	**24**	687
183	Narain Das v. Mangha Ram ...	**23**	815	191	Bishen Singh v. *Musammat* Bishen Kaur ...	**23**	902
184	Gujar v. Auliya ...	**23**	835				
185	Firm of Attar Singh Ajab Singh v. Haku ...	**24**	692				

(B).—49 PUNJAB RECORD, FOR MARCH, 1914.

No. of Vol. 49 P. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1913-14. V.	P.	No. of Vol. 49 P. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1913-14. V.	P.
	Civil.				*Civil*—concld.		
23	Jai Ram v. Sardar Singh ...	*To be reported.*		33	Allah Ditta v. Farz Bibi ...	**23**	395
24	Ram Lal v. Gopi ...	**25**	710	34	Joti Parshad v. Sant Lal ...	**21**	919
25	Punna Lal v. Seth Cowsji ...	**23**	919				
26	Amir Shah v. Jetha ...	**23**	908		*Criminal.*		
27	Jot Ram v. Hardawari ...	**23**	527				
28	Wali Muhammad v. Bahawal Bakhsh ...	**21**	925	4	Mohan Malik v. Crown ...	**24**	348
29	Bhagat Singh v. Sher Singh ...	**24**	212	5	Crown v. Ahmad Bakhsh ...	**24**	971
30	Dhanpat Rai v. Kahan Devi ..	**23**	422	6	Mahala v. Crown ...	*To be reported.*	
31	People's Bank of India, Ltd. v. Narain Das ...	**21**	577	7	Ram Lal v. Crown ...	**24**	958
32	Ishar v. Municipal Committee of Lahore ...	**23**	317	8	Nadir v. Crown ...	**24**	568

(C).—9 PUNJAB WEEKLY REPORTER, FROM 17TH MARCH TO 12TH MAY, 1914.

No. of Vol. 9 P. W. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1913-14. V.	P.	No. of Vol. 9 P. W. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
	Civil.				*Civil*—contd.		
40	Mela Ram v. Ralla Ram ...	**22**	549	43	Har Dayal v. Aya Ram ...	**22**	664
41	Joti Pershad v. Hakim Ali ...	**22**	528	44	*Musammat* Nup Dasi v. Ram Dhan	**22**	646
42	Budhu Mal v. Mansha Ram ...	**22**	644				

(C).—9 PUNJAB WEEKLY REPORTER, 1914—*concld.*

No. of Vol. 9 P. W. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
	Civil—contd.		
45	Firm of Murli Mal-Dayal Chand v. Lachhman ...	22	526
46	Kirpa Ram v. Jai Chand ...	23	445
47	Natha Singh v. Kishen Singh ...	22	637
48	Miraj Din v. Dilbagh Rai ...	25	51
49	Pokhar Das v. Uttam Chand ...	22	560
50	*Musammat* Jainan v. Rulia ...	25	43
51	Ram Karan v. Hukman ...	22	544
52	Jindu Ram v. Hussain Bakhsh ...	24	100
53	Ganga Ram v. Kaka Ram ...	22	403
54	Pir Bakhsh v. Hira Lal ...	25	26
55	Fazl Din v. Shah Nawaz ...	22	381
56	Muhammad Bakhsh v. Chhanga...	25	59
57	Ghulam Mohi-ud-din v. Deoki Nand ..	22	393
58	Ram Lal v. Gopi ...	25	710
59	Anant Ram v. Damodar Das ...	22	797
60	Sher Muhammad v. Ali Muhammad	25	715
61	Akbar v. Tabu ...	22	805
62	Mohammad Hayat v. Narsingh Dass ...	25	717
63	Amar Nath v. Gurdas Mal ...	22	716
64	Nasir Din v. Balla Mal ...	25	719
	Civil—concld.		
65	*Musammat* Amir Begam v. Sardar Muhammad Ismail Khan ...	25	723
66	Ganda Singh v. Gulab Singh ...	25	724
67	Roman Catholic Mission at Rawalpindi v. Sunder Singh ...	22	592
68	Administrator General of Bengal v. Lala Das ...	24	669
69	Sohaj Ram v. Ram Lal ...	22	542
	Criminal.		
18	Lal Singh v. Crown ...	24	833
19	Chima v. Crown ...	24	834
20	Lal Khan v. Crown ...	24	836
21	Raila v. *Musammat* Atti ...	24	841
22	Amir Bakhsh v. Crown ...	24	159
23	Rajwali v. Crown ...	24	842
24	Ballia v. Crown ...	*To be reported.*	
25	Banwari Lal v. Crown ...	22	748
26	Nihal Kaur v. Bhagwan Singh ...	24	962
27	Crown v. Bishen Singh ...	22	987
28	Rattu Ram v. Crown ...	25	343

Table 9

SIND JUDICIAL COMMISSIONER'S COURT.

7 SIND LAW REPORTER, FROM OCTOBER TO DECEMBER, 1913.

Page of Vol. 7 S. L. R. 1913.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
129	Oseri v. Bawa Balmukandass ...	24	712
138	Mahomed Dad Mahomed v. Fatma	24	881
141	Firm of Motumal v. Firm of Ruttanji ...	24	883
161	Crown v. *Musammat* Bachal ...	24	947
163	Firm of Kaluram Budharam v. Firm of Budhuram Parmanand	24	798
169	Secretary of State for India v. Mushtaksing ...	24	813
187	Jethmal, *In re* ...	24	949
192	Lalibai v. Valiram ...	24	861
194	Crown v. Imambux ...	24	952
199	Haji Mahomed Baradio, *In re* ...	24	944
200	Crown v. Ramzan ...	24	961
201	Syed Allahdadshah v. Mukhdum Amin Mahomed ...	24	977
203	Crown v. Ghulam Ali ...	25	344

Table 10

CRIMINAL LAW JOURNAL OF INDIA.

15 CRIMINAL LAW JOURNAL, FROM APRIL TO JUNE, 1914.

Page of Vol. 15 Cr. L. J. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914. V.	P.
225	Margam Aiyar v. S. J. Mercer ...	23	177
229	Jagar Nath Sahu v. Parmeshwar Narain ...	23	181
230	Ramphal v. Emperor ...	23	182
231	Jai Ram v. Emperor ...	23	183
232	Sarabdawan Singh v. Emperor ...	23	184
233	Lucas, C. J. v. Ramai Singh ...	23	185
234	Suraj Prosad v. Emperor ...	23	186
235	Sein Yin v. Ah Moon Shoke ...	23	187
236	Sinnu Gounden, *In re* ...	23	188
240	Radha Ballabh v. Emperor ...	23	192
241	Emperor v. J. S. Birch ..	23	193
242	Sessions Judge of Cuddapah v. Kondeti Obalesu ...	23	194
243	Bhagwan v. Emperor ...	23	195
243	Emperor v. A. J. Cooke ...	23	195
250	Emperor v. Nga Nyo ...	23	202
251	Prakash Chandra Kundu v. Emperor ...	23	203
253	Emperor v. Nga Kyauk Lon ...	23	205
253	Nathi Mal v. Emperor ...	23	205
254	Islam Khan v. Emperor ...	23	206
255	Preo Nath Datta v. Emperor ...	23	207
256	Kuttialikutti Marakar, *In re* ...	23	208
256	Govindarajalu Mudali, *In re* ...	23	208
257	Browne, C. H. v. Emperor ...	23	465
259	Ah Yway v. Ma Gyi ...	23	467
260	Emperor v. Lala Harkishen ...	23	468
261	Makhan Singh v. Gunner Jepson ...	23	469
262	Makund Sahu v. Emperor ...	23	470
263	Daya Ram v. Emperor ...	23	471
265	Emperor v. Ramchander ...	23	473
265	Abdullah v. Emperor ...	23	473
267	Jadu Ghosh v. District Board of Murshidabad ...	23	475
268	Jivanatha v. Emperor ...	23	476
270	Emperor v. Nga Taung Thu ...	23	478
271	Narayana Nadan, *In re* ...	23	479
275	Ghulam Muhammad v. Karam Singh ...	23	483
276	Ram Newaz Lal v. Emperor ...	23	484
278	Mi Thein v. Nga Po Nyun ...	23	486
279	Muhammad Sharif v. Dhanpat Rai ...	23	487
281	Parvataneni Kamayya v. Kasinaduni Tripurantakam ...	23	489
281	Raj Rajeswari Debi v. Emperor ...	23	489
283	Kshatri Siva Singh, *In re* ...	23	491

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S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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INDIAN CASES.

1914.

VOLUME XXIII.

MADRAS HIGH COURT.

SECOND APPEAL No 1521 OF 1911.

November 19, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

GNANIAR ROWTHER AND OTHERS—DEFENDANTS—APPELLANTS

versus

V. KRISHNA AIYAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 44—Confirmation of Court sale induced by fraud—Ejectment suit by auction-purchaser—Right of defendant in possession to prove plaintiff's fraud.

Where the plaintiff in an ejectment suit, relies on his title as a purchaser in a Court auction it is open to the defendants in possession of the property to show that such purchase was procured by fraud and, therefore, passed no title to the plaintiff.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 337 of 1910, preferred against that of the District Munsif of Periyakulam, in Original Suit No. 174 of 1907.

Mr. *K. Sreenivasa Aiyangar*, for the Appellants.

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *K. Balamukund Aiyar*), for the Respondents.

JUDGMENT.—The suit in this case was for ejectment and the plaintiff was bound to prove his title to the land in question, and the defendants were entitled to show that any link in his chain of title was bad, and they sought to prove that he had by fraud committed by him in execution proceeding induced a Court to pass an order confirming a sale held by the Court and to grant a sale certificate to the plaintiff's immediate predecessor-in-title. It was argued on behalf of the respondent that this plea of fraud was not sustainable and that the defendants, who were entitled to intervene in the execution proceedings to set aside the Court sale, should have adopted that procedure, and cannot in this suit go behind the order of the Court. This argument might hold good in a case where the execution proceedings had been merely irregular, in which case various considerations would influence the Court in exercising its power to set aside a sale; but a party is entitled to show that an order of a Court was obtained by fraud and is in fact a nullity. [See Evidence Act, section 44, and observations of Willes, J. in *Queen-Empress* v. *Saddlers' Coy*, (1)]. The order of the Court obtained by fraud is in fact in the same category as a forged conveyance, it is a nullity which cannot confer title, and we are of opinion that the defendants were entitled to set up this plea, and that the learned District Judge should have given a finding upon it. We, therefore, direct the District Judge to return findings on issues Nos. 1 and 2. Findings will be submitted within six weeks from the date of the receipt of this order and seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of Madura submitted the following

FINDING :—I am required to submit findings on the following issues:—

(I) Whether plaint properties belong to plaintiff by purchase?

(II) Whether Narayanan Servai was the owner of these properties and whether the Court sale to 4th defendant and the sale by

(1) (1863) 10 H. L. C. 404; 32 L. J. Q. B. 337; 9 Jur. (N. S.) 1081; 9 L. T. 60; 11 W. R. 1004; 11 Eng. Rep. 1083; 138 R. R. 217.

the 4th defendant to plaintiff are valid and binding on defendants Nos. 1 to 3?

2. It was not disputed at the trial of the action before the District Munsif that Narayana Servai was the owner of the properties. The claims under the settlement by Arianachee had been compromised. No argument has been addressed to me on this point on behalf of the respondents. I, therefore, accept the case put forward in the plaintiff's pleadings that Narayana Servai was the absolute owner of the property. This is my finding on the first portion of the second issue.

3. The right, title and interest of Narayana Servai in these properties was purchased by 4th defendant in execution of the decree in Second Civil Appeal No. 599 of 1903 and the plaintiff has acquired whatever title 4th defendant possessed. Unless then the execution proceedings were a mere nullity, the plaintiff must be considered the owner of the properties and the first issue must be answered in the affirmative.

4. I take it that it is for the defendants to establish the case of fraud on which they rely and that they are limited to the specific averments regarding it made in their written statement. The written statement of 1st defendant contains no such particulars but only a general statement that the plaintiff in collusion with the decree-holder in Second Civil Appeal No. 599 of 1903 had the properties fraudulently attached and brought to sale. In the written statement of defendants Nos. 2 and 3, there is also a similar general allegation that the execution proceedings were "a series of frauds perpetrated by the plaintiff with the co-operation of his relatives." The only specific allegations are that the plaintiff bought the properties in the name of a minor nephew and that although they were worth nearly Rs. 30,000, they were purchased for Rs. 220.

5. The allegation that 4th defendant was a minor is not now pressed. As to the total value of the properties, the evidence is to the effect that in 1910 at least they would be worth approximately Rs. 30,000. P. W. No. 1 puts the value at Rs. 7,000 or 8,000; but he is not a person whose word is entitled to credit and he is clearly underestimating. The statements of P. W. Nos. 2 and 3 support the figure already given. It is a little difficult to believe that this is not an exaggeration, for an average rate of Rs. 1,400 an acre is very high; but, however, this may be, there can be no doubt that the lands were very valuable.

6. There is no suggestion that the plaintiff was making the purchase on behalf of the decree-holder in the Small Cause Suit and the fact that 4th defendant was buying on behalf of the plaintiff who supplied the money does not in itself indicate fraud. It is true that the decree-holder and the plaintiff are relatives and residents of the same village but beyond this there is nothing which directly brings home to the plaintiff any connection with the execution proceedings prior to the sale. As has already been mentioned, the written statements contain no specific allegations regarding the conduct of the execution proceedings. An answer elicited from Narayana Servai that the proclamation was never made in the village has been referred to. This was not relied on before the District Munsif and the plaintiff cannot be expected to be prepared to meet allegations of which he has had no notice. I do not see how the plaintiff can be held responsible for the conduct of the execution proceedings.

7. The reference to the settlement-deed and the hypothecation by Karuppayee seem to be matters which might quite fairly be referred to with a view to leading intending purchasers to make inquiries. It is not denied that such transactions did exist. In fact there can be no doubt that the extent of the alienations and burdens alleged by different parties was considerably understated. The incorrect assertion that the mortgage under Exhibit II covered twelve items instead of four only is, no doubt, a serious mis statement but I am by no means satisfied that it really affected the course of the sale.

8. As to the inadequacy of the price, it has to be noted that the title of the judgment-debtor to the majority of the items was questioned altogether. A Will by the last male-holder and also a settlement by Arianachee were set up and have been relied on by the defendants Nos. 2 and 3 in their pleadings. A fourth of the land had been alienated prior to the attachment (*vide* Exhibit J) and a number of encumbrances had been created, *e. g.*, Exhibit II, and the

claims of 1st defendant in Original Suits Nos. 173—176 and 177. The total of these comes to about Rs. 8,000.—I have no doubt that the price was unduly low but considering the cloud on the title and the litigation and expenditure which must follow before the auction-purchaser could get possession, the absence of competition is not altogether to be wondered at. Inadequacy of price is not in itself sufficient to establish the defendant's case and I do not think that they have shown that the inadequacy is the outcome of acts or omissions which would entitle them to have the sale treated as a nullity as against the auction-purchaser. I would, therefore, answer the second part of the second issue in the affirmative.

This second appeal coming on this day for final hearing after the receipt from the lower Appellate Court of the findings on the issues referred by this Court for trial, this Court delivered the following

JUDGMENT.—We accept the finding and dismiss the second appeal with costs of the 1st respondent.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 133 OF 1913.

July 8, 1913.

Present:—Mr. Justice Twomey.

CHANGARAM—DEFENDANT—APPELLANT

versus

RAYA—PLAINTIFF—RESPONDENT.

Slander—Truth of imputation complete defence—Special damage—Loss of caste—Material disadvantage—Malice—Damages, measure of.

To prove the truth of a slanderous imputation is a complete answer to the slandered person's claim for damages.

Losing the general good opinion of one's neighbours is not special damage. There must be loss of some material advantage.

Malice in this connection signifies only the absence of just cause or excuse.

A Hindu woman was called by defendant a "prostitute" and in consequence of this slander was outcasted:

Held, (1) that the membership of caste being a material advantage in the eye of a Hindu, the loss of caste was clear proof of special damage;

(2) that the cost of a journey to Jagannath and back and of the customary propitiatory offerings at that shrine may fairly and conveniently be taken as the measure of damages for the loss of caste, even though, as a matter of fact, no journey to Jagannath was performed by the outcasted plaintiff.

Mr. *D. M. Karaka*, for the Appellant.

JUDGMENT.—The appellant admittedly said in the presence of several persons that the respondent was a prostitute. She prosecuted him for defamation under section 500, Indian Penal Code, and he was convicted and fined Rs. 100, of which sum Rs. 30 was awarded as compensation to the respondent under section 545, Code of Criminal Procedure. She then brought this civil suit against him for damages and was awarded Rs. 250 by the Sub-Divisional Court. This sum consists of Rs. 200 for loss of caste *plus* Rs. 80 for injury to the respondent's feelings *minus* Rs. 30 awarded by the Magistrate.

In the criminal case the appellant attempted to prove that the imputation made by him was true, but the witnesses called to show that the respondent was really a prostitute were disbelieved.

In the civil suit he made no attempt to prove the truth of the imputation, though that would have been a complete answer to the claim for damages. As he was defended by an Advocate, it can only be presumed that he was unable to prove the truth of the imputation, and that it was false.

The "Slander of Women Act, 1891" abolished the need of showing "special damage" in the case of words which impute unchastity to a woman. Until that Act was passed, a false accusation of immorality was not actionable *per se* in England*. It is not necessary to consider whether such an accusation is actionable *per se* in this country, for in the present case there is clear proof of special damage, the lower Courts having found that the respondent, a Hindu woman, has lost her caste in consequence of the slander uttered by the appellant. Losing the general good opinion of one's neighbours is not special damage. There must be loss of some material advantage. It is beyond doubt, I think that membership of this caste is a material advantage in the eyes of a Hindu.

The Divisional Court confirmed the Sub-Divisional Court's decree, and the grounds of this second appeal are briefly:—

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* See Pollock on Torts p. 249.

(1) that there was no special damage, (2) that there was no malice on the part of the appellant, (3) that the lower Courts should not have awarded Rs. 150 for offerings and a feast at Jagganath when, as a matter of fact, no journey to Jagganath has been performed, and (4) that calling the respondent a prostitute would not outcaste her.

I have already dealt with (1). Ground (2) hardly deserved serious notice. Malice in this connection signifies only the absence of just cause or excuse. In this case, as the learned Divisional Judge points out the imputation being false, malice must necessarily be inferred. (3) I agree with the Divisional Judge that the cost of a journey to Jagganath and back and of the customary propitiatory offerings at that shrine may fairly and conveniently be taken as the measure of damages for loss of caste. As regards (4) the lower Courts have found on the evidence that the respondent was outcasted and this decision appears to be right.

The appeal cannot be admitted.

Appeal rejected.

ALLAHABAD HIGH COURT.

FULL BENCH.

FIRST APPEAL No. 149 OF 1913.

February 25, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, Mr. Justice Ryves and Mr. Justice Piggott.

TIRLOKI NATH—APPLICANT—APPELLANT

versus

BADRI DAS AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 15 (1), 16 (1)—Debtor's petition—Court bound to adjudicate him insolvent.

Where a debtor presents a petition to be declared insolvent, the Court is bound to adjudicate him insolvent under section 16 (1) of the Insolvency Act, unless the petition amounts to an abuse of the process of the Court.

Udai Chand Maity v. *Ram Kumar Khara*, 7 Ind Cas. 394; 15 C. W. N. 213; 12 C. L J. 400; *Kali Kumar Das* v. *Gopi Krishna Roy*, 12 Ind. Cas. 48; 15 C. W. N. 990, *Girwardhari* v. *Jai Narain*, 7 Ind. Cas. 39; 32 A. 645; 7 A. L. J. 835; *Bidhata Din* v. *Jagannath*, 14 Ind. Cas. 570; 9 A. L. J. 699, referred to.

Nathu Mal v. *The District Judge of Benares*, 6 Ind. Cas. 870; 32 A. 547; 7 A. L J. 602, *Ponnuswami Chetty* v. *Narayanaswami Chetty*, 21 Ind. Cas. 293; 14 M. L. T. 305; 25 M. L. J. 545, distinguished.

Section 15 (1) deals entirely with a creditor's petition and does not apply in any way to a debtor's petition.

First appeal from an order of the Additional District Judge of Meerut, dated 25th June 1913.

Mr. *Sital Proshad Ghose*, for the Appellant.

Dr. *S. N. Sen*, (with him Mr. *Girdhari Lal*), for the Respondent.

JUDGMENT.—This appeal arises out of insolvency proceedings under Act III of 1907. The petitioner presented a petition asking that he should be adjudicated an insolvent. His petition complied with the provisions of section 11, and contained a statement that he was unable to pay his debt which exceeded Rs. 500. Notice went in the ordinary course to the creditors some of whom were represented, or appeared, when the debtor was examined, and opposed adjudication. The debtor was examined and stated that his debts exceeded Rs. 500 and that his means and property were quite insufficient to pay these debts. At the instance of the opposing creditors, his brother was examined and he produced certain documents connected with the property of the family to which the debtor belonged. The learned Additional Judge appears to have considered that the documents which were produced were devices for saving the property of the debtor from his creditors. One of these documents purported to be a Will of the debtor's father; the other purported to be a deed of relinquishment made by the debtor in favour of his father in the life-time of the latter. It seems to us that the opinion of the learned Additional Judge amounted to no more than this that he was not satisfied on the evidence that the debtor's debts exceeded his assets. He seems to have been largely influenced in arriving at this opinion because he thought that the alleged Will and deed of relinquishment would not have been upheld in a Court of law. He does not appear to have found or intended to find that the documents were forgeries.

The petition was dismissed. The petitioner debtor has appealed to this Court and it is argued on his behalf that under the circumstances of the case the Court was bound to adjudicate him an insolvent under section 16 (1) of the Act.

On behalf of the respondents it is contended that under the provisions of section 15 (1) the Court has power for any "suffi-

cient cause" to dismiss the petition, and that the fact that the petitioner debtor was unable to satisfy the Court that his debts exceeded his assets was quite sufficient cause for dismissing the petition. It was further contended that even if section 15 (1) did not apply, still the Court had power under its inherent jurisdiction to dismiss the petition in the present case as an abuse of the process of the Court.

Section 6 clause (3) provides that a debtor shall not be entitled to present an insolvency petition unless his debts amount to Rs. 500, or he has been arrested, or imprisoned in execution of a decree of any Court for payment of money, or an order of attachment in execution of such a decree has been made and is subsisting against his property. It is admitted in the present case that the debts did amount to Rs. 500. The debtor was, therefore, clearly "entitled to present an insolvency petition." An act of bankruptcy had been committed under section 5 by the presentation of his petition. Section 16 (1) provides that where a petition is not dismissed under the preceding section and the debtor is unable to propose any composition of a scheme which shall be accepted by the creditors and approved by the Court in the manner thereafter provided, the Court shall make an order for adjudication.

We have now to see whether the petition in the present case could have been dismissed under section 15 (1). This clause is taken almost verbatim from section 7 (3) of the English Bankruptcy Act of 1883. This section deals entirely with a creditor's petition and does not apply in any way to a debtor's petition. It seems to us that the words "or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition," refer to the Court being satisfied by the debtor that some sufficient cause exists why the order should not be made. It seems to us that there is a fundamental distinction between the adjudication of a person as an insolvent on his own petition, and an adjudication on the petition of a creditor. All the disgrace and other consequences which flow from an adjudication of insolvency in the case of a petition by the debtor himself are the result of his own petition. Furthermore, the creditors would not, as a general rule, be prejudiced or suffer loss by an adjudication of insolvency. All the assets of the debtor ought to be available in payment of his debts, and if his assets exceed the latter, so much the better for the creditors. We are very far from saying that there is no inherent power for the Court by its order in insolvency matters to prevent abuse of the process of the Court; and in certain cases it may be quite necessary to dismiss a debtor's own petition to be adjudicated an insolvent. All that it is necessary for us to say in the present case is that in our opinion the presentation by the debtor of his petition in this case did not amount to an abuse of the process of the Court.

The view that we take of section 15 is supported by the case of *Udai Chand Maity* v. *Ram Kumar Khara* (1) and also by the case of *Kali Kumar Das* v. *Gopi Krishna Roy* (2). A similar view was taken by this Court in the case of *Girwardhari* v. *Jai Narain* (3) and the case of *Bidhata Din* v. *Jaganath* (4).

The case of *Nathu Mal* v. *The District Judge of Benares* (5) has been referred to. It is clear that the remarks in the judgment cannot be regarded as a decision on the point now in question. The question there related entirely to a criminal trial: and the question which arises in the present appeal was neither argued nor discussed. Reliance is placed by the respondent upon the case of *Ponnuswami Chetty* v. *Narayanaswami Chetty* (6). In that case the facts were not altogether unlike the facts in the present case. The Court, however, came to the conclusion on the facts before it that the presentation of the petition amounted to an abuse of the process of the Court. We have already stated that, in our opinion, the facts of the present case do not constitute an abuse of the process of the Court. The question whether or not the

(1) 7 Ind. Cas. 334; 15 C. W. N. 213; 12 C. L. J. 400.
(2) 12 Ind. Cas. 45; 15 C. W. N. 990.
(3) 7 Ind. Cas. 39; 32 A. 645; 7 A. L. J. 835.
(4) 14 Ind. Cas. 570, 9 A. L. J. 699.
(5) 6 Ind. Cas. 870, 32 A. 547; 7 A. L. J. 602.
(6) 21 Ind. Cas. 293; 25 M. L. J. 545; 14 M. L. T. 305.

assets would or would not exceed the debts would depend upon the result of a suit at law.

In our opinion the present appeal ought to be allowed. We accordingly allow the appeal, set aside the order dismissing the petition, and under the provisions of sections 16 (1) we adjudicate the petitioner an insolvent, and direct that the record be returned to the Court below so that the matter may be proceeded with according to law. The costs of the appeal will be in the discretion of the Court below when making its final order. The costs in this Court will include fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 765 OF 1911.

October 16, 1913.

Present:—Mr. Justice Miller and Mr. Justice Tyabji.

SINGA IYER AND OTHERS—DEFENDANTS APPELLANTS

versus

VENKATARAMANA IYER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Partition Construction of partition deed—Family consisting of father and three sons—Status after partition.

Where a Hindu father and his minor son, by his second wife, effected a partition with his two major sons by his first wife and the partition deed recited that some of the immoveable properties shall be enjoyed by the two sharers (father and minor son) and that such and such property shall pass to and be enjoyed by each of the other two sons:

Held, that the father and the minor son still constituted a joint family and in a sale by the father the interest of the minor son also would pass.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in Appeal Suit No. 169 of 1910, preferred against that of the District Munsif of Coimbatore, in Original Suit No. 77 of 1908.

Mr. *O. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.

MILLER, J.—I have read the judgment which my brother will now deliver and I am not prepared to dissent, though I cannot say that it is at all clear to me that the Subordinate Judge's construction of the document is erroneous.

The appeal is allowed: the decree of the Subordinate Judge is reversed and that of the District Munsif dismissing the suit is restored with costs here and in the lower Appellate Court.

TYABJI, J.—The question in this case is whether the sale evidenced by Exhibit I (*a*) in favour of the appellants is valid as against the whole of the land purported to be sold thereby, or only against a half of it. The reply to that question depends upon whether at the time of the sale the 1st defendant was empowered by law to make a valid disposition of the plaintiff's interest therein.

This agreement depends upon the construction of Exhibit A which is described as a deed of partition effected on 14th December 1891, between the 1st defendant and his sons, one of whom was the plaintiff. The plaintiff was at the date of the partition-deed not over 4 years of age and was represented in the partition by the 1st defendant "his father and guardian." After mentioning the parties, Exhibit A enumerates the properties which are to be partitioned; this includes 5 items of immoveable property. Then the sums recoverable on leases and a decree are referred to and as against this, the debts and other liabilities are recited; and it is provided that sufficient assets (including two of the immoveable properties) should be made over to the 1st defendant for meeting these liabilities. Then the document proceeds:—

"But of the rest of the properties valued at Rs. 4,000, the aforesaid immoveable properties items Nos. 2 and 3 of the value of Rs. 2,000 shall pass to the two shares of Sesha Iyer and minor Venkataramana Iyer etc., to be enjoyed by the two sharers at the rate of Rs. 1,000 per share but of the properties comprising item No. 4 and valued at Rs. 2,000, a moiety thereof valued at Rs. 1,000 shall pass to and be enjoyed by Pichu Iyen *alias* Chidambara Iyen and the remaining moiety of the value of Rs. 1,000 shall pass to and be enjoyed by Ananta Venkatesa Iyer. As regards the moveable properties, such of them as are in the possession of each person shall belong to and be enjoyed by him respectively. Hereafter the relationship between each

other shall be a friendly one and none of commensality of property."

At the time when Exhibit A was executed, the 1st defendant was entitled to make a complete partition between himself and each of his sons including the plaintiff then a minor, or he might have partitioned so as to separate the two grown up sons from himself and his minor son by another wife.

I am of opinion on the whole that there was no intention at the time of the partition that the plaintiff and the 1st defendant should become absolutely separated from each other. The true construction to be put upon Exhibit A seems to me to be that the plaintiff and 1st defendant were to hold the properties allotted to them as joint tenants. Much reliance was placed on the words "the aforesaid immoveable properties shall pass to the two shares" (of the plaintiff and the 1st defendant) to be enjoyed "by the two sharers at the rate of Rs. 1,000 each". It seems to me, however, that the reference to the share of each as Rs. 1,000 was made merely for the purpose of showing on what basis the division of the property was to be. It is not otherwise stated in the deed that it was intended to divide the property on the basis that each of the sons was to take an equal share with the 1st defendant, the father. This reference to Rs. 1,000 as the share of each is the only indication of such having been the intention. It is true that a partition in unequal shares between father and his sons is now obsolete, but it is also true that the father can exercise wide powers at the time of partition. Compare *Kandasami* v. *Dorasami Ayyar* (1); *Karupanan Chetti* v. *Bulokam Chetti* (2); and I think, on reading the partition-deed as a whole, that the object of mentioning the Rs. 1,000 as the share of each of the co-parceners was meant to indicate the basis of the partition and not in order to sever the status of each of the co-parceners amongst themselves. The share was referred to in the terms of the sum of rupees by which it was represented because the whole of the estate was notionally converted into rupees. In particular, I am also of opinion that there are indications in the deed that there was no intention that the plaintiff and the 1st defendant should be separate from each other after the date of the deed. For the two immoveable properties allotted to the plaintiff and the 1st defendant are given to them jointly, whereas the terms, by which the property allotted to the two other parties is made to vest in them, refer expressly to the fact that each of them is to have a moiety thereof; the words referring to the interests taken by the latter are as follows;—"A moiety thereof valued at Rs. 1,000 shall pass to and be enjoyed by" one of them "and the remaining moiety of the value of Rs. 1,000 shall pass to be enjoyed by" the other. In the case of these two sons it is, therefore, clearly stated that only a moiety should pass to each of them. In the case of the plaintiff and his father it is said, on the other hand, that the two properties shall pass to their two shares. I think the fact that in the one case it is stated that a moiety of each of these properties shall pass to them and that in the other case it is not so stated is significant. The reference to the fact that the shares given to the two adult sons are of the value of Rs. 1,000 each, indicates, in my opinion, the basis of the partition and fixes the quantum of their share and the fact that only a moiety of the property is to vest in each of them indicates that they were to be separate each from the other and were not to hold the property jointly. The significance of these facts taken by themselves may not have been as great as it becomes when it is borne in mind that one of the two properties allotted to the plaintiff and 1st defendant—the property in dispute in these proceedings—is less than Rs. 1,000 in value and it could well have been allotted to either the plaintiff or the 1st defendant, had it been intended that they should thenceforth be separate from each other. The same remarks apply in considering the allotment of the debts jointly to the two. These debts are for Rs. 140, 60 and 25 making up Rs. 225.

It also seems to me that the provision about the moveable properties bears out this view of the proper construction of Exhibit A. The plaintiff was at the time a minor. He could not have been in possession of any moveables, had it been intended to allot to him specific moveables and to separate his property entirely from

(1) 2 M. 317.
(2) 23 M. 16.

that of the 1st defendant. The words: "As regards the moveable properties, such of them as are in the possession of each persons shall belong to and be enjoyed by him respectively" would have had the effect of depriving the plaintiff of all share in the moveables. This was not, it is clear, the intention of the parties, especially of the 1st defendant and because (as at any rate it has been the case of both parties it could not be otherwise on the findings) the partition was made in perfect good faith and the interests of the plaintiff were not in any way lost sight of. It also seems to me to be material to bear in mind that the plaintiff was at the time only 4 years of age. The conduct of the parties after the partition bears out the view that it was intended that the plaintiff and his father should be joint. Exhibit 1 *(a)* which was executed 4 years after the partition and which refers to it shows that though there was no intention on the part of the 1st defendant to act to the detriment of the plaintiff, the 1st defendant purported to complete the partition which he had commenced in Exhibit A and for this purpose to allot one of the immoveable properties to himself and to sell it.

It, therefore, seems to me that both the terms of the partition-deed when they are carefully read and their various provisions compared, and the conduct of the parties indicate that the partition-deed was not meant to sever the interests of the plaintiff and the 1st defendant. This construction also seems to me to be most in consonance with what would be reasonably expected for. I consider it difficult to believe that it could have been intended to change the status of the parties as between the plaintiff and the 1st defendant from that of a Hindu joint family, and yet to have them in the unsatisfactory position of owning two properties jointly neither of which could be dealt with by the father except as regards a moiety. I can understand a complete partition effected by metes and bounds or something equivalent to it. I can also understand that the parties should have elected to remain in *status quo.* If, however, it is alleged that the status of the parties was changed so as to be intermediate between these two positions, then, I think, considering the relationship of the parties concerned in this case and all the other circumstances, it is necessary that the intention to bring about so anomalous a result should be shown to have been expressed in the clearest and most explicit terms. I think the partition-deed falls far short of this.

I would, therefore, allow this appeal with costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO 1433 OF 1913.

January 12, 1914.

Present:—Mr. Justice Ryves and Mr. Justice Piggott.

RAMJIT AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KHEMCHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 38, 45—Mortgage—Payment of debt by mortgagor to one of several co-mortgagees, whether valid discharge of debt.

The payment of the mortgage-debt to one of several co-mortgagees, without the concurrence of the others, is not a valid discharge thereof.

Second appeal from the decision of the District Judge of Mainpuri, dated 13th June 1913.

FACTS.—This was a suit for the recovery of Rs. 5,000 on the foot of a mortgage-deed dated 24th March 1882, executed by Ramjit and Kallu in favour of Narain Das and Brij Lal, and in case of default in payment, for foreclosure. The defence, *inter alia*, was that the money had been advanced by Narain Das alone and the name of Brij Lal had been entered fictitiously and the debt was satisfied by payment to Narain Das alone. The first Court decreed the suit. The lower Appellate Court confirmed the decision of the first Court and delivered the following

JUDGMENT.—This was a suit for recovery by Brij Lal plaintiff-respondent No. 2 and his family of the half share of the mortgage money due on a mortgage-deed executed in 1882 in favour of Brij Lal and Narayan Das jointly; the mortgagor resists the claim on the grounds:

That Brij Lal was a minor in 1882, that he was in reality no party to the mortgage con-

tract at all, his name being merely entered fictitiously, and that the mortgage-deed has been discharged in full by the execution in 1885 of another mortgage-deed in favour of Narayan Das only, also that as Narayan Das was the guardian of Brij Lal, the payment to Narayan Das was in any case binding on Brij Lal, and that in any Court Brij Lal's share of the mortgage money could not be as much as half.

The lower Court, however, decreed the claim in full.

In my opinion this decision was a correct one. As regards Brij Lal's alleged minority etc. In 1882 the only evidence adduced by appellants to prove their assertions is the verbal statement of one Karan Singh, a marginal witness to the deed in suit, and a caste-fellow of appellants. His bare statement by itself, however, is quite insufficient. Admittedly the bond of 1882 was executed in supersession of a mortgage-deed of 1887 to which Ude Ram, uncle of Brij Lal was a party as co-mortgagee with Narayan Das. It is not suggested that Udai Ram's claims under that deed had been separately satisfied in full before 1882 and, therefore, Karan Singh's assertion that Brij Lal, Udai Ram's successor-in-interest, was no party to the bond of 1882 is on the face of it incredible and untrue and proves the witness to be a totally unreliable person. Apart from his statements, there is absolutely no proof that Brij Lal was a minor in 1882 and there is a general presumption that the contract of 1882 was entered into in the ordinary course of business by persons competent to contract.

Further, in the absence of evidence to the contrary, there is as noted by the lower Court a presumption that each of the mortgagees paid half share of the mortgaged loan. Karan Singh says that Narayan Das paid it all. As before his bare statement by itself is quite unconvincing, and there is nothing tangible to support it. It is true that according to the endorsement on the back of the bond, part of the consideration money which was or purported to be paid before the Sub-Registrar was actually handed over by Narayan Das only. But no inference of any sort can be drawn from this fact as it is quite unnecessary that both co-mortgagor should join in personally handling over the actual cash before the Sub-Registrar. In fact in many cases this handling over of actual cash before the Sub-Registrar is mere make-belief, the money being returned to the tenderer, the moment the parties are outside the office, because the real consideration is already paid before the parties come to the office at all. No good reason there has been shown for rejecting Brij Lal's claim that he paid half the mortgage loan. Obviously no re-payment made to Narayan Das alone could bind Brij Lal as Narayan Das was not entitled to give a valid discharge without Brij Lal's consent, and the suggestion that Narayan Das was acting as Brij Lal's guardian is utterly unproved. The only point now raised by appellants that appears to require consideration is that as Brij Lal admits that he is in possession of old account books of his firm and family and has not produced them because they would show either that he did not find any portion of the mortgage loan of 1882 or that if he did he received back his proportionate share from Narayan Das after 1885. Brij Lal's reply to this point is, however, that the mortgage-deed of 1882 is by itself good enough for him in order to prove that he provided half the mortgage money, that Narayan Das has never re-paid him a penny of his share, that he was never called upon to produce his books. Under the circumstances it seems to me that no presumption unfavourable to Brij Lal can properly be drawn in this connection. The appeal, therefore, fails and is dismissed with costs.

The defendant appealed to the High Court.

Mr. *Mohan Lal Sandal*, for the Appellant, submitted that a payment to one of the co-mortgagees was a valid payment and discharged the entire debt. He relied on *Barber Maran* v. *Ramana Goundan* (1), section 38 of the Indian Contract Act, Shephard's Transfer of Property Act, section 84, *Mannava Annapurnamma* v *Uppala Akkayya* (2). Lord Halsbury's Laws of England, Volume 7, page 456, section 930, page 445, section 911, page 421, section 863. *Wallace* v. *Kelsall* (3).

He further submitted that the view of the Allahabad High Court, as expressed in *Ramchandra* v. *Goswami Rajjan Lal* (4), was against his contention but the ruling was open

(1) 20 M. 461.

(2) 19 Ind. Cas. 12; 24 M. L. J. 333; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328.

(3) 7 M. & W. 264; 8 D. P. C. 841; 10 L. J. Ex. 12; 4 Jur. 1064; 56 R. R. 707.

(4) 5 Ind. Cas. 129; 32 A. 164; 7 A. L. J. 99.

to further discussion in view of the recent Full Bench ruling of the Madras High Court.

JUDGMENT.—The only point pressed in this appeal is the first ground in the memorandum of appeal. It is admitted that the decision of this Court reported as *Ramchandra* v. *Goswami Rajjan Lal* (4), following an earlier decision, is against the contention of the appellant. But it is urged that inasmuch as an old decision of the Madras High Court [*Barber* v. *Ramana* (1)] has been affirmed by a majority of a Full Bench of that Court in a case reported as *Mannava Annapurnamma* v. *Uppala Akkayya* (2) an opportunity might be given to the appellant to have the question re-considered. We find that *Barber* v. *Ramana* (1) has not been followed in *Husainara Begum* v. *Rahmannessa Begam* (5), nor in *Sita Ram Apaji Kode* v. *Shridhar Anant Prabhu* (6). The case has been doubted in the Madras High Court itself and has not been followed in the three other High Courts. Under these circumstances we think it is unnecessary to re-consider the question. We dismiss the appeal.

Appeal dismissed.

(5) 8 Ind. Cas. 837; 38 C. 342; 13 C. L. J. 3.
(6) 27 B. 292; 5 Bom. L. R. 91.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 248 OF 1911.
February 27, 1914.
Present:—Mr. Justice Imam and Mr. Justice Chapman.
ABDUL HAKIM—PLAINTIFF—APPELLANT
versus
JAMILA KHATUN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 77—Document—Execution of document—Parda nashin *lady, conveyance by—Document read over after execution and receipt of consideration—Inclusion of property not agreed to be sold objected to.*

Two *parda nashin* illiterate women agreed to sell certain property to the plaintiff, who thereupon wrote out a *kobala* purporting to convey not only the property which the women had agreed to sell but also certain other properties. The brother of one of the women signed the *kobala* on their behalf without reading it himself or reading it over to the women. The consideration money was handed over by the plaintiff to the brother. The *kobala* was then read out. The women, who were behind the *parda*, at once protested saying that the *kobala* contained properties which they did not intend to sell. The document not having been registered, the plaintiff brought this suit under section 77 of the Registration Act for the registration of the document:

Held, that there was no execution of the document and the suit was rightly dismissed.

Dagdu v. *Bhana*, 28 B. 420; 6 Bom. L. R. 126, referred to.

Appeal from the decree of the Sub-Judge of Chittagong, dated November 28th, 1910, reversing that of the Munsif of Chittagong, dated January 27th, 1910.

Babu *Probodh Kumar Das*, for the Appellant.

Babu *Jyotish Chandra Sarkar*, for the Respondents.

JUDGMENT.—This was a suit under section 77 of the Registration Act for a decree directing that a document should be registered. The defendants in the suit by whom the document was alleged to have been executed were two illiterate *pardanashin* women. The finding of the learned Subordinate Judge in appeal is to the following effect: The women agreed to sell a certain property to the plaintiff. The plaintiff thereupon wrote out a *kobala* purporting to convey not only the property which the two women had agreed to sell but also certain other properties and came to the house with the *kobala*. There the brother of one of the women signed the *kobala* on their behalf without reading it himself or reading it over to the women. The consideration money which the women had agreed to receive for the property which they intended to sell was handed over by the plaintiff to the brother. The *kobala* was then read out. The ladies who were behind the *parda* at the time immediately protested and said that the *kobala* contained certain properties which they did not intend to sell. The judgment of the learned Subordinate Judge might have been more specific on certain points. But we are satisfied upon these findings that there was no execution of the document. It is not a case of a person executing a document under a misapprehension of its legal effect. Assuming even that the brother did sign under some previous authority given by the women, the women clearly gave that authority in the belief created by the conduct of the plaintiff that they were authorising a signature to a

conveyance relating only to the property which they had agreed to sell and to no other property. There was an implied declaration that the document was a conveyance only of the property the ladies had agreed to sell. Moreover, the circumstances of the case and the conduct of the ladies themselves make it quite clear that they did not intend the execution of the document to be complete until it had been read over and understood by them. For the principle applicable we need only refer to the case of *Dagdu* v. *Bhana* (1) where it is said: "It is established that if a man who cannot read has a written contract falsely read over to him and the contract written differs from that pretended to be read, the signature of the document is of no force, because he never intended to sign and, therefore, in contemplation of law, did not sign the document on which the signature is. And it is all one in law to read it in other words and to declare the effect thereof in other manner than is contained in the writing." No doubt, this principle is not applied for the protection of carelessness: but in the present case the ladies were behind the *parda*. They were not negligent. We are satisfied upon the findings of the learned Subordinate Judge in this case that there was no execution of the *kobala* and that his decision was correct.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 28 B. 420; 6 Bom. L. R. 126.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 436 OF 1913.

January 27, 1914.

Present:—Mr. Justice Tudball.

GHURE AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHATRAPAL SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 63 (5)—"Seen," meaning of—Oral evidence of contents of document—Statement of illiterate witness as to contents, whether sufficient.

An oral account of the contents of a document given by some person who merely saw it with his eyes but was unable to read it is merely the repetition of what was told or read out to him by some body else. The word 'seen' in clause 5 of section 63 of the Evidence Act means something more than the mere sight of the document. The clause contemplates the evidence of a person who having seen and examined the document is in a position to give direct evidence of the contents thereof. Hence the evidence of an illiterate person as to the contents of a document is not sufficient within the meaning of the clause.

Second appeal from the decision of the Subordinate Judge of Agra, dated 1st March 1913.

Mr. *G. L. Agarwala*, for the Appellant.

Dr. *S. C. Banerjee*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought to redeem an old mortgage. The plaintiffs' case was that the property in suit was mortgaged by two persons Kiddu and Sahi Ram to one Mewa Lal, the predecessor-in-title of the defendant, for a sum of Rs. 99, somewhere about the year 1831. The mortgage was alleged to be usufructuary, the terms being that the income of the property was to be deemed equal to the interest on the money advanced, neither party to account. The plaintiffs are the purchasers of the equity of redemption from one *Musammat* Punia, the representative-in-title of the original mortgagors. The mortgage being for a sum of less than Rs. 100 is said to be unregistered. Neither the original deed nor a copy was produced. The defence was a total denial of the mortgage and the allegation of the defendants was that they were the owners of the property and not the mortgagees. The plaintiffs produced one witness Neka who testified that he was a marginal witness to the document and that the document was executed in his presence and he gave the terms of the mortgage. To support his evidence the plaintiffs produced copy of the *Khewats* of 1283 and 1256 *faslis*. The copy of 1256 *fasli* shows that the property was then unmortgaged. The copy of 1283 *fasli* which bears on it the signature of Mewa, the original mortgagee, shows that the property was then recorded at the Settlement time as in the hands of Mewa Lal the mortgagee, Kiddu and Sahi Ram being the mortgagors. The Court of first instance came to the conclusion that there had been a mortgage, but in regard to the terms of the mortgage, it disbelieved the evidence of the witness Neka, and holding that the terms of the mortgage not having been satisfactorily proved, the plaintiffs were not entitled to

a decree. The lower Appellate Court held that the evidence of Neka was worthy of credit and strongly corroborated by the documentary evidence, namely, the *Khewats* of 1256 and 1283 *faslis* and granted a decree for possession of the property, the sum of Rs. 99 having been paid into Court. The defendants come here on second appeal. Though there are several grounds entered in the memorandum of appeal, only one ground has been pressed. The point taken is that the witness Neka, as his evidence shows, is an illiterate person who is unable to read and write, that his evidence if anything falls within clause (5) of section 63 of the Evidence Act which lays down that secondary evidence means and includes an oral account of the contents of a document given by "some person who has himself seen it", and that as he, Neka, was illiterate and could not read, he is not one of that class of witnesses which is contemplated by clause 5 of section 63. There is considerable force in this argument. An oral account of the contents of a document given by some person who has merely seen it with his eyes but is unable to read it is merely the repetition of what was told or read out to him as to the terms of the document by some body else. I am clearly of opinion that the word "seen" in this clause of section 63 means something more than the mere sight of the document. The clause clearly contemplates the evidence of a person who, having seen and examined the document, is in a position to give direct evidence of the contents thereof. In this view the evidence of the witness Neka does not fall within this clause, he having admitted himself to be unable to read and write. He even admits that he did not sign his name on the document but merely touched the pen with which his name was written by another person. But from an examination of the record it will be seen that the plaintiffs had other evidence to produce of the contents of the document, *e. g.*, that of the scribe who actually wrote it. The objection now taken for the first time in second appeal was not raised in the Courts below. If it had been taken there, it might possibly have been met by production of the scribe who was summoned as a witness but was not examined. The *Khewat* of 1283 *fasli* leaves it beyond doubt that there was a mortgage and also beyond doubt that there is considerable justice in the plaintiffs' claim. The case is one in which, in my opinion, justice demands that all the evidence available should be brought on the record and the plaintiffs be allowed an opportunity of meeting an objection which has been raised for the first time on second appeal. I, therefore, remand the case to the Court below with directions to take any further evidence which either side may offer as to the contents of the document, and after considering that evidence together with the evidence which is already on the record, to come to a fresh finding on the point of fact, namely, as to the terms of the contract between the parties as embodied in the document. On receipt of the finding, ten days will be allowed for objections.

Case remanded.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 196 OF 1912.

January 27, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

SAMED SHEIKH—PETITIONER—APPELLANT

versus

NABA NEPAL GHOSE AND OTHERS—OPPOSITE PARTY—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 143, sub-s. (2), 153—Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 cl. (t)—"Suit," whether includes appeal—Appeal—Order of lower Appellate Court refusing to re-hear appeal heard ex parte in rent suit valued less than Rs. 100 if appealable.

An appeal against an order of the lower Appellate Court refusing to re-hear an appeal heard *ex parte* from a decree in a rent suit valued at less than Rs. 100, is not competent being barred by section 153 of the Bengal Tenancy Act.

The term "suit" includes the appellate stage.

Gagan Chand Sardar v. *Casperszs*, 4 C. W. N. 44, followed.

An application to re-hear an appeal is an application in the suit.

Achha Mian v. *Durga Charan Law*, 25 C. 145; 3 C. W. N. 137, relied upon.

Appeal from the order of the Additional Sub Judge of Khulna, dated January 26th, 1912.

Babu *Bimal Chandra Das Gupta* for Babu *Jadu Nath Kanjilal*, for the Appellant.

SAMED SHEIKH *v.* NABA NEPAL GHOSE.

Babus *Narendra Chandra Bose*, *Charu Chandra Biswas*, and *Sarat Chandra Mukerjee*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant against an order by which the Court of Appeal below has refused to re-hear the appeal heard *ex parte* in his absence. The suit was for recovery of arrears of rent; the claim was valued at less than Rs. 100 in the Court of first instance and was dismissed on the merits. The plaintiffs appealed against this decree of dismissal. At the hearing of the appeal, the respondent was not represented and the appeal was decreed *ex parte*. He then made an application under Order XLI, rule 21 of the Code of Civil Procedure, to have the appeal re-heard in his presence. The Court refused the application. The present appeal is directed against that order.

The first question for consideration is, whether the appeal is competent. Under sub-section 2, section 143 of the Bengal Tenancy Act, the Code of Civil Procedure applies to all suits between landlord and tenant, subject to any rules made by the High Court under sub-section (1) and subject also to the other provisions of the Bengal Tenancy Act. On behalf of the appellant it has been argued that the order in question is open to appeal under Order XLIII, rule 1 clause (*t*) of the Code of Civil Procedure. But before this contention can be accepted, we must examine, whether there is any provision of the Bengal Tenancy Act which bars the right of appeal. In our opinion, section 153 is clearly a bar. That section provides that an appeal shall not lie from any order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent, where the order is passed by a Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100, unless the order has decided one or more of certain specified points. It is not suggested, that the order against which the present appeal has been preferred, decides any question of this character. The point for consideration, therefore, reduces itself to this: is this an order passed in a suit instituted by a landlord for recovery of rent. The learned Vakil for the appellant has not disputed that the term 'suit' includes the appellate stage. This indeed is clear from the decision in the case of *Gagan Chand Sardar* v. *A. Caspersz* (1) and *Batasu* v. *Jaiti* (2). In fact, it has been held in the case of *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (3) that the term 'suit' includes even the execution proceedings based on the final decree made in the suit. It has been argued, however, that an application to re-hear an appeal is not an application in the suit, but is an extraneous proceeding which, if granted, in effect revives the appeal. In our opinion there is no force in this contention, and the application to re-hear the appeal is clearly an application in the suit. This view is supported by the decision in the case of *Achha Mian Chowdhry* v. *Maharaja Durga Charan Law* (4) where it was held that an application to review an order made in a suit is a proceeding in the suit itself. The case before us is obviously very much stronger. Finally, we have been invited to contrast the language of clause (*t*) of rule 1 of Order XLIII with that of clauses (*c*), (*d*) and (*n*) and to hold that the absence of the restrictive words "in a case open to appeal" from clause (*t*) supports the right of appeal claimed by the appellant. But this contention is obviously fallacious; the crucial point of the matter is that sub-section (2) of section 143 of the Bengal Tenancy Act which makes Order XLIII, rule 1 clause (*t*) of the Civil Procedure Code applicable, makes it applicable subject to the operation of the restrictive provision of section 153 of the Bengal Tenancy Act.

It follows that this appeal must be deemed barred under section 153 of the Bengal Tenancy Act and consequently dismissed with costs. We assess the hearing fee at one gold *mohur*.

Appeal dismissed.

(1) 4 C. W. N. 44.
(2) 3 C. W. N. lxii.
(3) 27 C. 484; 4 C. W. N. 269.
(4) 25 C. 146; 2 C. W. N. 137.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 558 OF 1911.

February 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

GONTLA VENKATA PITCHAYYA—PETITIONER

versus

SOWDAGAR MAHOMMAD ABDUL KAREEM BEG SAHEB AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree—Declaration of service good under what circumstances—Indefinite absence of the defendant—Evidence apart from the return can be received by the Judge.

In order that substituted service of a summons by affixing it to the door of the defendant's house in his absence may be effectual it is not necessary that the return of the process-server should show that there is a likelihood of defendant being absent for a long period, so as to entitle the process-server to affix it to the door of the house. The Court may from other circumstances of the case and upon other evidence taken by it come to a conclusion upon that question.

Sankaralingam Mudali v. *Ratnasabapathy Mudali*, 21 M. 324, followed.

Sitaram Swami v. *Kalandi Patra*, 13 Ind. Cas. 127; 17 C. W. N. 999, *Sakina* v. *Gauri Sahai*, A. W. N. (1902) 68; 24 A. 302, *Sakharam* v. *Padmakar*, 30 B. 623; 8 Bom. L. R. 757, *Abraham Pillai* v. *Donald Smith*, 29 M. 324, distinguished.

A High Court will not interfere in a case of this kind under section 115 of the Code of Civil Procedure.

Wazir Khan v. *Naqui Yawar*, 6 A. L. J. 45; 1 Ind Cas. 127, dissented from.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Kistna, in Miscellaneous Appeal No. 5 of 1911, preferred against that of the Principal District Munsif of Bezwada, in Miscellaneous Petition No. 1921 of 1910, in Original Suit No. 360 of 1910.

Mr. *P. Narayanamurthi*, (with him Mr. *V. Ramadoss*), for the Petitioner.

The *Advocate General* (with him Mr. P. *Nagabushanam*), for the Respondents.

JUDGMENT.—The first defendant is the petitioner in revision. An *ex parte* decree was obtained by the plaintiff against the petitioner for specific performance of an unregistered written agreement by which the defendants agreed to execute a registered rent deed in favour of the plaintiff. This *ex parte* decree was passed on the 16th August 1910. The first defendant was not personally served with the defendant's summons in the suit. His permanent residence was Bezwada and the suit was brought in the Bezwada District Munsif's Court. When the process-server went to serve him with the summons on 2nd July 1910, 1st defendants's *gumastah* said that the 1st defendant had gone to Tirupati and so the duplicate summons was affixed to the outer door of his house. The process-server was solemnly affirmed on the 5th July 1910 and deposed to the truth of his return to the above effect. The District Munsif treated the service by affixture as service duly made, and after examining one witness for the plaintiffs who proved that the unregistered agreement was executed by the 1st defendant, gave a decree against the 1st defendant (decree was also passed against the other executant of the agreement, the 2nd defendant, but we are not concerned now with that matter).

When the suit for the specific performance (Original Suit No. 360 of 1910) was brought, the law in Madras seems to have been that an unregistered agreement to execute a rent deed could be used and was admissible as evidence in a suit for specific performance of that agreement. [See *Konduri Srinivasa Charlu* v. *Gottumukkala Venkatarayu* (1)]. The fact that in February 1910, Benson and Krishnaswamy Aiyar, JJ., had doubted the correctness of that decision and had referred the matter to the Full Bench [see *Narayanan Chetty* v. *Muthia Servai* (2)] was probably not known in the *mofussil* then. The District Munsif, therefore, on 16th August 1910, treated the unregistered agreement on which the Suit No. 360 of 1910 was brought in his Court for specific performance as admissible in evidence and passed his *ex parte* decree on that date. On the 23rd August 1910, the 1st defendant put in a petition to the District Munsif to set aside the *ex parte* decree on the ground that he had gone on a pilgrimage to Benares in May 1910, that he returned to Bezwada only about the 13th August 1910, that he did not then know of the suit having been brought against him, that the *ex parte* decree of 16th August 1910 which was passed about three days after he returned to Bezwada, came to his knowledge only on the 22nd August 1910

(1) 17 M. L. J. 218.

(2) 8 Ind. Cas. 520; 21 M. L. J. 44; 35 M. 63; 9 M. L. T. 142.

and on these grounds he applied to set aside the *ex parte* decree. This petition was dismissed by the learned District Munsif on the ground that the 1st defendant must have been informed by his clerk of the affixing of the summons in July to the outer door of the 1st defendant's house, that the District Munsif did not believe the allegation in the first defendant's affidavit, (that the 1st defendant had gone to Benares) because the endorsement on the summons showed that he had gone only to Tirupati and that the 1st defendant had signed "the suit agreement." On appeal, the learned District Judge confirmed the order of the District Munsif refusing to set aside the *ex parte* decree. The learned District Judge's reasons are that the 1st defendant who was absent when the process-server took the summons for service to his house was not temporarily absent, but was absent for an indefinite period and that the service by affixture was correctly effected in such a case and could be treated as "due service." It was argued in this Civil Revision Petition No. 558 before me that the endorsement of the process-server itself shows that the 1st defendant was not only served, (see the 2nd ground of the petition), and that "the Court below failed to see that the plaintiff's suit was not maintainable on the face of it, as no suit could be brought on the basis of an unregistered agreement to lease. *Vide* Full Bench decision of *Narayana Chetty* v. *Muthia Servai* (2), (See the 5th ground of the revision petition). This case *Narayana Chetty* v. *Muthia Servai* (2) was decided on 3rd November 1910, the reference to the Full Bench having been made by Benson and Krishnaswamy Aiyar, JJ., as I said before, on the 8th February 1910. This ground of the revision petition lends some support to the argument of the learned Advocate-General (who appeared for the respondent in this case) that the 1st defendant knowing of the suit, allowed it to be decreed *ex parte* on the 16th August 1910, as he was ignorant of the fact that the decision of *Kondari Srinivasa Charlu* v. *Gottumukkla Venkataraya* (1) had been doubted by a Bench of this Court in February 1910 and that the matter had been referred to a Full Bench, that he, (1st defendant) after 16th August 1910 came to know of the fact and that, thereupon, he put in a petition on the 23rd August 1910, to set aside the *ex parte* decree. [The decision of *Narayanan Chetty* v. *Muthia Servai* (2) has also been reported in the authorized reports as I. L. R.35 M. 63.

The argument of the learned Vakil for the petitioner before me was that as the process-server has merely stated in his return that the 1st defendant (petitioner) was alleged to have gone to Tirupati and as the process-server did not add that the date of the 1st defendant's return to Bezwada was not known or was indefinite, the service was not duly made and that under Order IX, rule 13, he (1st defendant) was entitled to have the *ex parte* decree set aside when the summons was not duly served. He relies upon several cases one of which is *Abraham Pillai* v. *Donald Smith* (3). That case of *Abraham Pillai* v. *Donald Smith* (3) goes, however, too far and has been doubted in *Kasivis Anathan Chetty* v. *Arunachelam Chetty* (4) and it is also the decision of a single learned Judge. *Kasivis Anathan Chetty* v. *Arunachelam Chetty* (4) follows *Sankaralingam Mudali* v. *Ratnasabapathy Mudali* (5) in which it was held that if the absence of the defendant is for an indefinite period, service by affixture was sufficient. Whether the absence is for an indefinite period or not, has to be ascertained from the circumstances of the particular case. The learned Vakil (Mr. P. Narayanamurthi) for the petitioner contends that unless the process-server's return expressly shows that the person who gave the information to the process server of the absence of the defendant from his usual place of residence is stated in the return itself to have added that the date of the return of the defendant to his usual place of residence is not known, the Court could not legally accept the service as due service. I am unable to accept this contention. The Court might find the indefiniteness of the period of absence not only from the express words in the return (if there are such express words) but also from the other circumstances as appearing from the return. In the case of *Sankaralinga Mudali* v. *Ratnasabapathi Mudali* (5) in which it was held that the Subordinate

(3) 29 M. 324.

(4) 12 Ind. Cas. 420; 21 M. L. J. 978; 10 M. L. T. 566.

(5) 21 M. 324.

Judge was justified in declaring the defendant as duly served with summons on the basis of the process-server's return, I find on looking into the printed records that the process-server merely said in his return that "the families of the said person's house and the owner of the neighbouring houses say that it was two days since the defendant went to Tinnevelly" and that he, (the process server), therefore, affixed it to the street-door. In the present case the information that the 1st defendant, a resident of Bezwada, had gone on a pilgrimage to Tirupati and not to a neighbouring village reasonably led to the presumption that his absence was indefinite as the District Judge points out. If the 1st defendant's case is true that he had left Bezwada on a pilgrimage to Benares a month before the summons was affixed to the outer door, the presumption is still stronger that his absence was for an indefinite period. Following *Sankaralinga Mudali* v. *Ratnasabapathy Mudali* (5) I hold that the Munsif was justified in declaring that 1st defendant was duly served and in passing an *ex parte* decree against the 1st defendant (petitioner). In the case of *Sitaram Swami* v. *Kalandi Patra* (6), where the defendant had left the jurisdiction of the Court (as in this case) it was held that the affixing of the summons to the outer door of his house could be rightly held by the Court as due service. In that case also, there was no express statement by the process-server that the date of the return of the defendant from Vizagapatam (to which he had gone) from his usual place of residence, (in Cuttack) was not known and yet it was held that service by affixture could be legally held to be sufficient. In the case of *Sitaram Swami* v. *Kalandi Patra* (6) reliance was placed for the defendant upon the observations of *Sakina* v. *Gouri Sahai* (7), *Sakharam* v. *Padmakar* (8) and *Abraham Pillai* v. *Donald Smith* (3) (just as these decisions were relied on by the petitioner's Vakil in this case) but as pointed out by Mookerjee and Carnduff, JJ., "in some of these cases the rule was too broadly stated, and it may be a question whether the decision in every one of these cases can be justified upon the most liberal interpretation of Rule 17." The above case of *Sitaram Swami* v *Kalandi Patra* (6) followed *Sankaralinga Mudali* v. *Ratnasabapathy Mudali* (5) and I also propose to follow that case *Sankaralinga Mudali* v. *Ratnasapathy Mudali* (5)] in preference to the other cases.

Lastly, this is a petition for revision under section 115, and I am very doubtful whether even if the lower Courts were wrong in their law that service under these circumstances by affixture was due service, whether they could be considered as having acted without jurisdiction or illegally or with material irregularity. I am inclined to doubt the correctness of the decision of *Wazir Khan* v. *Naqui Yawar* (9) which held that interference in revision can be properly made in such a case. Of course, in a case of patent and extreme hardship, the powers under section 15 of the Charter Act could be invoked and used by this Court

In the result this civil revision petition is dismissed with costs.

Petition dismissed.

(6) 13 Ind. Cas. 127; 17 C. W. N. 999.
(7) 24 A. 302; A. W. N (1902) 68.
(8) 30 B. 623; 8 Bom. L. R. 757.
(9) 1 Ind. Cas. 163; 6 A. L. J. 45.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2327 OF 1911.
January 29, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

MOHENDRA NATH BISWAS AND OTHERS —DEFENDANTS—APPELLANTS

versus

SHYAM LAL BANERJEE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant, relationship of—Temporary Settlement under Government—Permanent sub-lease to plaintiff—Plaintiff granting sub-lease to defendant—Renewal of Settlement from time to time by Government, effect of, upon defendant.

S held lands under the Government under a temporary Settlement during the currency of which he granted a permanent sub-lease to the plaintiff who again granted a permanent sub-lease to the defendants. The Settlement was renewed from time to time by Government in favour of *S*:

Held, that the effect of the re-settlement by the Government with *S* was to keep alive the contractual obligations of the subordinate holders as amongst themselves, and that the relationship of landlord and tenant existed between the plaintiff and the defendants.

MOHENDRA NATH BISWAS *v.* SHYAM LAL BANERJEE.

Appeal from the decree of the Officiating Additional Sub-Judge of Khulna, dated May 26th, 1911, confirming that of the 3rd Munsif of Bagerhat, dated May 28th, 1910.

Babu *Brojo Lal Chakravarti* for Babu *Jadu Nath Kanjilal*, for the Appellants.

Babu *Surendra Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for rent, and the question in controversy is whether the relationship of landlord and tenant subsists between the parties. The facts necessary for the determination of this question may be briefly stated.

Srinath Bhadra and Srinath Biswas held lands under the Government under a temporary Settlement which was not to expire till the year 1890. During the currency of this Settlement they granted a permanent sub-lease to the plaintiffs-respondents on the 30th December 1873. The grantors and the grantees were aware of the precarious nature of their interest, but the parties assumed that upon the expiry of the then current term of Settlement, the Government would renew the lease in favour of the grantors, possibly, upon payment of enhanced revenue. The grantees accordingly agreed that if at any future time the Government imposed an additional revenue,the grantees themselves would bear the additional burden in proportion to the area of land held by them. On the 4th February 1874, the lessees under the lease of the 30th December 1873, granted a permanent sub lease to one of the grantors. Here again a provision was inserted to the effect that if the revenue was increased upon a future Settlement, the tenant would bear the burden in proportion to the land in his possession. Ever since then, the sub-lessee and his successor-in-interest have been in occupation of the land. The Settlement has been from time to time renewed by the Government in favour of the original Settlement-holders or their representatives. In the course of the last Settlement the under-tenures for some unexplained reason were not mentioned in the Settlement Records. In answer to the present suit for rent, the defendants, the sub-lessees under the permanent sub-lease of the 4th February 1874, contend that the plaintiffs are no longer entitled to recover rent from them inasmuch as their tenures have not been recognised by the Settlement Authorities. This contention is obviously without foundation. The mere omission of the Settlement Authorities to make an entry in the Settlement Records in respect of the tenure and under-tenure cannot affect the rights of the parties. On the other hand, it cannot be disputed for a moment that the effect of the re-settlement by the Government with the original Settlement-holders was to keep alive the contractual obligation of the subordinate holders as amongst themselves. This position is supported by the decision of the Judicial Committee in the case of *Prianath Das* v. *Ram Taran Chatterjee* (1), and in fact accords with the view taken by this Court in an earlier litigation between these very parties which arose upon the termination of a previous Settlement. It has been contended, however, that a different view of the rights and obligations of the parties should be taken on this occasion; because the tenure and under-tenure have not been recorded in the course of the Settlement now current. As we have already explained, this circumstance does not, in our opinion, affect the position of the parties. Their rights and obligations are mutual; the plaintiffs are bound to make good the title of the defendants as soon as by virtue of the re-settlement they are placed in a position to continue the lease in favour of the defendants, and, similarly the defendants are under an obligation to continue as tenants under the plaintiffs on the basis of the lease of the 4th February 1874 and to pay rent accordingly. In this view the plaintiffs have been rightly allowed a decree for rent as against the defendants.

The result is, that the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 30 C. 811 (P. C.); 7 C. W. N. 601; 30 I. A. 159.

BALDEO DAS *v.* GOBIND DAS.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 255 OF 1912.

January 22, 1914.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

BALDEO DAS—DEFENDANT—APPELLANT

versus

GOBIND DAS—PLAINTIFF—RESPONDENT.

Hindu Law—Endowment—Power to appoint mahant, *in whom vests—Evidence Act (I of 1872), s. 35—Report of official of Native State.*

In the absence of any provision to the contrary the power to appoint a *mahant* of an endowment would vest in the founder and his successors.

In connection with the appointment of a *mahant* of a temple situated in a Native State, the Political Agent referred the matter to the *Kotwal* of the State for inquiry. The *Kotwal* made a public inquiry and reported who had built the temple, who was the first *mahant* and by whom he was appointed:

Held, that the report was a public record of a public enquiry, and as such was admissible in evidence in a suit relating to the appointment of a future *mahant* of the temple.

First appeal from the decision of the Subordinate Judge of Banda, dated 13th May 1912.

The Hon'ble Dr. *Sunder Lal*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, with him Messrs. *P. D. Tandon*, and *K. R. Leghate*), for the Respondent.

JUDGMENT:—This appeal arises out of a suit in which the plaintiff claimed possession of a village called Sangrampur. The plaintiff says, this village appertained to a temple in *Mouza* Niminpar in the Ajaigarh State, that the power to appoint a *mahant* of that temple is vested in the Raja of Ajaigarh and that the Raja duly appointed him *mahant*. The appellant pleads that the village in question does not appertain in any way to the temple at Niminpar, that the Raja has no power to appoint, that he himself was duly appointed many years ago, upon the death of the last *mahant*, to the *gaddi* which is situate not at Niminpar but at Sangrampur, the village itself. It was also pleaded that the plaintiff belongs to the *Harabbyasi* sect while the *gaddi* is *Charendasi*, and that accordingly the plaintiff can, in no event, be appointed to be *mahant* of this temple.

The Court below has come to the conclusion that the village appertains to the temple which is situate in *Mouza* Niminpar in the Ajaigarh State, and that the Raja has the power to appoint, and that he duly appointed the plaintiff, and accordingly has decreed the plaintiff's suit with mesne profits to be determined in execution of the decree.

The defendant appeals. We have carefully considered the evidence and heard both sides, and we are quite satisfied that the village in question appertains to the temple which is situated at Niminpar in the Ajaigarh State. The earliest document is a document of 1801 in which Nawab Ali Bahadur and Raja Himat Bahadur granted this village to one *Mahant* Bhajananand. It is stated in it that the village "should be released to be enjoyed by the *naib* of the said *mahant* and on no account should any interference be made with the income therefrom which should be spent by the said *mahant* on his own maintenance with perfect peace of mind. The said *mahant* should devote himself in bathing and meditation at the bank of the Ganges and remain engaged in offering prayers for the prosperity of the *Sarkar*." The defendant contends that this document clearly shows that the grant was made to *Mahant* Bhajnanand personally. It will be seen that this was not the original grant. It appears that the two villages named Saurahai and Rewai had been formerly granted, and that this document of 1801, was merely the substitution of the village of Sangrampur for the two villages mentioned above. Apart from this document, all the evidence is in favour of the village being granted as an endowment for the maintenance of the temple. It is common case that as far as the history of the village goes back, it has always been used for this purpose as a matter of fact. There can be little doubt that Bhajnanand was the *mahant* of this temple. Undoubtedly *Mahant* Ram Sanehi was a *mahant* of the temple after him. Jugal Das who succeeded him was also the *mahant*. Behari Das, who succeeded Jugal Das, was the next *mahant*. All these persons were in enjoyment of the profits of this village, and all of them admitted that the income of the village went to meet the expenses of the temple. At one time the village, which was *muafi*, was resumed by Government but on the representation that it had been granted as an endowment for the temple at *Mouza* Niminpar, the British Government remitted the revenue and the village was again *muafi*

and it remains so to the present time. Under these circumstances we agree in the finding of the Court below that the village in question did appertain to the temple in *Mouza* Niminpar.

The next question is whether the Raja of Ajaigarh had authority and was the proper person to appoint the *mahant* of the temple. It is admitted that the temple is within his territory. We find that a report, made by the *Kotwal* as far back as the year 1840, recited that the temple was built by the wife of Raja Guman Singh, who was the Raja of Ajaigarh and that Bhajnanand had been the first *mahant* and that he was succeeded by Ram Sanehi who was appointed by the Raja's successor. It is said that this document is not evidence. We think that it is evidence. It is a public record of a public inquiry. The matter was referred to the *Kotwal* for a report by the Political Agent in connection with the appointment of Jugal Das as *mahant* of the temple by the Raja of Ajaigarh. We find later on that the Raja purported to depose Jugal Das for misconduct and to appoint Behari Das as his successor. The authorities in British India appear to have questioned the authority of the Raja to make the appointment and to have put one Mohan Das, a claimant, into possession. After inquiry the representatives of Government recognised the authority of the Raja to make the appointment. Later on, the Raja thought fit to depose Behari Das in turn and to re-appoint Jugal Das. Again the authority of the Raja was recognised. Later on, Jugal Das was once more deposed and Behari Das re-appointed. The authority of the Raja was again recognised. There is no evidence worthy of the name on the record to show that any other person or authority ever appointed a *mahant* of this temple other than the Raja of Ajaigarh for the time being. The fact that the Raja did make the appointment of *mahant* rather goes to support the finding of the *Kotwal* in 1840, that the founder of the temple was the Raja, or the wife of the Raja of Ajaigarh; and if this is so, in the absence of any other provision as to the endowment, the power to appoint a *mahant* would vest in the founder and his successors.

On the whole, we see no reason to differ from the Court below in the finding that the Raja had power to appoint a *mahant*.

With regard to the plea raised by the defendant that the plaintiff was not qualified for appointment by reason of the fact that he belonged to the sect known as *Harabbyasi*, it is true that apparently all the previous *mahants* belonged to the *Charandasi* sect, but the defendant did not show in the Court below that the plaintiff by reason of his not belonging to that sect was incapable of performing the duties of a *mahant* of this particular temple, and we know of no reason why he should be so disqualified. The defendant's case in the Court below was that this village had no connection with the temple at Niminpar and that the Raja had no power or authority whatsoever. We think, however, that it may not be out of place to make some comment on the past appointments. At one time Jugal Das was appointed. He was removed from the *mahantship* on grounds of his immorality and Behari Das was appointed in his place. Very shortly afterwards Behari Das was removed from his office on the very same grounds and the same Jugal Das was re-appointed as a moral and honest man. Very shortly after that, Jugal Das is said again to have become immoral and Behari Das moral, and the latter was once more appointed to the office which he held up to the time of his death. These appointments and re-appointments were not calculated to bring credit on the Darbar, but they are comparatively speaking ancient history, but even the recent appointments cannot be regarded as satisfactory. Behari Das died in the year 1899. The defendant who appears to have had the approval of the other *mahants* and who would have been not an unnatural successor to Behari Das, has remained *de facto mahant* up to the date of the institution of the suit. It is true that he was called upon in the year 1900 to appear before the Darbar and make good his claim, and that apparently he did not do so. Nevertheless he was allowed to remain in possession until the present suit was instituted on the 5th of December 1911. We feel sure that in

future when the vacancy occurs in this *mahantship*, the Durbar will take care to appoint a fit and proper person to exercise the functions of *mahant* as soon as such an appointment can reasonably be made, and so avoid disputes and scandal.

We think that the decree of the Court below ought to be varied in one particular. That Court has awarded mesne profits to be ascertained in execution. We think considering that the defendant was allowed to remain in possession in the way we have mentioned, there ought to be no profits save from the date of this judgment. We are informed by both parties that possession has already been given. This being so, the decree of the Court below will be varied by dismissing the claim for mesne profits. We affirm the remainder of the decree. The appellant must pay the costs of this appeal including in this Court fees on the higher scale.

Decree varied.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 403 OF 1912.

August 26, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

MURLIDHAR—APPELLANT

versus

JAGANNATH—RESPONDENT.

Suit, right of—Lambardar, *customary agent of proprietary body, whether can sue alone—Custom.*

A *Lambardar*, as the customary agent of the proprietary body, is entitled to sue to set aside a voidable transaction.

Nilmoni Gountia v. *Jogendra Guntia*, 6 Ind. Cas. 389; 12 C. L. J. 104; 37 C. 694; and *Ramji* v. *Syed Nur*, 4 N. L. R. 45, distinguished.

Partap v. *Umrao*, 11 C. P. L. R. 1, followed.

Appeal against the decree of the District Judge, Narsinghpur, dated the 30th April 1912, reversing that of the Munsif, Narsinghpur, dated the 8th February 1912.

Mr. *S. R. Pandit*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—The plaintiff and his two brothers, Debiprasad and Parmanand, are members of a joint Hindu family, of which the plaintiff is the manager. The plaintiff is the *Lambardar* of the village of Khaira Kalla, which, according to the plaintiff, is owned by the three brothers. The defendants had pleaded that there are two other persons who are co-sharers of the village. This plea was found against them in the first Court and in the appeal before the District Judge it was conceded that the existence of these two persons may be ignored for the purposes of this suit. The plaintiff is the *lambardar* of the village and claims to represent the entire proprietary body consisting of himself and his two brothers. The suit is to avoid a mortgage executed by some absolute occupancy tenants in the village, executed according to the plaintiff in contravention of section 38 of the Tenancy Act, 1883, corresponding with section 41 of the Act of 1893. The plaintiff seeks ejectment of the defendants on the ground that the mortgage was invalid and that the defendants have obtained possession of the holding under a foreclosure decree against the original tenants. The defence was that the mortgage was consented to by the then landlord and that the plaintiff alone could not maintain the suit. The first Court held that the consent alleged was not proved and that the plaintiff as *lambardar* could maintain the suit without joining his brothers. The lower Appellate Court, following the judgment of the Calcutta High Court in *Nilmoni Guntia* v. *Jogendra Guntia* (1), has dismissed the suit on the sole ground that the plaintiff as *lambardar* is not entitled to sue in his own name without joining his two brothers as co-plaintiffs. The case cited was a case from the Sambalpur District and, no doubt, supports the view taken by the District Judge. The plaintiff has now preferred this second appeal on the ground that the *lambardar* as the customary agent of the proprietary body can bring a suit for the avoidance of the mortgage and for the ejectment of the transferees under a voidable title. I agree with Brett and Sharfud-din, JJ., in the above case that a *lambardar*, as a mere agent of the proprietary body in its relations with the Government, such as he is under the definition given in the Land Revenue Act, cannot represent his co-sharers in the internal management of the village. But the attention of the learned

(1) 6 Ind. Cas. 389; 37 C. 694; 12 C. L. J. 104.

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Judges was never drawn to the fact that the *lambardar* is ordinarily the customary agent of the co-sharers for such purpose. I do not understand the Calcutta High Court to lay down—nor has it been suggested before me—that apart from statutory provisions enabling him to do so, a *lambardar* even if the customary agent, is not entitled to maintain a suit in his own name. Under section 70 of the Land Revenue Act, the Settlement Officer shall ascertain the custom or rules by which the proprietors in each *mahal* are mutually bound as to the granting of *pattas*, the ejectment of tenants, the realization and distribution of rents and other profits, the payment of land revenue, village expenses and other charges, and generally as to the control and management of the *mahal*, and shall decide all disputes and record all agreements regarding the matters mentioned in this section. The *Wajib-ul-arz* of all Districts recognise the customary authority of the *lambardar* to represent his co-sharers in the management of the village. The Narsinghpur *Wajib-ul-arz* is particularly clear on the point. Under the heading "Extent to which co-sharers are represented by *lambardars*", it is there laid down that "The person who is appointed *lambardar* shall attend the Courts when there is business of the village to be done there, and shall be responsible for the leasing of land, the collection of rents, and the payment of the Government demand". Stevens, J. C., in *Pratap* v. *Umrao* (2), held that the *lambardar* was entitled to maintain a suit for rent, even though a portion had been paid to a co-sharer. The learned Advocate for respondents admits that the *lambardar* would represent his co-sharers in a suit for rent but contends that he cannot do so in a suit for ejectment and in support of this contention relies on *Ramji* v. *Syed Nur* (3). It seems to me that if he can represent others in one class of suits authorised by the Tenancy Act, he can equally represent his co-sharers in the other class of suits. What was held in the last mentioned case is that such a suit would fail on the merits, because the co-sharers were not agreed as to the desirability of avoiding the transfer and in that particular case, in view of the consent given to the transfer by other co-sharers, the *lambardar* could not be held to represent the proprietary body. In the present case there is no allegation that the plaintiff's brothers ever consented to the transfer. In the very case cited by the learned Judges of the Calcutta High Court, apparently with approval, Ismay, J. C., remarked as follows:—"Ordinarily the *lambardar* as the agent of the co-sharers for the management of the village would be the person whose consent is necessary and sufficient. In the same way the *lambardar* acting on behalf of the proprietary body would be entitled to sue to set aside a voidable transaction." *Gopal* v. *Govind* (4). Further on, the learned Judicial Commissioner says that "anything which the Tenancy Act requires or authorises a landlord to do must be done either by all the co-sharers, acting together or by an agent authorised to act on their behalf". The agent here refers to the customary agent—the *lambardar*—as would be apparent from the earlier part of his judgment—express authorisation in such a case not being necessary.

It may be that in some cases it would be desirable to make all co-sharers parties to a suit. In my opinion it was unnecessary in this suit to join the plaintiff's brothers in view of the pleadings but the suit cannot fail for such non-joinder.

The decree of the lower Appellate Court is reversed and the appeal is remanded to that Court for trial on the merits. The appellant will be given the usual certificate for refund of Court-fees. Other costs will follow the result.

Appeal remanded.

(2) 11 C. P. L. R. 1.
(3) 4 N. L. R. 45.
(4) 13 C. P. L. R. 113.

EAST INDIAN RAILWAY CO. *v.* NOPE CHAND MAGNIRAM.

CALCUTTA HIGH COURT.
CIVIL RULE No 1323 OF 1913.
March 3, 1914.
Present:—Mr. Justice Fletcher and
Mr. Justice N. R. Chatterjea.

EAST INDIAN RAILWAY COMPANY—DEFENDANT No. 2—PETITIONERS

versus

NOPE CHAND MAGNIRAM—PLAINTIFF AND BENGAL AND N.-W. RAILWAY COMPANY—DEFENDANT No. 1—OPPOSITE PARTIES.

Railways Act (IX of 1890), s. 80—Carriage of goods by different Railways—Loss of goods—Liability of particular Railway - Proof that loss occurred on that Railway.

The plaintiff consigned to the Bengal and N.-W. Railway Company certain goods for delivery at Howrah. The Railway Company gave the usual receipt and invoice, and forwarded the forwarding note to the East Indian Railway Company. Certain goods were received by the last named Company who offered them to plaintiff, but he declined to accept on the ground that these were not the goods consigned. The plaintiff sued both the Companies for his loss:

Held that, in order to render the East Indian Railway Company liable, there must be evidence under section 80 of the Railways Act showing that the loss, injury, destruction or deterioration occurred on the line of the East Indian Railway Company.

Jetha Mal v. *Bombay Baroda and Central India Railway Company*, 3 Bom. L. R. 260 and *Kaluram Maigraj* v. *Madras Railway Company*, 3 M. 240, followed.

Rule against the decree of the Small Cause Court Judge of Howrah dated July 25th, 1913.

Mr. *S. P. Sinha* and Babu *Ambika Pada Chaudhuri*, for the Petitioners.

Dr. *Rash Behary Ghosh*, and Babu *Probhash Chandra Ray*, for the Opposite Parties.

JUDGMENT.

FLETCHER, J.—This is a Rule obtained by the East Indian Railway Company calling on the plaintiffs to show cause why a judgment of the Small Cause Court at Howrah should not be set aside. It appears that, on the 27th February 1912, the plaintiffs consigned to the Bengal and North-Western Railway Company at Baranui 11 bundles of gunny bags for delivery at Howrah and the said Railway Company gave the usual receipt and the invoice and the forwarding note was duly made out and forwarded to the East Indian Railway Company. Certain goods were, according to the East Indian Railway Company, delivered to them and received at the Howrah Station on the 4th March 1912. When the East Indian Railway Company offered those goods to the plaintiffs, they declined to accept delivery on the ground that those were not the goods that they consigned from Baranui. The case came on for trial before the learned Small Cause Court Judge and it was brought not only against the Bengal and North-Western Railway Company as the booking Company but also against the East Indian Railway Company as the delivering Company. In order to render the East Indian Railway Company liable in a case of this nature, there must be evidence under section 80 of the Railways Act showing that the loss, injury, destruction or deterioration occurred on the line of the East Indian Railway Company. It is not denied that there was no evidence as to that, on which the learned Small Cause Court Judge could find the East Indian Railway Company liable. The view that I have expressed has been adopted not only in the Bombay High Court in the case of *Jetha Mal* v. *The Bombay Baroda and Central Indian Railway Company* (1) but also in the Madras High Court in the case of *Kaluram Maigraj* v. *The Madras Railway Company* (2). It seems to me that the words of the section are quite clear and that unless there was evidence of loss, injury, destruction or deterioration on the line of the East Indian Railway Company, the learned Small Cause Court Judge ought not to have decreed the suit as against them. In my opinion, this Rule in which the East Indian Railway Company are the only applicants must be made absolute.

The decree in so far as it is against the Bengal, North-Western Railway Company remains unaffected as they are not parties to the present application and as they, so far as I know, have not made any other application with reference to this matter.

In the circumstances, we make no order as to costs.

N. CHATTERJEA, J.—I agree.

Rule made absolute.

(1) 3 Bom. L. R. 260.
(2) 3 M. 240.

MADRAS HIGH COURT.
CIVIL APPEAL No. 123 OF 1908.
February 10, 1914.
Present:—Mr. Justice Miller and Mr. Justice Tyabji.

SUBRAMANIAN PATTAR KARIAKAR'S SON SIVARAMA PATTAR KARIAKAR—PLAINTIFF—APPELLANT

versus

EDATHIL MADHATHIL V. KRISHNA IYER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Registration Act (III of 1877), ss. 26, 71, 77—Suit to compel registration—Time expired when Court closed—Suit filed immediately on opening of Court—Extension of limitation on general principles—Refusal to register, mere return of document amounts to—Order of refusal not endorsed on returned document, effect of.

On general principles and apart from section 5 of the Limitation Act, which does not apply to a suit providedfor by section 77 of the Registration Act, when a plaintiff in such a suit cannot, owing to the Court being closed, present his plaint on the particular day, on which it ought to be presented, he should not be allowed to suffer if he presents it at the earliest possible opportunity thereafter.

The act of a registering officer in returning a document presented to him for registration on the ground that the executant failed to appear, is equivalent to a refusal to register though those words are not actually written on the document.

Veeramma v. *Abbiah*, 18 M. 99; *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi*, 20 M. 249; *Aravamuda Ayyangar* v. *Samiyappa Nadan*, 21 M. 385; *Sambasiva Chari* v. *Ramasamy Reddy*, 22 M. 179; *Haji Ismail Sait* v. *Trustees of the Harbour Madras*, 23 M. 389; 9 M. L. J. 270, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Calicut, in Original Suit No. 20 of 1907.

FACTS.—A document was presented for registration before the Sub-Registrar; he sent summons twice to the executant but he did not appear at all. Upon this the Sub-Registrar returned the document to the party who had presented it and he instituted a suit to compel its registration. The suit was barred by limitation on a date when the Courts were closed and it was filed immediately on the re-opening of the Court. The lower Court held that the suit was barred by limitation. The present appeal is against that decree.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant. The provisions of section 5 of the Limitation Act apply to suits instituted under section 77 of the Registration Act.

Abu Baker v. *Secretary of State for India* (1) is a case under the Forest Act.

Nijcbutoola v. *Wazir Ali* (2) is a case under the Registration Act. Section 5 of the Limitation Act was held to apply.

Matabbar Mollah v. *Sasi Bhusan Ghatak* (3) is a case under the Registration Act and it is said, section 5 applies. Section 73 of the Act enforces the same principle.

Feary Mohun Aich v. *Anunda Charan Biswas* (4), *Surendra Nuth Nag Chowdhury* v. *Gopal Chunder Ghosh* (5) recognize the same principle.

As to the 2nd question.—If on summons the party does not appear it means that he does not admit execution.

In the goods of Taramoni Dasi (6); *Bechun Sahu* v. *Syed Ali Rasul* (7).

Mr. *T. R. Ramachandra Aiyer*, for the Respondent. In all these cases there was a refusal to register endorsed on the document; here there is no order refusing to register.

[MILLER, J.—Suppose the Sub-Registrar returns the document refusing to register, would it not come under the Act?]

Mr. *T. R. Ramachandra Aiyer*.—Refusal to register is an order in writing within the meaning of section 92 of Indian Evidence Act.

As to limitation, the decision in the Full Bench *Yeeramma* v *Abbiah* (8) is conclusive.

JUDGMENT.—We think this appeal must be allowed. We are bound by the Full Bench decision of *Veeramma* v. *Abbiah* (8) and the decision of *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (9) which followed it, to deal with the case on the footing that the provisions of the Limitation Act are inapplicable to the suit provided for by section 77 of the Registration Act.

But apart from that Act, it would be reasonable on general principles to hold, that when the plaintiff cannot, owing to the Court being closed, present his plaint on a

(1) 5 Ind. Cas. 884; 34 M. 505; 7 M. L. T. 132; 20 M. L. J. 283.
(2) 8 C. 910; 10 C. L. R. 333.
(3) 12 Ind. Cas. 33; 16 C. W. N. 20.
(4) 18 C. 631.
(5) 8 Ind. Cas. 794; 12 C. L. J. 464.
(6) 25 C. 553.
(7) 16 Ind. Cas. 614.
(8) 18 M. 99.
(9) 20 M. 249.

particular day, on which it ought to be presented, he should not be allowed to suffer if he presents it at the earliest possible opportunity thereafter. That principle has been recognized by the Legislature in section 10 of the General Clauses Act of 1897 and in this Court in *Aravamuda Ayyangar* v. *Samayappa Nadan* (10), *Sambasiva Chari* v. *Ramasami Reddy* (11), *Haji Ismail Sait* v. *Trustees of the Harbour, Madras* (12) and *Messrs. Arbuthnot and Co.* v. *Sabapathy Mudaliar* (13).

Our attention has been drawn to section 26 of Act III of 1877 as indicating that the Legislature intended to exclude the application of this principle; by that section the same principle is expressly applied to the case where the Registration Office is not open on the day on which a document ought to be presented for registration and so, it is contended, is impliedly excluded in all other cases. We are unable to take this view. It may be correct in many cases but here in the absence of any apparent reason why the person coming to present a document should have the right to await the opening of the office, while a plaintiff coming to the closed Court with his plaint should not have the corresponding right, it seems the more reasonable view that the Legislature did not intentionally exclude in the latter case the operation of this generally recognized principle which it recognized in the former case.

In *Appa Rau Sanayi Aswa Rai* v. *Krishnamurthi* (9) and *Veeramma* v. *Abbiah* (8) the effect of this principle was not in question as apart from its enunciation in section 5 of the Limitation Act, and we may follow the other cases, to which we have referred and hold that it is applicable to a suit under section 77 of the Registration Act.

The suit was, therefore, not barred by limitation.

On the remaining question, we think, the Sub-Registrar did refuse registration. The executant, after being twice summoned, failed to appear and on the authorities the Sub-Registrar should have made an order refusing registration on the footing of denial of execution. The plaintiff in Exhibit I pointed out the executant's failure to appear and asked that the Sub-Registrar should register the instrument or return it to him (the plaintiff).

We read this prayer as the Subordinate Judge reads it; that is, as a prayer to register, or if that cannot be done, then to return the document.

The Sub-Registrar returned the document and endorsed it as returned in accordance with the request of the party presenting it; he also in a subsequent notice to the plaintiff described it as a document of which registration was refused (Exhibit E). In these circumstances we think the Sub-Registrar's order returning the document was really an order consequential on a refusal to register it, though he did not make the written order with reasons for refusal as required by the law. The request of the plaintiff was to return the document if it could not be registered and by the order of the Sub-Registrar it was returned *as requested*.

We think there was, in fact, a refusal to register and that the endorsement was intended to be consequent on the refusal and so may be taken to be an order refusing to register.

The decree of the Subordinate Judge must, in these circumstances, be reversed and the suit remanded for disposal according to law.

Costs will abide the result.

Decree reversed.

(10) 21 M. 385.
(11) 22 M. 179.
(12) 23 M. 389, 9 M. L. J. 270.
(13) 14 Ind. Cas. 579; 23 M. L. J. 221; 12 M. L. T. 169.

D. WESTON *v.* PEARY MOHUN DAS.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL SUIT No. 61 OF 1911.

August 17, 1912.

Present:—Mr. Justice Woodroffe,
Mr. Justice Coxe and
Mr. Justice D. Chatterjee.

D. WESTON AND OTHERS—DEFENDANTS—APPELLANTS

versus

PEARY MOHUN DAS—PLAINTIFF—RESPONDENT.

Limitation Act (XV of 1877), *Sch. II, Arts.* 19, 23, 36, 120—*Suit on joint torts—Fraud, allegation of, to be formulated definitely and not merely hinted at—Evidence, rule of—Evidence Act (I of* 1872), *ss.* 3, 125—*Proof—"Proved","Disproved" meaning of—Document—Privilege—Adverse inference from non-production when document privileged—Claim of privilege—Liability of officer acting on reports—Honest belief on reports—Finding of explosive articles—Place where several persons have access—Liability of* karta—*Possession—Explosive Substances Act (VI of* 1908), *ss.* 5, 6—*Arrest made under statute—Immaterial under what section arrest made if arrest may be justified—Arrest under law—Immaterial whether it was present or not to mind of officer making arrest—Pleadings—Erroneous statement in pleadings if can overcome fact apparent on record or admitted—Counsel—Instructions—Cross-examination—Making charge—Right of Court to ask Counsel—Counsel's responsibility—Disciplinary action of Court—Reliance by Court on materials to be made known to parties at trial—Opportunity of adducing evidence—Counsel—Knowledge of important facts—Propriety of accepting retainer—Counsel giving evidence in case in which he is retained—Whether unprofessional conduct—General practice—Undesirable that Counsel engaged in case should give evidence—Withholding evidence—Inference, adverse—Cause of action—Conspiracy—Torts.*

A suit on joint torts, in which the plaintiff alleges that the torts of malicious arrest and prosecution, and trespass were committed by the three defendants acting in conspiracy, instead of by one, is governed by the one-year rule of limitation contained in Articles 19 and 23 of the Limitation Act, 1877.

Counsel appearing in a case ought to give his deposition if he can thereby throw light upon the case.

Per *Woodroffe* and *Cox, JJ.*—In a suit based upon fraud, what is required of the plaintiff is that he should at least know and formulate precisely what the fraud is which he alleges and against whom he charges it, and he should be able also to definitely formulate in an intelligible way what his theory and scheme is and how it fits in with the facts. Charges should be formulated and not merely hinted at. A charge may be met but not a suspicion. The charge should be put forth in a precise form and then presented in that form and not in some changed form by all honest means.

There is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of the terms "proved" and "disproved" in section 3 of the Evidence Act. The test in each case is, would a prudent man, after considering the matters before him, (which vary with each case), deem the fact in issue to be proved or disproved? In a matter of this kind, the conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment.

Where charges of a fraudulent or criminal character are made against a party to a suit, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is, the greater, of necessity, is the force of the evidence required to overcome such presumption.

The English rule in these matters does not, as such, apply to India.

Jarat Kumari v. *Bissessur Dutt*, 13 Ind. Cas. 577; 16 C. W. N. 265; 39 C. 245 at p. 255, referred to.

When a document is in fact privileged, no adverse inference can be drawn from its non-production, for to allow this would be in fact to destroy the privilege. This rule applies as regards the party claiming privilege. *A fortiori*, where privilege is claimed by a third person, no adverse inference can be drawn against any party to the suit in consequences of such claim and allowance of privilege.

Though section 125 of the Evidence Act does not, in express terms, prohibit a witness, if he be willing, from saying whence he got his information, both the English authorities, from which the rule is taken and a consideration of the foundation of the rule, show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is the duty of the Judge, apart from objection taken, to exclude the evidence. *A fortiori*, if objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness.

An officer is not liable who acts on false reports, provided that he acted honestly in respect of them.

Where articles are found in a house in such a place or places as several persons living in the house may have access to, there is no presumption that those articles are in the possession or control of any other person than the *karta* or housemaster.

Queen-Empress v. *Sangam Lall*, 15 A. 129, relied upon.

It is immaterial under what section of the Explosive Substances Act an arrest is made, if, in fact, the circumstances are such that the Act justifies the arrest. The officer making the arrest is entitled to call in aid any statute which justifies his action quite irrespective of whether or not it was present to his mind, when he made the arrest.

Clarke v. *Brojendra Kishore Roy Chowdhry*, 2 Ind. Cas. 436; 5 M. L. T. 367; 13 C. W. N. 458; 9 C. L. J. 298; 36 C. 433 at p. 451, referred to.

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An erroneous statement in the pleadings cannot overcome an actual fact apparent on the face of the record and admitted by the plaintiff himself and his Counsel.

A Court is entitled to ask Counsel, who in cross-examination makes a charge, whether he makes it on instructions, and if so, on whose. Instructions to Counsel are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. But if the Court calls for written instructions, it cannot use them as evidence in the cause which is tried. They could be called for then and there, and be used after the trial on the determination of the question whether disciplinary action should be taken against the Counsel. It is not sufficient even to plead instructions. Counsel have a responsibility in the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

Whatever a Court relies on should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point.

Durga Prasad Singh v. *Ram Doyal Chaudhuri*, 10 Ind. Cas. 955; 38 C. 153, relied upon.

If Counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein. If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client. If Counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises, is likely to be impugned in the case, he ought not to accept a retainer. If he accepts a retainer, not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client.

There is nothing necessarily unprofessional in Counsel giving evidence in a case in which he appears as such; and Counsel engaged in a case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer.

Corea v. *Peiris*, 5 Ind. Cas. 50; 79 L. J. P. C. 25; 100 L. T. 790; 25 T. L. R. 631; 12 New Law. Rep. (Ceylon) 147; (1909) A. C. 549; 14 C. W. N. 86 and *Cobbet* v. *Hudson*, 1 E. & B. 11, 22 L. J. Q. B. 11; 17 Jur. 488; 1 W. R. 54; 93 R. R. 1; 118 Eng. Rep. 341, relied upon

But as a matter of general practice it is undesirable when the matter to which Counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting.

When evidence which could be but is not produced, the inference is that if produced it would be unfavourable to the person who withholds it. The same rule applies to the case of a Counsel who ought to have been called but is not called.

The same set of facts cannot constitute two causes of action, *viz.*, for a tort and for a conspiracy to cause damage. The one excludes the other. If a joint tort is committed there is no necessity to have recourse to any law of conspiracy.

D. Chatterjee, J.—A tort, committed by several persons acting in concert, is not different from the same tort committed by a single individual. A trespass is a trespass, whether it is committed by one person or by more, and so is a malicious prosecution or false imprisonment. The combination in such cases may be an element of aggravation in the assessment of damages, but it does not suffice to make it a different tort.

Appeal from the judgment of Mr. Justice Fletcher, dated 7th August 1911, in Original Side Suit No 5 of 1910, reported at 13 Indian Cases. 721, 16 C. W. N. 145.

Messrs. *Garth*, *Dunne*, *Norton*, *Gregory* and *S. Sharfuddin*, instructed by the *Government Solicitor*, for the Appellants.

Messrs. *K. B. Dutt* and *H. D. Bose* instructed by Mr. *J. C. Dutt*, *Solicitor*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—[Before delivering his judgment Mr. Justice Woodroffe said:—] Before reading my judgment, I am desired by Mr. Justice Coxe to say that he entirely agrees with me both as to the order passed, and the grounds therefor. Mr. Justice Chatterjee, who, except as to the question of costs, agrees with the order passed, will himself deliver a separate judgment, giving his reasons therefor.

[Mr. Justice Woodroffe in the course of his judgment said]:—If one confines one's attention to the relevant and material facts in this lengthy case, the issue may be shortly stated. The plaintiff alleges that the defendants who were the District Magistrate, Deputy Superintendent and Inspector of Police respectively of Midnapore, in pursuance of their object, which is now (though not in the plaint) stated to be a wicked and concerted plan to implicate falsely in an imaginary "Bomb Conspiracy" "the wealthy and respectable inhabitants of Midnapore and other parts of India" placed and connived at the placing of the bomb in his house. They then, he says, pretended to search it and discovered the bomb which they themselves had placed or knew to have been placed there and falsely alleging that the plaintiff's son, Santosh Das, was responsible for the pre-

sence of the bomb, they arrested and imprisoned him. Then subsequently they arrested the plaintiff as well, not in the belief that they were entitled to do so as the owner of the house in which the bomb was found or otherwise, but in order to extort a false confession from his son, that the latter had put the bomb in the house which they knew had been placed there in pursuance of a conspiracy amongst themselves. The plaintiff was after his arrest kept in detention for some time, for more, in fact, than a month after the confession had been secured to obtain which he is alleged to have been arrested, and then discharged for want of evidence. His son Santosh and another accused were at first convicted by the Sessions Judge but were subsequently acquitted on appeal by this Court. The plaintiff now sues in respect of the alleged pretended search and trespass in his house, his alleged false arrest, imprisonment and malicious prosecution.

The first and the main issue, therefore, is whether the bomb was placed in the plaintiff's house by and with the connivance of the defendants as alleged. If it were so placed, then there was a pretended search, trespass, malicious arrest, imprisonment of the plaintiff, and assuming that what was done constituted a prosecution in fact, it was a malicious one. The existence of all these charges follows on the truth of the first, just as on disproof of the first, all subsequent charges are negatived if we confine ourselves to the case made in the pleadings.

Mr. Justice Fletcher before whom this suit was tried was of opinion that the plaintiff had failed to establish his charge that the bomb was placed in his house as he alleged, but for some reason unexplained (unless it be that in his view of the suit as one on a general conspiracy to cause special damages, which in my opinion it was not, proof of one overt act was considered sufficient) omitted to come to any conclusion whether there was either a pretended search or trespass. Whatever may have been the learned Judge's reason or whether it was due to an oversight, we must, I think, assume that as he omitted to find on these charges in favour of the plaintiff, it was because in his opinion the plaintiff had not established them. Nor did he determine whether there had been a malicious prosecution unless it can be said that such determination is involved in his finding on the next two issues to which I now refer.

The learned Judge has, however, found that there was a malicious arrest and imprisonment and has given the plaintiff a thousand rupees damages therefor.

If, however, as the learned Judge has found the bomb was not placed in the house by the defendants or with their knowledge, then it was truly discovered by them there. If they then honestly believed that the plaintiff as owner of the house or otherwise was so implicated by such a discovery as to entitle them to proceed against him under the provisions of the Indian Explosives Act (VI of 1908) then the only question which remains for determination is (apart from limitation) whether the Act in fact justifies his arrest. The discovery of the bomb was in itself *prima facie* justification (though liable to be rebutted) for that belief, as also for the arrest, if the warrant was issued under a provision of the Act which authorised it. On this issue, Mr. Justice Fletcher, holding that the District Magistrate, Mr. Weston, had not spoken the truth and that the plaintiff had, found that the defendants had no such *bona fide* belief in their right to arrest the plaintiff nor had they authority therefor. The issue then on the judgment (given according to the previous finding—the presence of the bomb) was whether the defendants had such belief and authority; or, to put the matter from the point of view of the plaintiff, did the defendants maliciously arrest him for the purpose and with the object of extorting a false confession from his son? I have said "on the judgment," because I here reserve the question whether the judgment has not travelled beyond the proper issues in this suit; and because Mr. K. B. Dutt, who appears on behalf of the respondent, had challenged all the findings in the judgment which are against him; and, therefore, we have as regards Mr. Dutt's client also to ascertain whether the bomb was placed in his house as he alleges, but Mr. Justice Fletcher has negatived.

The defendants deny all these charges. Their defence, shortly stated, is this. The District of Midnapore at the time of the events in question was and had been for some time past, in a disturbed state and the Midnapore town was one of the chief centres of sedition. The defendants received reports of a "Bomb Conspiracy," as it is called, which they thought credible and acted upon. Learning from such reports that the plaintiff's son Santosh had taken to and kept a bomb in his father's house, they searched it. They found the same, which they did not place there, but which on the faith of their informers' reports they believed, had been placed there by Santosh. The finding of this bomb, they contend, justified both the reports received and the action taken on it, including both the search of the house, the arrest of the plaintiff's son, and the arrest of the plaintiff himself, who as owner of the house was called upon to explain its presence there. They denied that the plaintiff was arrested as a means of extorting a false confession from his son. And they say that when after inquiries including the confessions of his son and another co-accused, it was found that there were not sufficient grounds to further proceed against him, he was, some five or six weeks after his arrest, released on the 31st August 1908.

The gravity of the relevant charges made doubtless justified a full inquiry. The trial, however, exceeded all ordinary limits and lasted some eleven months. The inquiry went with lengthy cross-examinations (that of the Deputy Superintendent of Police, Moulvi Mazarul Huq, referred to shortly as "The Moulvi" alone taking over one month, and extending to between 800 and 900 pages) into various matters which, in my opinion, are irrelevant, and at length presented itself last April before us in the form of twelve quarto volumes of some 10,000 printed pages. The appellate hearing has taken some three months, fourteen months in all having thus been occupied in the discussion of what is supposed to be the plaintiff's case.

The latter I should have mentioned is an old man formerly in Government service as a Sub-Registrar of deeds. In the year 1884, he was dismissed from Government service in connection with his action in having returned, to a party presenting the same a forged deed. Whether any moral blame attached to him in the matter, or whether it was merely a breach of the Governmental rules, does not appear. It may be, and I assume, it was only the latter. Years ago he was an Honorary Magistrate in virtue of his office as Sub-Registrar, but he ceased to be that on his dismissal from the post of the Sub-Registrar. His position, at any rate in Midnapore, was a comparatively humble one, and his means appear to be modest. His son Santosh was employed as a probationer in the Police and his other son, Ashutosh, in the Post Office.

The evidence given in this suit covers a period extending from the Partition of Bengal in 1905, to the decision of this Court in what is called the Midnapore Bomb Conspiracy Case in June 1909. Generally speaking, the evidence and judgment relating to this period discuss the political condition of Midnapore, the action of the Government, the conduct of the District Officers as regards not only the plaintiff but third parties, the conduct of other officials who appear at different stages of the history, the decisions of this and other Courts in other Midnapore cases, the provisions of the Criminal and Jail Codes and other matters with an exhaustive particularity which covers practically all administrative and judicial acts which on the widest principles of admissibility can be said to precede, concern, or follow the alleged "Bomb Conspiracy" and connected matters between 1905 and 1909.

It is, therefore, not without reason that this case, which in the ordinary course would be entitled after the names of the actual litigants, has been known as "the Midnapore Case." But it is not only the extensive nature of the inquiry which justifies such an appellation. For I have no doubt that this suit is not the plaintiff's suit only (if it is his suit at all) but that he is the mouthpiece of others whose implications, and possibly in some cases false implications, in the alleged "Bomb Conspiracy" or other personal reasons have caused them to prompt or support this suit with its external and as I find, malicious charges. Mr. Weston seems not to have been a popular man at Midnapore with the nationalist party, whether of the right wing, the "soft" (*narum*), or moderate

party, of which Mr. K. B. Dutt was a leader, or the left or "hot" (*garum*) or as it is called the Extremist party. It is idle to suppose that a man of somewhat humble position and modest means, and who is so chary of expending them as to be described by his witness Bonomali as a miser, should for the sake of the thousand rupees, which Mr. Justice Fletcher has given him prosecute and carry on a suit for over fourteen months at the necessarily enormous cost involved.

His real interest, if he had any, would in fact have been injured, as his real case has been embarrassed by the introduction of charges which are not necessary to it, however they may have served the purposes of others. It would have been feasible for the plaintiff to have framed a suit for illegal arrest which is the plaintiff's real cause of action, (if he has any) along, in fact, the lines of the alternative cases put before us by Mr. Dutt without resorting to the mass of charges of fraud which have encumbered this suit, and have helped by their failure to discredit it. It is these charges also which have helped so largely to contribute to the great volume of this suit which is probably as Mr. Dunne had put it, one not merely (if at all) to right the supposed wrong of a somewhat obscured resident of Midnapore, but of those other more wealthy or influential inhabitants of that town who conceived themselves to be aggrieved by the action of the defendants taken by them during their administration of the District. The defendants have, in fact, been called upon to justify their informers' reports, not only as regards the plaintiff's son who took the bomb to his father's house but also as against as many of the other persons implicated rightly or wrongly by those reports as the plaintiff choses to call.

* * * * *

A considerable portion which is said to be one-sixth of the record is concerned with the alleged ill-treatment in Jail not only of the plaintiff but of his son Santosh and a third party, Surendro Mukerjee, unconnected with either save as co-accused of the latter. All this evidence had had eventually to be ruled out as it was not shown that the defendants were in any way connected with it—even if it were true, which is denied. This evidence, in my opinion, should not have been admitted at all. Assuming it was all relevant, which I am not disposed to think, it should not in any case have been admitted until it was shown that the defendants were connected with the ill-treatment alleged. Several witnesses have been called merely to prove the fact that this Surendro Mukerjee was kicked by one of the Police defendants and other evidence has been given which was equally of little assistance in the determination of this case. There is also a considerable body of charges against officials other than the defendants and also against the Police which I deal with separately at the conclusion of the judgment and which sometimes directly and in other cases remotely if at all, affect the issues which were allowed to be raised.

* * * *

The charges made are of the gravest possible character and such that if they be established, then not one of the defendants is fit for further public employment. The peculiarity of this case is that the charges are not as is usual directed against the Police only (who in this case happen to be Officers of long service and good record, the Moulvi also as Deputy Superintendent occupied an exceptionally high position) but also against the District Magistrate, Mr. Weston. It is alleged that he, who as such Magistrate was at the head of and responsible for the proper and just administration of the District was himself a party to a very malignant criminal conspiracy (the other members of which were his subordinates, the Police Officers) to falsely implicate persons whom they know to be innocent, and that for the purpose of such a conspiracy he and they stooped to such base acts as the introduction of bombs into other people's house, concocting false informers' reports, or acted on reports which they knew to be false, arrested and imprisoned and ill-treated persons they knew full well to be innocent, suborned false evidence and were themselves guilty of forgery and perjury. In the course of this suit in which the gravest charges have been launched broadcast with a light hand, the plaintiff or his witnesses have further charged a number of other gentlemen not parties to it with misconduct in connection with this case.

Mr. Macpherson, Commissioner of Bur-

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dwan, Captain Weinmann, I. M. S., Mr. Brett, Assistant Superintendent of Police, Mr. Nelson, Joint Magistrate, Col. Buchanan, Inspector-General of Prisons, Babu Nogendro Chundra Chuckerbutty, Deputy Magistrate, Mr. P. K. Bose, Counsel of the English Bar, practising at Midnapore, Mr. Hadrill, formerly a member of the English Bar, and now a Solicitor instructing the defence, have all been charged with varying degrees of misconduct, some of the grossest character not merely dishonest but criminal. As these gentlemen are not alleged to be conspirators against the peace of the loyal and law-abiding inhabitants of Midnapore, we are asked to hold that they have all of them deserted in different ways and degrees the character to which they presumably owe their respective positions in order to unjustly and maliciously pursue the plaintiff and his son Santosh Das with whom they have no personal concern. Having regard to the extraordinary character of all these charges the responsible position and *prima facie* respectable character of the persons against whom they were made, and the unsatisfactory manner in which they have been put forward, I was at pains to endeavour to elicit from Mr. Datt what his case (shift as it did throughout the trial) precisely was, how he supported it and met the numerous objections which the appellants on a careful analysis of the judgment and survey of the facts had made against it.

* * * * *

What is required of the plaintiff is that he should at least know and formulate precisely what the fraud is which he alleges and against whom he charges it and he should be able also to definitely formulate in an intelligible way what his theory and scheme is and how it fits in with the facts. This Mr. Dutt was unable to do and as it appeared to me unwilling to do. At length when questioned he stated that he preferred to take his case in his own way. I pointed out that there was the risk in so doing that the learned Counsel and the Court, particularly in a case of this magnitude, might overlook the particular point. Mr. Dutt, however, appears to have been willing to accept this risk, for though he on occasions returned to his subject, he did not return to the point. This is not the way a case should be presented to the Court. I need say, however, no more on this aspect of it beyond this that the failure to meet, and indeed the evasion of the objections taken by the appellants, have convinced me as much as the arguments of the latter that in respect of the graver charges and the main issues of the suit, the plaintiff has no answer to them. I only here wish to add that the remarks I have made do not apply to the junior Counsel, Mr. H. D. Bose, who, though obviously oppressed at times by the difficulties of his case, was always studious to afford in a straight forward manner such explanation of them as he could.

The other aspect is, however, to my mind a more serious one. The duty to the opponent in a case of this kind means the possession of a sense of ordinary fairness. Charges should be formulated and not merely hinted at. A charge may be met but not a suspicion. The charge, if there is anything in it, should be put forth in a precise form and then presented in that form and not in some changed form, by all honest means. But if Counsel thinks that he cannot reasonably formulate or support it on the evidence, it should be withdrawn. I observe, however, from the record that Mr. Dutt claimed (unless specially directed by the Court) the right either to state or not to state his case to the defendants as he chose, just as he claimed to regulate the civility which he should extend to their witnesses. I need hardly say that charges of fraud cannot be kept up in the sleeves and then sprung on the opponents when it is thought that he is least likely to be able to meet them. Further, the charges have not only lacked definition, so that it is not possible even now to exactly say on some points what the plaintiff's case is, but they have shifted throughout the whole length of the trial and appeal. The case was, in fact, in one or another material particular, differently presented to the Court in the plaint, in the opening of the Counsel at the trial, and in the appeal. And the learned Judge in conclusion found a different case from that made in the pleadings and in some respects from that suggested in the opening of the Counsel or at the trial.

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What Mr. Justice Fletcher has in effect done is this: he has either rejected or held not proven the grosser charges which the plaintiff has made and on the proof of which in fact depends his whole case as made in the plaint. The principal charge, the alleged introduction of the bomb on which all the rest depend, the learned Judge has, however, treated as though it were an almost negligible incident in the case instead of being, as it is in fact, its keynote. He has then substituted for the case as made in the plaint another which stands independent of the proof of the charges (which he has found to have failed) and which is of a different character from that stated in the plaint and which the defendants were not summoned to meet. I will now proceed to examine this matter in detail so as to discover what issues are which have been tried or should have been tried. I cannot, however, without unduly lengthening the judgment on a preliminary point deal with all the shifts and changes in the plaintiff's case. I take only such of the chief items as are sufficient to justify the observations I have made.

* * * * *

After the conclusion of the examination of the boy Bonomali, on the 26th August, it must have become apparent to the plaintiff's Counsel that reliance could not be expected from this evidence alone. The story had gone unless something else could be brought in to show that it was a probable incident in a wider scheme. Therefore, in the months of September to November 1910, a case of a still more extended conspiracy was put forward. It was then suggested not merely that the defendants had conspired to implicate "the wealthy and respectable inhabitants of Midnapore and other parts of India" in an alleged "Bomb Conspiracy" but that in a District free or practically free from sedition, the defendants had conspired together to invent the "Bomb Conspiracy" itself in which those wealthy and other persons were to be implicated. The conspiracy itself in short was the outcome of their own very wicked imagination. The charge then assumed a colossal form. There was first what Mr. Dutt calls a primary conspiracy. That which was alleged in the plaint became only a secondary conspiracy. The former was alleged to be the motive and cause, the latter the actual cause of action. The primary conspiracy by the defendants was to invent another imaginary bomb conspiracy in Midnapore and then to implicate the wealthy and other persons there, and elsewhere in it. The secondary conspiracy was merely instrumental to the first. The plaint alleged a conspiracy to injure the plaintiff. But it was then said that he was not really aimed at. It was not the predominant intention of the defendants to injure the plaintiff, whatever in fact the results of the defendants' act might, in fact be. Indeed there was no grudge, personal spite, or other personal motive against him at all. Nor, except as a means to an end, was his son Santosh aimed at. What the defendants were, it was said, really aiming at was to injure the wealthy and other inhabitants of Midnapore and other parts of India and to "net" as many as they could, in a spurious and invented conspiracy. The plaintiff and the rest of his family, persons of somewhat humble condition and modest means, were to be the mere instruments of this wider purpose. They were to be such instruments in this way that through their extorted and false confessions, the wealthy and respectable citizens might be falsely implicated. This extension of the general conspiracy involved also extensions of other charges. On the previous case, only the report of the 7th July and those directly connected with it, could be said to be relevant, because they alone implicated Santosh. Now the defendants were called upon to defend themselves in respect of all the reports and all the charges made against all other persons in those reports, the Raja of Narajole, Jamini Mullick, and numerous others of whom some thirty have been called as witnesses. The previous case as to the reports was, that they were the work, though false, of a true informer. Though this was kept up through the trial, an alternative and inconsistent suggestion was also then put forward, namely that the reports were the inventions of the defendants or some one or other of them.

* * * * *

Mr. Dutt's only explanation of his departure from the rules which govern a case based on fraud is a surprising one, that the defendants have not been prejudiced and that their case, at any rate, has been found to be false by the learned Judge.

The defendants have in fact been gravely prejudiced and have been defeated precisely because of the breach of the rules to which I have referred, and because of the learned Judge's view on the facts put forward as the result of such breach. I need not enlarge on what is so obvious: the difficulty in meeting undefined and shifting charges, the cost and trouble to which the defendants have been put in having to sit out a trial of eleven months whilst they have been made, and the prejudicial effect they are likely to have both on the mind of the Court and the possibility, which in this case has ripened into fact, that in this volume of irrelevant matter, the real issues might be lost sight of.

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[Dealing with Mr. Justice Fletcher's judgment his Lordship said:—] What the learned Judge does find is this. He finds, *firstly*, that the plaintiff has not proved that which is the basis of his suit, namely, his allegation that the defendants were responsible for the presence of the bomb in his house. He next finds that the reports are false and that (to use his language) "there is not a word of truth" in the evidence of the defendants' witnesses which corroborate certain incidents in them. He then makes a distinction between Mr. Weston and the Police. The former, he says, misled by the Police, believed these false reports, grossly improbable as he finds them to be. Mr. Weston is also found to have believed that Santosh's confession was true. The Police apparently with more discrimination—for it is not suggested that they had other information which Mr. Weston had not—did not believe either. The reasons which the learned Judge assigns for this distinction are, as regards Mr. Weston, that he had his house guarded by armed constables. The learned Judge does not say in connection with this passage whether Mr. Weston did so under a reasonable apprehension of danger. During, however, the course of the case he has made the following remarks to which our attention has been called: "Two Policemen played upon Mr. Weston's fears and Mr. Weston fell into the trap." From this observation it would appear that the precautions which Mr. Weston took for his own safety were due to a lack of courage and that there was no real ground for them. As, however, the remark was made during the progress of the suit and before the defendants' case was concluded, we cannot treat it as having been intended by the learned Judge to be a finding in the case. In fact, his subsequent judgment, when he had considered the evidence, does not seem to support this reflection on Mr. Weston's courage. The observation suggests that there was no conspiracy except what was got up in fact by the Police, and Mr. Weston was put into groundless fright by the trap they set for him. The judgment does not find any such concoction of a conspiracy by the Police but, on the contrary, finds that there was a real criminal conspiracy at Midnapore which was in a highly seditious state and which conspiracy, as the learned Judge finds, included Satyendra and Khudiram both of whom were subsequently hanged. The evidence further proves that Mr. Weston's life was threatened. In my opinion there is no ground for the conclusions involved in the learned Judge's observations if it was not, as I think it may have been, merely a passing remark recalled, in effect though not in words, by the judgment.

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To this judgment the learned Judge subsequently added the sentence after the conclusion that the plaintiff had not proved that the defendants were responsible for the presence of the bomb in the house. "I am unable to say who placed the bomb in the house, but, in my opinion, Santosh did not." As I have pointed out, in the original judgment the learned Judge omitted to find whether Santosh's confession was true or false. If it was true there was an end at once of the charge against the defendants in respect of the alleged placing of the bomb. The learned Judge did discuss this confession but, from the point of view of certain alleged irregularities in the taking of it, a discussion is manifestly superfluous if the confession was itself false. It is argued, and I think with reason that the general tenor of the original judgment shows that when it was delivered, the learned Judge was unable to come to the conclusion that Santosh did not put the bomb in the house, and, therefore, abstained from a finding on the question of the truth of

his confession, though a finding one way or the other was necessary. We must, however, take it that even though there is now no formal finding on the point, the added remark necessarily implies that the confession was false. But for this added conclusions no reasons are given. These findings have been attacked by both the appellants and the respondents on three grounds.

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[After stating these grounds his Lordship said :] The point is, were the defendants acting in the honest belief that they were entitled to arrest the plaintiff, for I will deal in its own place with the question whether the statute in fact authorised the arrest. Now, the original case made by the plaintiff was that the defendants had no such honest belief. And why had they no such belief ? Because they directly knew the plaintiff to be innocent. And how again did they know this ? Because they had themselves placed the bomb in the house in respect of which they were charging him. And what was their motive ? To extort a false confession from his son Santosh, a confession which they knew to be false for the same reason that they knew the plaintiff to be innocent.

The learned Judge has found all these allegations, which were those the plaintiff made in his plaint, to be not proved. He has, however, in effect said this:—"It is true that you have not proved the ground of your suit or the allegations which are based thereon in the way alleged in the plaint but I hold it has been proved in another way."

* * * *

[After dealing at length with this, Mr. Justice Woodroffe said :—]

It will be observed from what I have said that the effect of the judgment is to substitute for the case of direct knowledge by the defendants of the plaintiff's innocence, due to their direct knowledge of the truth of the facts owing to their having placed the bomb in the house themselves, a case of knowledge based on grounds of inference from alleged acts, circumstances and conversations including direct admissions. What Mr. Dutt relied on in his opening was not such an admission but the alleged fact that Bonomali had put the bomb in the house. Mr. Dutt must probably have had in the proofs of the plaintiff his first witness some such statement of the conversations he is said to have had with Mr. Weston as he (the plaintiff) has deposed to in the Court. It is a noteworthy fact, however, that in the opening (I quote from the transcript he has given us) he does not, beyond a vague allusion to "threats", mention these admissions. It is possible he did so and has not been reported. But if so this can only have been because the reference was of a cursory character. Mr. Dutt to whom these conversations are alleged to have been reported possibly was able to estimate this evidence at its true value and, therefore, rested his case in conformity with the pleading on the story of the introduction of the bomb in the house. If this were not so, one would have expected him to put these alleged admissions prominently forward. His argument would have been "there is no doubt about Mr. Weston's belief in the innocence of my client for he repeatedly told him so. There is no doubt what his motive was in effecting my client's arrest, for he expressly told him that the cause of the arrest which followed his threat was his failure to get his son to confess." If this story were true one would expect it to be put in the forefront of the case, especially if Mr. Dutt had as the plaintiff alleges been told about all these conversations immediately after they are said to have occurred. That Mr Dutt did not so put it, shows two things; that he considered his real case to rest on the story which his witness Bonomali was going to tell about the introduction of the bomb and he estimated as I have said the story about the alleged admissions of Mr. Weston at their true value by saying nothing about them. It was only after Bonomali's story failed that an attempt which has proved successful was made to rest the case on them.

* * * *

Further, though the general *onus* was on the plaintiff, the learned Judge has criticised only the evidence for the defendants. Beyond the statement that some of the plaintiff's witnesses are not loyal and law-abiding, a matter which the learned Judge has further found not to affect the truth of their testimony, there is no observation in the judgment against any witness for the plain-

tiff that his evidence was open to criticism by reason of his having said that which was untrue. Even though, as Mr. Dutt has pointed out, the learned Judge holds that Bonomali's story is not proved, he nowhere says that his evidence is (as it, undoubtedly, has been proved to be) false. On the contrary, as I shall have occasion to point out in this judgment, there is no doubt whatever on the deposition of the plaintiff and some of the most important of his witnesses, it clearly appears, that they have given false and in some case admittedly false testimony. To arrive at this conclusion it is not necessary to have seen these witnesses. It is patent on the depositions themselves. As regards the appreciation of the defendant's witnesses it is not only affected by the errors to which I have referred and others, but in some cases adverse criticism is passed upon them for which, in my opinion, no ground or insufficient or incorrect grounds are given. As regards the Moulvi's evidence I will deal in detail later. Further, in the appreciation of testimony it is necessary to observe whether it has been met by other available evidence. But though the learned Judge has more than once adverted to the non-calling of evidence by the defendants, he has not observed that the plaintiff's evidence is gravely open to attack on that very ground. In fact the only reference which he makes to this matter is with reference to the objection which was strongly and rightly pressed upon him that inferences adverse to the plaintiff should be drawn from the absence from the witness-box of Mr. K. B. Dutt, who is said to have knowledge, either personal or reported, on every one of the main incidents in the case and against whom, in connection with it, personal charges have been made. I deal at the conclusion of this judgment with the question whether Mr. Dutt was, as Counsel, precluded from giving evidence and whether even were that so, the fact of the plaintiff having briefed him deprives the defendants of the comment that he should not have been briefed but should have been called. It is sufficient for me to say here that the fact that he was not called is, in my opinion, one of the invalidating arguments against the truth of the plaintiff's case.

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Before passing to the evidence I will deal with the question of the standard of proof required of the plaintiff in a case such as this, to which both the judgment and the argument have referred. The learned Judge has cited in support of his views in this matter the case of *Jarat Kumari Dassi* v. *Bissessur Dutt* (1), which was heard by the Chief Justice and myself. I wish to point out that the observations to which Mr. Justice Fletcher refers are to be found in the judgment of the Chief Justice, and that the separate judgment which I then delivered contains the grounds on which I disposed of that appeal.

In my opinion there is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of the terms "proved" and "disproved" in section 3 of the Evidence Act. This Act, to use the language of the Chief Justice in the case cited, "in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof." The test in each case is, would a prudent man after considering the matters before him (which varies with each case) deem the fact in issue to be proved or disproved? In a matter of this kind, the conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment. And speaking for myself where, whatever be the form of the proceeding, charges of a fraudulent or criminal character are made against a party thereto, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is, the greater of necessity is the force of the evidence required to overcome such presumption. I cannot myself imagine a Court saying to a party, who, as in this case, may be a person holding a high and responsible position, with a previous unblemished record: "It is true that I have reasonable doubts whether you did the grossly criminal acts with which you are charged, but I find that you did so all the

(1) 13 Ind. Cas. 577; 39 C. 245 at p. 255; 16 C. W. N. 265.

same." And this exclusion of reasonable doubt is all that the so-called "criminal proof" requires. What I understand the Chief Justice to have held, and with this part of his judgment I agree, is, that the English rule in these matters (whatever it be, for authorities are not at one) does not, as such, apply to India. He proceeded, however, to say that the presumption against misconduct is not (as I have also said) without its due weight, though (he adds) the standard of proof, to the exclusion of all reasonable doubt required in a criminal case, *may* not be applicable. That is not that it is *not* applicable, but it possibly *may* not be. For this, two English cases are cited. Apart from the fact that the English authorities are not uniform on the subject, in my opinion the reasons which exclude the application of the English rule (whatever it may be) in this country, also exclude as authorities the cases which are said to embody and interpret it. Whatever, however, be the standard of proof applicable, and assuming it to be as the learned Judge puts it, the plaintiff has, in my opinion, for the reasons which I give in my review of the facts to which I now proceed, failed to satisfy it.

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After the decision of this Court in the criminal appeal, the Government deputed the Commissioner of Burdwan, Mr. D. J. Macpherson, to inquire into and report upon the charges made against the Police in respect of the alleged conspiracy. This was done on the 10th June 1909, and on following days, Mr. Macpherson, who has been called in this case, took the evidence of witnesses in the presence of Mr. K. B. Dutt, who was implicated by the informer's reports and who is said to have been the chief complainant and spokesman for the others. Some of the statements of the witnesses in that enquiry have been put in and used, and the witnesses for the plaintiff have been considerably cross-examined as to important discrepancies between these two statements then and now made. Learned Counsel for the respondent has rightly objected to the admission of any statement which is not relevant to evidence actually given at the trial. The depositions at the enquiry are only admissible either to corroborate or contradict evidence given here. Mr. Macpherson then made a report, and a question arose about its production. I cannot see myself how a finding on a departmental inquiry or Mr. Macpherson's opinion in the matter could under any circumstances be evidence before us. But in any case the Government claim, as it was entitled to do, privilege. We have been told that in the House of Commons the Secretary of State declared that it was not advisable that the report should be published during the pendency of these proceedings. A similar privilege was claimed for a confidential diary of the Moulvi. Mr. Justice Fletcher allowed both claims of privilege. A suggestion was, however, made in cross-examination on behalf of the plaintiff that the Government claimed this privilege because it knew that the documents would, if produced, falsify the defence and that it did not, to use Counsel's word, "dare," therefore, to produce them. The question in which this unfounded suggestion that Government was assisting a case known by it to be false was made, was a scandalous one and was very rightly disallowed by Mr. Justice Fletcher. The supposition is not to be tolerated that the Government of this country, one of whose functions is to administer justice through the very Court in which this accusation was made, was itself party to a conspiracy to defeat the just claims of the plaintiff by wrongfully withholding that which, if produced, would establish the falsity of a defence of its officers which they had further aided by public money. The suggestion serves, however, as a leading sample of the reckless and unfounded charges which have been made throughout this case.

On this point of privilege, another matter must be noted; when a document is in fact privileged no adverse inference can be drawn from its non-production, for to allow this would be in fact to destroy the privilege. This rule applies as regards the party claiming privilege. *A fortiori*, where, as here, privilege is claimed by a third person, no adverse inference can be drawn against any party to the suit in consequence of such claim and allowance of privilege. The learned Judge, however, when dealing with the evidence, notes that the confidential diary was not produced, with the apparent object of drawing an adverse inference therefrom. If further the suggestion was that the confidential diary had been kept

back, the appellants have rightly contended that such an inference was prejudicial to them. The defendants do not represent the Government, though being its officers, the costs of their defence are, I understand, borne by it. They are sued personally for their own alleged personal wrongs. Had they been the parties claiming and allowed privilege, no adverse inference could be drawn against them. But they are not. They in fact complain that the decision of the Government not to produce these documents has hampered them in their defence. In particular it is claimed that the production of the Moulvi's confidential diary would have helped to establish, as I think it might, the authenticity of the informer's reports which have been challenged. The learned Judge further allowed the claim of privilege for which the Evidence Act, section 125, provides, but has yet in several instances drawn inferences adverse to the Police defendants by reason of the non-disclosure by them of the source of their information, the subject of the privilege. The learned Judge's comments were, in my opinion, not open to him. It must be, of course, first determined whether there is a privilege or not. But it is obvious that after the Court has once held that a document or subject-matter of enquiry is privileged, with the result that the other party cannot compel production or answer, the comment is not then open to the Court that the party to whom privilege has been allowed has not done or said that which the law and the Court have said he cannot be compelled to do or to say. I will only add as regards section 125 of the Evidence Act that though the section does not in express terms prohibit the witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is a duty of the Judge, apart from objection taken, to exclude the evidence. *A fortiori* if objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness.

The learned Judge, in dealing with the evidence of the witnesses for the defence, in more than one place says that it is a matter of comment how Lal Mohan was able to discover them. The law, however, for the purposes of the administration of justice provides that a Police officer shall not be compelled to say whence he got any information as to the commission of an offence (Evidence Act, section 125). The protection does not depend upon a claim being made, and it is the duty of the Court, apart from objection taken, to exclude such evidence. Here, moreover, the witness claimed and was allowed privilege. This being so, it was not, in my opinion, open to the Court which allowed the privilege, to draw inferences adverse to the case which the witness was called to support, because that did not appear in the witnesses' evidence which the law had protected from disclosure.

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[His Lordship dealt at very great length with the condition of the Midnapore District in 1908, and summed up his conclusions as follows:—] The learned Judge finds what is, indeed, obvious that it was in a highly seditious state. He further says this:—"It is not denied that at this time, in fact, there existed a criminal conspiracy at Midnapore which included Satyendra and Khudiram both of whom were subsequently hanged." The learned Judge's conclusions are correct, but he is not, I think, right in saying that the fact was admitted, unless Mr. Dutt has gone back upon something he said to the learned Judge which was the case of the latter saying that a conspiracy was not denied. On the contrary, it is denied, even in this appeal in which I put this passage to Mr. Dutt who did not accept the finding, but contested it. In fact, when one looks at the evidence, one finds that the point has been contested all along and on that account the defendants have been driven to call a mass of evidence to establish a point of which there is not the least doubt and which should have been admitted. Even in this appeal, after all the evidence has been taken, all that the respondent's Counsel will do is to make some vague and grudging admissions that there may have been some foolish boys and one or two of what Mr. Bose calls "pioneers" in sedition, I suppose, in Midnapore. It is, in fact, a weakness in the case that the admission of an existent conspiracy as the learned Judge finds is now

made. However little founded such an allegation might have been, it would have at least been intelligible if it had been argued that there was sedition and conspiracy in Midnapore, in fact and that what the defendants did was to implicate wealthy and influential people in a conspiracy which did exist, though it did not include them. The case, however, made is not that; but that in a District peaceful, but for the scarce extravagances of youths on the one hand and a few adult sedition pioneers on the other, the defendants hatched a "bomb conspiracy" which had no existence outside their own evil imagination, for the purpose of snaring into the net, to which Mr. Dutt's opening alludes, the loyal but wealthy residents and others of Midnapore.

Mr. Dutt's cross-examination of Mr. Weston and Mr. Nelson as to the armed guards which the former had at his house was directed to show that there was no ground for apprehension as there was no sedition or conspiracy.

I do not take up time in repeating all the plaintiff's prevarications on these points, but, having denied that he knew what a volunteer was, it was shown that he himself had used the term in his evidence before the Sessions Judge in his statement (which must have been also untrue) that he did not know that his son was a "volunteer." He then proceeds to explain that he did not correct that deposition (though why he should correct it at all does not appear) "but when the clerk read it I was not able," he says, "to catch the word" and so forth. At length he admitted that there were some volunteers "who did not go to war," and that his son was a volunteer, though to save something of his statement he would not admit that he knew he was the Captain. He cannot account for the presence of the volunteer flags and badges in his house except upon the supposition that "they might have been brought there by little boys" though why the "little boys" brought them to his house rather than another he cannot say except on the surmise that his own "little boy" happened to pick them up and then brought them in from that playground. Having sworn that he did not know what an *Akhra* was, he in his deposition before the Sessions Judge stated that he himself had warned his son against going to *Akhras*, of which word though he now pretends that he does not know the meaning, he then accurately defined as "places where *lathi* play and sword exercises are done." This shuffling and prevarication are characteristic of the plaintiff's evidence on more important points in the case.

Having dealt with the sedition and conspiracy which in fact existed in Midnapore, I pass to the allegation that the defendants contrived to invent to falsely implicate the plaintiff and his son. [His Lordship dealt with Mr. Weston's evidence and proceeded]:—It is straining credulity to its full length to suppose that a Magistrate in a District so seditious that his own safety was in peril, in receipt of daily information and proof as to its disaffected condition and the presence of Arms and Explosives, aware of the existence and possibility of actual outrage, with, as the learned Judge finds, more work to do than time to do it, should under circumstances, such as these, set himself down in company with his subordinates to invent, with these materials at his hand, an imaginary conspiracy in which the basest means should be employed to implicate the loyal and the innocent. In the Court of trial, beside the charge of blackmail made against the Police, suggestions of corruption were made against Mr. Weston. Mr. Dutt now says he never made such a charge, a matter to which I later refer. We have accordingly asked him what object then Mr. Weston could have had in entering into such a base conspiracy and Mr. Dutt has replied that "it is hard to say." But perhaps it was never expected that such a charge should be accepted. Before us it barely emerged from the background from which it was cast. It serves, however, sometimes the purpose to make a soiling charge without hope of real attempt to prove it. I have said that the learned Judge has not found these charges proved for there is no evidence which establishes them. What he has done is to substitute another and a different conspiracy altogether, a conspiracy to do an act which, if proved, was grossly illegal but stands clear of these grave charges of fraud.

The observations I have already made

and those which follow, establish that no question of conspiracy of any kind arises as regards Mr. Weston and the Police. Whether Mr. Weston who is alone responsible for the arrest did so illegally is a question with which I later deal.

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[Proceeding his Lordship dealt with Abdur Rahman's evidence and Mr. Justice Fletcher's criticism of it, and after examining some circumstances which went to establish the truth of Rahman's reports, said :—]

The whole of the learned Judge's criticisms of this witness is that his evidence was affected by other erorr based on suspicion and that Rahman and the Moulvi are unreliable and, therefore, their evidence is not to be accepted unless corroborated though such conclusion must itself depend on the evidence. But even where corroboration exists, as in the case of Mr. Plowden's statement, of what Rahman told him, the learned Judge rejects it on the ground (as he has done in the case of Mr. Weston's evidence as to the search and arrest) that his memory must be at fault. No reason is assigned for this conclusion and I can see none unless it be that the acceptance of Mr. Plowden's statement would in fact help to establish the credit of a witness whom the learned Judge says he does not believe; in other words that Rahman's evidence is false and if Mr. Plowden's evidence corroborates him then he must have made a mistake. But he is not only corroborated by Mr. Plowden but by Mr. Weston and Mr. Cornish. The former speaks to the early mention of matters in connection with the Calcutta conspiracy and several revolvers were produced to Mr. Cornish of one of which (the white handled one) he made a sketch. The learned Judge has put aside both these witnesses. As regards Mr. Cornish and the revolvers the learned Judge, whilst admitting their production, queries the source whence they came. There is nothing improbable in their having been in the unlicensed possession of arms in Midnapore. Such arms were produced just as the seditious literature which was also going about was produced. Moreover, as regards one revolver the fact that it was found subsequently on Khudiram after the Mozzafferpore murder conclusively corroborates Rahman as to the source whence it came.

In my opinion the learned Judge's conclusion that Rahman's reports were false are not justified by the evidence which satisfies me that at least a substantial portion of the information which he gave was well founded.

[Dealing with Rakhal Laha's reports, his Lordship said that these reports were very extensive, and he would later have to point out that the greater part of the discussion into which he was taken by the argument led to nothing, which really bore upon the issues in this case. He then stated the general character and gave the gist of the reports, and went on to say :] There are really two questions which arise upon the truth of the reports ; but only one of these is in any case relevant, *viz.*, are they true in so far as they implicate Santosh Das directly, and through him and indirectly the plaintiff ; *secondly*, are they true in so far as they implicate third parties ? In this case we are not properly concerned with the second question. Now as regards the plaintiff and Santosh, the defendant has, in proof of the reports, the finding of the bomb in their house, if the learned Judge's decision on this point is upheld. This evidence is itself sufficient, without having recourse to the testimony of Mohesh Chandra Kundu and Rakhal Bera which, if true, only proves that one day they saw the Raja of Narajole leaving Jamini's house, —a circumstance mentioned in the report of the 7th July on which the search was made.

As regards, however, the question of the implication of others than the plaintiff and his family, the defendants' evidence except as regards Baroda Dutt and his family and Surendra Mukherjee, amounts to very little if indeed anything. As regards the Dutts there is the very strong evidence, unless displaced, of the finding of a bomb in their house, and as regards Mukherjee there is his confession. As regards anybody else the evidence amounts to next to nothing. The defence witnesses who speak to the reports are some ten in number. It is of these witnesses that the learned Judge has

said "that there is not a word of truth" in the testimony of them.

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[His Lordship then reviewed this evidence and said:—]The conclusion then at which I arrive is, that as affecting the plaintiff and Santosh, Laha's reports are "*prima facie*" proved by the discovery of a bomb in their house, apart from the evidence of Mohesh and Rakhal Bera which may or may not be true. The confession of Santosh also has, unless displaced, relevancy on the question whether there were grounds for the defendants' alleged belief in the reports. For reasons which I subsequently give the confession of Santosh has not been shown to be false; but, as I also there state, even if it were, the plaintiff would also have to displace the inferences arising from the discovery of the bomb in his house, which he does not achieve if he does not prove, as I think he has not proved, his allegation that the defendants conspired to put it there. As regards Baroda Dutt, whose name is mentioned in the report of the 27th July, and other members of the family and Madhusudhan Dutt, their common manager, the reports are "*prima facie*" proved by the discovery of a bomb in the Dutts' house. For the reasons later stated, the plaintiff has not established that the defendants conspired to put that bomb in the Dutts' house, and both the unsatisfactory character of Baroda Dutt's own evidence and the absence of evidence from Madhusudan Dutt and other members of the family failed to rebut the "*prima facie*" proof.

Then as regards Surendra Mukherjee, his confession is as against him "*prima facie*" evidence of his guilt as alleged by the reports and the plaintiff, for reasons subsequently stated, has not shown that his confession, is as alleged, untrue. As against the plaintiff the confession of Surendra is not directly evidence of the truth of the facts deposed to in it. It is, however, evidence of the existence of grounds for the defendants' alleged belief in the reports.

Lastly, as regards the rest of the persons mentioned in the reports, there is no sufficient evidence to prove that as against them Rakhal's reports are true. In so holding I desire to guard myself from being understood to say that the rest of the charges made in the reports are wholly false. That is another matter. What I hold is that there is no evidence in this case which proves them to be true. But for the sake of argument and of this judgment it may be assumed that they are untrue. It makes no difference one way or another. What really concerns us here is not charges against third parties. What we are concerned with, is the question whether a bomb was truly discovered in the plaintiff's house which justified search and arrest or whether the defendants conspired to put and did put it there.

Whilst, then, I am of opinion that the evidence does not justify the conclusion that all the reports are false, there is certainly no ground for the conclusion or conjecture that they are all true. On the contrary, I think it possible and in some cases probable, that they are not. Whilst on the one hand it is not improbable that seditious action, where it was not actually inspired by, received the sympathy and perhaps, in the indirect way, the support of members of the more responsible classes, there is an initial improbability against any active participation by them in such action. I am quite ready to believe that some of the persons charged were innocent. Thus neither probability nor the evidence suggested that the charge against Mr. K. B. Dutt of subscribing for bombs and the like is true. On the contrary, it seems in a high degree improbable, and in all likelihood untrue. And there may be others to whom the same observations apply.

Obviously an accusation by a man like Rakhal Laha whose livelihood at the time depended on his supplying information regularly amounts to little. I am also ready to believe that some others have no worse offence to be laid to their account than that of associating with persons of extreme views and listening with silence and refraining from putting a stop to their speeches and actions. Such association and conduct may have formed one ground for false rumours against them. On the other hand, there was at Midnapore a party which at least passively acquiesced in, when it did not actually inspire, projects of violence and there was a younger and less responsible section who were ready to give and, as the evidence shows, actually did give effect to such projects.

Having regard then to the evidence and in

particular to the failure of the plaintiff to rebut the inferences arising from the discovery of the bombs at his and Dutts' house, as also to the confessions of Santosh and Surendra, matters with which I later deal, I conclude that Laha was a real informer and that whilst his reports may have been in part untrue, owing either to ill-founded rumour or possibly to his own invention, they were not, as alleged, wholly false, but, on the contrary and on the evidence, must be held to be true as regards Santosh, Surendra and Baroda Dutt or other members of his family, who were responsible for the presence of the bomb in their house; or to put it at the lowest, the reports must be held as regards such persons to possess such "*prima facie*" truth as to justify the belief of the defendants and their action taken thereon.

These conclusions really dispose of the next argument which, however, I shall mention and with which I shall shortly deal. I have held that the reports were not wholly false. Assuming, however, that they were, they would not, in itself, fix the defendants with any liability. An officer is not liable who acts on false reports provided that he acted honestly in respect of them. As the learned Judge points out, it is not expected of a Magistrate that he should be an expert in criminal investigation and all that is required of him, (and I may add, of the Police) is common honesty of purpose and action. The learned Judge also finds that Mr. Weston did take some steps to satisfy himself, as to the truth of the informer's story though he adds "he had neither the time, for his charge at Midnapore seems to have been an extraordinarily heavy one, nor the experience to do this in a satisfactory manner. It is certainly true that Mr. Weston was overwhelmed with work and the anxiety the seditious state of his District added to it, though I think the learned Judge has underestimated what Mr. Weston did do by way of testing the information received.

We may attribute error but we cannot attribute lack of honesty and intelligence to all those who had to deal with these reports. Their difficulties arise, in my opinion, from the fact that the learned Judge has in this and other instances put aside the case of the parties to make one of his own. This is not a case where it is alleged that the Police alone concocted credible reports and thus imposed on the Magistrate. The case is that the reports were incredible and that both the Police and Mr. Weston stand (as they must on such an assumption) on the same footing. This common footing in this matter is the case of Mr. Dutt who challenges the learned Judge. It is also that of the appellants, and what I conceive the Court's duty in any case to be is, to decide on the case of the parties and not on some third case. There is in fact no ground in the case as made for the distinction which the learned Judge has drawn between Mr. Weston and the Police in this matter. If Mr. Weston should not have believed, then Mr. Cornish, Mr. Plowden and the rest should not have believed them and if they did they are as much in the alleged fraud as any o , else. The learned Judge has naturally avoided such a conclusion but only at the cost of a distinction which is not warranted by the evidence. The learned Judge's finding on this matter is also a sterile finding since it has no bearing on the issues in the case. It does not touch the issue as to the alleged introduction of the bomb, for the learned Judge finds that the Police did not put the bomb in the house notwithstanding that they did not believe the reports. It does not bear upon the issue of the plaintiff's arrest, for the learned Judge holds Mr. Weston liable in this matter though he did believe the reports. It does not affect the Police on the same issue, for the finding against them is made independent of that relating to their alleged disbelief in the reports; and the finding as to that disbelief cannot itself stand with the finding that on the issue of the introduction of the bomb the plaintiff has failed.

The question, as I have said, arises neither on the case nor the findings, nor on the facts. The whole argument of the learned Counsel further confuses probability and credibility. Some incidents in the reports may be improbable but that is not to say that they are incredible. It is suggested that it is incredible that a gentleman like Mr. Dutt should enter into a bomb conspiracy against Government. And we have been asked even to say that it is incredible that in a disaffected seditious district, gentlemen whose loyalty and law-

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abiding character have been believed by the learned Judge should enter into such a conspiracy. But what is it we are asked to believe by the plaintiff? We are asked to believe that Mr. Weston, a gentleman whose claims to respectability are not inferior to those others whom Mr. Dutt mentions, joined with the Police in a conspiracy to implicate innocent persons, one of the means employed being the fabrication and introduction of bombs in such persons' houses. We are asked to say not only that this is credible but to hold that it is true. None of these propositions are incredible, though to all of them, improbability, in varying degrees, may attach.

Concluding, then, that the reports were the work of Laha, that they appear to be partly true and partly unfounded, that they are not incredible on their face, and that the defendants when they acted on them believed them to be true; I pass to the facts relating to the search of the 8th July which is said to have been induced by them.

* * * *

[After detailing the evidence as to the search, the alleged introduction of the bomb, and the confessions, Mr. Justice Woodroffe, referring to the confession said :—]

The learned Judge does not, as I have stated, come to any conclusion on the main point, namely, as to the mode in which the confession was given. Was it dictated by Mr. Weston or tutored by the Police according to the varying allegations of Santosh or was it given as Mr. Nelson and Mr. Weston state? The learned Judge says that though he thinks Mr. Weston's conduct was improper and irregular (in being present at the confession and suggesting questions) he sees no ground for suggesting that Mr. Weston or Mr. Nelson put to Santosh questions, and received answers which they knew to be untrue. But the question is.—Did Mr. Weston put any questions at all? Did Mr. Weston, as Santosh says, put the questions and himself dictate the answers, and was Mr. Nelson in this matter a dishonest tool of his? This was the issue upon which the learned Judge's judgment was invited. If those suggestions are unfounded, then Santosh's credit on this point generally is gone. Instead of coming to a conclusion on this issue, the learned Judge in this as in other instances finds a case which is that of neither party; *viz.*, that Mr. Weston thought that with a little judicious examination (according to Santosh he took the whole matter into his hand and dishonestly tutored instead of examining him), Santosh might make a full disclosure with regard to a considerable portion of the conspiracy (although according to the plaintiff's case, Mr. Weston knew that Santosh was innocent and that there was no conspiracy at all).

In my opinion and I so find, not only is there no foundation for the charge that either of these gentlemen took part in recording a confession which they knew to be false or that Mr. Nelson certified that it was voluntary when he knew that it was dictated or tutored but the manner in which the confession was recorded was as stated in their evidence and the testimony of Santosh to the contrary is, I am satisfied, in this matter, where it is in conflict with their evidence, wholly untrue.

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[Further examining the evidence, Mr. Justice Woodroffe said, the learned Judge, though he did not expressly say so, appeared to accept Ashutosh's story of the visit to Mr. Weston, and proceeded :—]

I am unable to do so, as it appears on its face to be untrue. I may here point out that the evidence is not correctly stated in the judgment. It is not the fact, as there stated, that Ashutosh was directed to be at Mr. Weston's house, on the morning of the 13th, and that he went there and found Mr. Weston sleeping and was told to come back late. According to Ashutosh he did see the Magistrate at 7 or 8 A. M. and had a conversation which the learned Judge has omitted.

Before Mr. Macpherson Santosh said that it was not true that he tutored Surendro and that his retractation statement was not true and that they were Asha and Jotin who tutored Suren. According to the third story he had told, it was the Police who were tutoring him. The learned Judge is in error in thinking that the alleged tutoring was on

the 13th and 14th. According to the evidence, it was on a later date According to the Police case, Santosh was confronted with Surendra when the former said he had given out everything upon which they had a conversation and Surendra who had previously denied all knowledge in the matter said he would make a statement, Surendra's confession mentions Ashutosh Das. Santosh admits that that night the Police did not tutor Surendra to implicate Ashutosh. The latter it is said was then sent for as he was implicated by Surendra. He at first denied all knowledge in the matter but being informed of Surendra's statement consented himself to make a statement.

According to Rakhal's reports, Ashutosh was prominent amongst the violent anarchists. The idea that the Police tutored him to make a statement which indicates that he practically knows nothing of the conspiracy at all, and can scarcely accuse anybody of anything tangible and make Ashutosh learn it by heart and reproduce it, is so absurd as scarcely to deserve criticism. I have alluded to it in some detail because this is one of the several circumstances which, in my opinion, stamps him as a mandacious witness.

I here stop to examine this matter for it is one of the several circumstances which shows that Ashutosh Das is as untrustworthy as his brother. According to this witness (and the evidence of Surendra and Jotindra are much the same) Ashutosh, who says he himself knows nothing, never really made any statement at all. He was given, we are told, a large sheet of paper to learn from and for four or four and a half hours studied his lessons. He says he was prepared to state anything which the Police wanted him to say, and we know that according to the reports Ashutosh was deeply implicated in the alleged conspiracy. The Police, therefore, would (one might expect) deeply implicate this willing tool. Subsequently he was called on to repeat what he had learnt, and Lal Mohan took his statement down. But what was taken down was not what Ashu really said but what was put down in the sheet as that which he was tutored to say. Under these circumstances, one would expect that a statement so prepared and recorded, whatever else it might be, would be wholly sufficient and unexceptionable from the point of view of the prosecution in that case. One is, therefore, surprised to learn from Ashutosh's evidence after the usual prevarication that when it was taken to Mr. Weston, he rejected it, as wholly insufficient. We are asked to believe then that the Police defendants had so little knowledge of what their fellow-conspirators wanted, that they with the informer's reports at their disposition took all this pains to prepare the statement which was regarded by him as worthless. Mr. Weston swears that he never saw Ashutosh at his house after the 13th August, but Mr. Justice Fletcher finds from the evidence of Ashutosh that this is untrue and that the latter saw him and had conversation, on the 15th August. He says he was taken to the Magistrate's house by the Police.

* * * *

[After reading Ashutosh's evidence on this point, his Lordship said:—] It is to be observed that this evidence really suggests that Mr. Weston knew that what Ashutosh had said was false but that it was not sufficiently false and did not meet with his purposes and warned Ashutosh to be careful not to betray him to the Police by saying that the Police had tutored him or that the Magistrate had induced him to make these statements. When, moreover, Ashutosh charged him with a betrayal of his alleged promise, the Magistrate said nothing and in effect admitted it. The learned Judge expresses himself as being satisfied that this evidence is true. I find it difficult to reconcile the learned Judge's findings on these and similar points with his general conclusions as to Mr. Weston's honesty of purpose that he believed the Police reports and the confessions were true and so forth. If this evidence is, as the learned Judge finds, true, then Mr. Weston has not only perjured himself but the evidence will show that he knew that the Crown case was false, that the Police had tutored the accused and he was as much in the alleged conspiracy as the Police whose case the learned Judge distinguishes from his. In my opinion the statement is on its face so improbable—the story of the Magistrate giving himself away, admitting to a man like Ashutosh or any one that he knew that the case was false, and asking him to be so good as not to give out his "tempting offers" and his and the

Police misdoings when he (the witness) was taken before another Magistrate, that I should have had the greatest difficulty in believing it, if it was deposed to by other creditable witness. The learned Judge does not criticise Ashutosh's evidence or indeed any evidence given on behalf of the plaintiff. That evidence is, as I have already shown, quite unreliable, as is also the evidence of the plaintiff and other members of his family.

Ashu said when he went to the Bar Library that he saw a number of Pleaders and Mr. Dutt in the Library. All these Pleaders (some fifteen) were there and doing nothing, for it was five in the afternoon and had evidently assembled to hear what Ashutosh had to say. He says "I told them all" and how he had "escaped" from Mr. Weston who had torn up his statement, an allegation itself untrue for the original was then and until it was mislaid by Mr. Hadrill, in existence. He asked whether Mr. K. B. Dutt who had heard all the conversations did not say to Mr. Bradley Birt that Mr. Weston was making a serious blunder and replied that he could not say in what light Mr. Dutt took what Ashutosh said. He was again asked whether Mr. K. B. Dutt had not told him he had informed Mr. Macpherson that he considered Mr. Weston was blind to the misdeeds of the Police and replied he did not know. Mr. Dutt has not been called and though his views by themselves would not be relevant, it would be obviously material to know whether he had said this for if he had, it is not possible that the plaintiff could have informed him as he says he did of the alleged conversations he had with Mr. Weston, and which if true show that he was as guilty if not more guilty than the Police were alleged to be. In fact, if Mr. K. B. Dutt made this observation it is destructive of the case made against Mr. Weston. After the meeting, the Pleader Kamoda Charan Ghose and some others went to Mr. Bradley Birt as they "were informed that almost all the gentlemen of the town were going to be implicated." Mr. Bradley Birt says that they complained against the Police and he told them, he was not the person to entertain the complaint but Mr. Weston, on which they said it was no use going to the latter as he was the head of the Police. The learned Judge's statement that they said that Mr. Weston was entirely in the hands of the Police is incorrect. Mr. Bradley Birt says that they made no charge of crime or bad faith against Mr. Weston himself and that a few days after this, he saw Mr. Dutt who did not do so either.

At this stage I will deal with the evidence of one of the witnesses, the Pleader Upendra Nath Maity, who was present at the Bar Library meeting. He was also called on to disprove the truth of the allegations in the reports of the informer against him. He is a plaintiff in one of the other suits against Mr. Weston and interested in the present case. Mr. Justice Fletcher has entertained a high opinion of this witness on the ground as he says of his respectability and position and has also described him as the most important of the thirty odd witnesses who are called to speak against the reports.

I regret to say that I cannot share this view and, in my opinion, the evidence of this witness which the record shows to have been given in parts in an evasive, prevaricating and impertinent manner, is not truthful. I need not trouble with his evidence touching his alleged complicity in the bomb conspiracy. His denial on this point may be correct, though a conclusion in this sense would not safely rest on his denial alone. It is sufficient to state that he says that not only has he never had anything to do with bombs but that he has never in his life taken part in politics and is indeed careful to state that for so little a matter as the possession of a photo of Dadabhoy Nowroji, a copy of the Bengal Partition scheme and something like an essay or speech found n the search of his house, is not responsible and that they came from the box of a boy who was being maintained by him. He asks the Court to suppose that he was not even aware that an indignation meeting was held at Midnapore to protest against the action of the Government with regard to the Barisal Conference, though the "Medini Bhandab" represents him as having himself seconded the resolution by which Mr. K. B. Dutt was voted to the chair at such meeting.

I now come to an incident as to which a great deal of evidence has been given and the arguments on which extend over some three or four days before us. On the 31st

August two petitions were put in by Santosh and Surendra respectively asking for bail. The petition of the former says: "Your petitioner respectfully insists that an opportunity should be offered to your petitioner to make a statement which would disclose the circumstances under which he was by threat, inducement, persuasion compelled to make a statement which is being treated as a valid confession." Surendra's petition contains the passage "that your petitioner, therefore, prays that he be produced in your Honour's Court to-day and that he may be let out on bail after your Honour's ascertaining the real state of affairs by allowing him to make a statement."

Now the plaintiff charges that Mr. Nelson who was then in Court knew on that date that these petitions had been filed before him and that the two accused (one of whom had made his confession to him and the other in his presence) were desirous of having an opportunity of retracting them but he was unwilling that they should have this opportunity and that he and the defendants attempted to suppress these petitions in order that the accused might meanwhile and before the next hearing be persuaded to adhere to the false confessions they had previously made.

This charge is made though Mr. Nelson swears that he was not informed that Santosh and Surendra wanted to make a statement and if he had been so informed, he would have given them an opportunity—an assertion which not one of the plaintiff's witnesses dares categorically to deny. The prevarication and contradiction are even for this case extraordinary. To the witness Satya Charan Mukerji, the question had to be put no less than eleven times before he would give a straight answer, and he then shrank from asserting that Mr. Nelson was informed and took refuge in a pretended ignorance. Indeed it has not been suggested before us that Mr. Nelson was so informed. What has been done is that he put forward the evidence of the Pleader, Peary Lal Ghosh, who says that Mr. Nelson burked Mr. Dutt as he was about to inform him of the matter. But though this question has been the subject of controversy since the 31st August 1908 this allegation has never been made before nor by any other witness in the present case, is directly contradicted by several witnesses for the plaintiff and has evidently been invented by the witness on the spur of the moment. On the top of all a suggestion is made that Mr. Dutt who was the Counsel made a statement to Mr. Macpherson, which if made and true, shows that the allegations which he asks us to accept on behalf of his clients is personally known to him to be untrue and Mr. Dutt is not called. I propose now to examine this matter fully because so far from this charge having any foundation I am fully satisfied that it was never intended that the Court should know of the contents of these petitions and both the incidents and the charges made thereon throw grave discredit on the plaintiff's case and on Peary Lal Ghosh, the Pleader, on whose evidence this charge mainly rests.

It is admitted that three petitions were prepared outside the Court and not in the Jail, that the three accused, the plaintiff, his son Santosh, and Surendra were asked to sign them in Court and that they did so whilst they were in the dock. It is denied that the petitions were filed in the ordinary way in open Court but they were, it was charged, put in the record in such a way that the Magistrate's attention should not be drawn to them. It is said and it is indeed not denied that neither Mr. K. B. Dutt, who appeared as Counsel for the accused other than the Raja of Narajole nor any one else ever stated to the Court that the accused wished to retract their confession. And a likely reason for this is that the plaintiff and those in his interest had committed themselves to a story which was sent up to Government on the 27th August and were otherwise not prepared to have either Santosh or Surendra examined on that day as it was feared that if he were then and there examined, his story might not accord with the statement sent to Government or be otherwise serviceable to them. So far from Mr. Nelson or the defendants having suppressed these petitions, the last thing which the advisers of these accused, in my opinion, wanted was that the petitions should come to light and that they should be then and there examined on them. From this view the matter has a bearing on the question as to how far the retractations which were subsequently filed on the 7th September were spontaneous and genuine.

I will now deal in detail with this incident.

I will refer first to the evidence of the two legal witnesses, the Muktear Satya Charan Mukerjee and the Pleader Peary Lal Ghosh, both of whom gave their evidence in an evasive and prevaricating manner. I trust neither of them, and unless all the other evidence in this case on this point whether for the plaintiff or defendants is wrong, the latter has not told the truth. The former who was one of those mentioned in the first information in the bomb case and deposes to the untruth of some incidents in the reports had to be repeatedly warned by the Court to answer properly the questions put to him. According to Peary Lal Ghosh the petitions were first drafted on the 21st August, but as the accused were not then produced, they were not put in. Certain alterations were then made in them. The witness drafted the petition of Santosh and Suren and showed them to Mr. Dutt. The petition of the plaintiff was, it is said, drawn up on the information got from Ashutosh. Satya Charan says that before going to Court there was a consultation with Counsel when it was decided that a petition should be put for bail stating that the confession was false and asking for an opportunity for explanation. He says that it was known that so long as these confessions stood it was not possible to obtain bail and that in fact it was with this knowledge that the allegations as to the falsity of the confessions were inserted in the petition. He also admits that it was known to be of the first importance that if the confessions were to be retracted, the circumstances under which they were said to have been made should be brought before the Court at the earliest possible moment. He says, however, that he does not remember whether it was discussed whether the accused should make a statement from the dock. He says that when he went to Court he did not expect that they would make such a statement, "but this I know, that if an opportunity were given to them to explain to the Court the way in which their confessions had been obtained from them, they would certainly state matters to the Court." I have no doubt upon his and the other evidence that it was also arranged by their advisers that no such opportunity should be given to them. He says, however, that he did not expect that Counsel would make a point that the confessions were withdrawn, that he did not consider it important that the matter should be urged, nor that it was necessary that the Magistrate should be asked to take the statements of the men there and then. After repeated questions and warnings and self-contradictions, he at length admitted that no oral application was, in fact, made by Counsel to have the accused examined. He said he could not explain why that was not done.

A statement is to be noted, in connection with the averment of Peary Lal Ghosh and the argument of Mr. Dutt in this Court that it was intended to make such an application, which was in fact commenced but which was defeated by Mr. Nelson rising when Mr. Dutt began to speak; a suggestion in short that Mr. Nelson dishonestly burked the matter. It was, of course, obviously of the first importance that Mr. Nelson should be informed of the contents of the petition and that the accused should have the opportunity of explanation which their positions ask, and the question, therefore, is whether Mr. Nelson dishonestly burked Mr. Dutt's petition and so prevented him from stating to the Court that the accused asked for such opportunity or whether Mr. Dutt did not purposely in accordance with previous arrangement, omit to draw the Court's attention to the point with the object I have mentioned.

The statement of Peary Lal Ghosh that Mr. Dutt commenced to speak on the matter and was stopped by Mr. Nelson's rising is, in my opinion, wholly untrue. But if any person could have told us what Mr. K. B. Dutt said and did, it is Mr. Dutt himself who has not been called. And there appears to be a good reason for this. Mr. K. B. Dutt gave his evidence before Mr. Macpherson. It was put to the witness that at that enquiry, Mr. Dutt stated that he did not in applying for bail make mention of the retractations and that he did not ask the Magistrate to take Surendra's statement that day because he had information that Mr. Weston was practically doing everything in the case, and Mr. Nelson was merely carrying out his mandate and he thought it was useless to make any request to Mr. Nelson. Now, if this be true, then not only is the suggestion here made that Mr. Dutt wished to make the statement before Mr. Nelson but was burked

by the latter was untrue, but Counsel was putting forward a suggestion to the Court which he personally knew had no foundation. There is in this connection a noteworthy statement of Santosh which supports this suggestion, for he says that if he had told Mr. Nelson that he retracted his confession the latter would probably not have released him, "as he was completely in the hands of Mr. Weston."

To sum up what are the outstanding facts. It is admitted that the accused were not produced in Court on the 7th August. It is alleged but denied by the plaintiff that they were produced in Court on the 21st. It is admitted on both sides that they were produced on the 31st August. Now, Santosh at least is represented as being desirous of retracting for some time before that date and, indeed, it is suggested that he did not retract earlier because he was not given any opportunity to do so by his production in Court. It was absolutely necessary, therefore, that it should appear at least on the record of the 31st that the desire to retract existed. It is not necessary to adopt Mr. Garth's suggestion (for it is nothing more than that) that the murder on this date of the informer in the Alipore conspiracy case was a reason why the written desire to retract should appear on the file, so that it might be not said that the accused had been influenced to sign his petition by that circumstance. It is sufficient to say that having regard to the case made as to Santosh's desire to retract, it was necessary that that desire, if it was to be believed, should be formally expressed on the first admitted production of the accused in Court. But more than that was not wanted. Had the accused been here and there examined, there was a risk of the same going to the board or of the accused's statements being in conflict with those previously submitted to Government on the 27th. On this point there is a very strong piece of evidence with which Mr. Dutt's argument has not attempted to deal. And it is this. Both Santosh and Surendra admit that they did not want the contents of their petitions of retractions to be known. But why? We are supposed to be dealing with men who wished to retract and one of whom at least has been for some time past craving for that opportunity. Yet when the occasion appears they do not want the contents of their petitions in which they ask to retract to be then known. Is it likely that if this was the attitude of the clients, that of their advisers was different? Is it, moreover, likely that the clients would have adopted so strange an attitude had they not been advised to do so? Santosh in his subsequent petition of retraction of the 7th September, in paragraph 16, stated that he made an application which he signed and handed over to his Counsel "to be filed." He does not say that it was filed; but that the Magistrate, he is informed, refused an application for a copy on the ground that it had not been filed. No allegation is made that Mr. Dutt said anything about the confession or that Mr. Nelson burked him but that the "said applications curiously enough have disappeared from the records for two days apparently suggesting that the record had been spirited away by the Police; nor was a single suggestion made to any of the plaintiff's witnesses that Mr. Dutt invited the Court's attention to the petitions but that it refused to hear him. Then it is clear and indeed it is not denied that no mention was in fact made by Counsel that men wished to retract, though Mr. Dutt as a Counsel of experience must have known that it was idle to ask for bail while the confessions stood. Nor did the men themselves come forward and say "we wish to be heard." It is admitted again the petitions were not, from whatever cause filed in the usual course in fact, that is, they were not threaded, punched or marked and were found in the part of a record where they should not have been. This circumtance by itself tells either way, for it is consistent with the theory of supression by the prosecution who did not do what ought to have been done with papers which came into its hands. When, however, it is read with the desire of the accused to conceal the contents of the petitions and the absence of all mention by Counsel that they wished to retract their confession, the inference to my mind is irresistible that the reason why they were not openly "filed" and why Counsel said nothing, was that the Court's attention might not be drawn to them with the resulting examination of the accused. We find further that two other petitions were properly filed and orders are written on them. Yet these are not 'filed' nor are orders written on them. Mr. Keays was not told of the petitions and other witnesses

for the plaintiff say that they heard no mention of the word confession that day.

On the main question whether it was brought in fact to Mr. Nelson's notice that these men asked to retract from confessions which he had himself recorded and witnessed, the evidence is conclusive that it was not, and so also it is, in my opinion, whether it was ever intended to do so. Peary Lal Ghosh's story that Mr. Dutt mentioned the confessions but was burked by Mr. Nelson is, in my opinion, false. It is not supported by any other witness and is contradicted by the rest of the plaintiff's own evidence. Lastly Mr. Dutt who asked us to accept that story and who was the central personage in that incident is not called to speak to the events of that day or to rebut the suggestion that he gave an account of the matter to Mr. Macpherson which, if true, shows that the suggestion which he has asked us to accept is untrue. In my opinion, so far from there having been any suppression of the petitions or other improper conduct by Mr. Nelson or the defendants, the evidence goes to show that the Court itself was on that occasion made the subject of imposition. Learned Counsel has asked us to say that no such charge was made during the trial, though it was during the argument. I should have thought that his memory would have been more accurate on a matter which so nearly concerned him. The passage to which he has referred us in the brief where the Advocate-General is recorded as saying 'no such charge is made' refers not to the defendants' case but to Mr. Nelson's order, the subject of the question on which the observation was made. This would appear even from the brief Court notes, but the shorthand transcript makes it clear wherein the Advocate-General is recorded as saying:—"I would remind your Lordship, if you look at the exact wording of this (that is, Mr. Nelson's order) that there is no such charge against Counsel or anybody." That is so as regards the particular order. It is not so as regards the defence in this case. Mr. Dutt stated that it was not necessary for this case to have gone into this matter but that he only did so as the appellants had pressed it. It would, undoubtedly, have been of importance to his case, could he have established, as alleged, that the defendants were parties to the dishonest suppression of the petitions as part of the conspiracy alleged, but having read and closely considered the evidence, I understand his reluctance to bring up again a charge which has not only no foundation but which on failure to establish it recoils on those who have made it.

On the question whether the petition now produced was that produced on the 31st August, attention is drawn to the wording of paragraph 12. It is said, that if it had been filed on the 31st August, that date would not have been given, but it would be said "this date." The evidence does not, however, enable me to say as the appellants suggest that a different petition has been substituted which contained an incorrect statement as it did or if it did not, he wished to examine the document more carefully before he put it in. If it be true as is said that it was read out to him in Court, he does not appear to have seen it before. There may have been also another reason. He may have thought that there was the less necessity for any haste to file an unconsidered petition, seeing that so far as he was concerned he was going to be discharged and may indeed have thought it prudent not to do so. When the story about Mr. Bose and the Police seeing the accused's son and Surendra during the luncheon hour was set up, it was possibly thought advisable to postpone the striking out of the plaintiff's name until after the luncheon hour and to point to that fact as proof of the alleged conversation and as a consequence of it. As I have said, I accept Mr. Bose's evidence which disposes of this alleged conversation which I may here point out the learned Judge does not himself find to have taken place.

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[After dealing at some length with the discovery of the bomb in the Dutts' house, and the alleged statement by Mr. Gregory in the Appeal Court, that he placed no reliance on this bomb, Mr. Justice Woodroffe said:—]

To sum up, the learned Judge's suspicions are based on an alleged admission of Counsel in another case which is not evidence and is denied, on an erroneous supposition that Mr. Cornish had made an admission which he did not; on the matter of which there is

no evidence but in respect of which explanation might have been given to satisfy the learned Judge, had they been raised by him not in his judgment but at the trial. In my opinion there is no legal ground for suspecting the evidence which is all one way and which corroborates the defendants' case. The bomb was found in a locked room, could not have been put in from outside; the key was missing, and no explanation is given either of that circumstance or any other by witnesses who might have been called; and the man who is allowed to have been responsible for the custody of the room is not examined and no explanation is given therefor. As the learned Judge has observed in connection with the non-calling of certain witnesses by the defendants, we must assume that the evidence of this man and others who were living in the house at the time would not have been favourable to the plaintiff.

I may observe that it suffers from the same defect which attaches to almost every important incident in the plaintiff's case. It was not put forward at the time but later under circumstances which throw suspicion on it. When I say "not put forward" I do not criticise the fact that the story now told was not put forward in July 1903. Even if it were a true story all the facts might not then have been known; what I here refer to is the absence of mention of Bonomali's alleged sudden disappearance or of any suspicion as regards its possible connection with the discovery of the bomb.

[Passing on to Bonomali's story, his Lordship said:—] I find Bonomali's story not merely unproved as the learned Judge appears to hold it to be, but one which has been disproved by reason *first* of the suspicious circumstances under which it was put forward, including, as the final act of those circumstances, the uncontradicted evidence that the Pleader Kishori Pothi Roy attempted to get the constable to support it; *secondly*, because of its inherent improbabilities; *thirdly*, because of the falsity apparent both on the face of Bonomali's deposition and from other parts of the record; and *fourthly*, because what, in my opinion, is an integral portion of that story, namely, the alleged taking of the boy to the Moulvi by the constable Kartic has been conclusively proved to be untrue. There is also, of course, the evidence of the Moulvi in denial of it.

Now if this be a false story, who is responsible for it? Mr. Dutt has argued that his client may have been deceived but is it likely that this old man nearly of 72 was deceived by this boy? It is obvious, of course, that if he has told an untrue story he has been put up to do so by the plaintiff and possibly also by others, of whom I believe the plaintiff for reasons given was a mouthpiece. It is obvious also that if the plaintiff has been instrumental in putting forward an untrue story, that in itself, apart from any other circumstances, gravely discredits both his case and evidence.

* * * * *

I next pass to the arrest of the plaintiff. The first question which arises is whether Mr. Weston was in law justified in effecting that arrest. Section 5 of the Explosive Substances Act (VI of 1908) enacts that a person who knowingly has in his possession or control an explosive substance under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession or under his control for a lawful object, is punishable unless he shows that he had it in his possession or control for a lawful object. Therefore, once it is established that a person has under such circumstances in his possession or under his control an explosive substance, the statute casts the onus on him of proving that he had it in his possession or control for an innocent purpose. Section 6 of the same Act deals with abettors. Any person who by money, provision of premises, supply of materials or in any other manner abets or is accessory to the commission of any offence under the Act, is punishable in the same way as if he had committed the offence itself.

The first question then is whether the bomb must be taken to have been in the plaintiff's possession or control. The bomb was not found in any place in the separate and exclusive possession of any other person than the plaintiff. It was found in the *boitakhana*, a common room in possession of the family, by whom it was used and to which they all had access. As pointed out in *Queen-Empress* v. *Sangam Lal* (2) where

(2) 15 A. 129.

articles are found in a house in such a place or places as several persons living in the house may have access to, there is no presumption as to possession and control that those articles are in the possession or control of any other person than the *karta* or house-master (in this case the plaintiff). This case was followed in the criminal appeal of Santosh against his conviction to this Court. There the Chief Justice said: "Had the bomb been found in Santosh's room when the search was made there, this might have been fair ground for imputing to him possession or control within the meaning of the Act. But the discovery in the *boitakhana*, a place equally open to others, taken by itself points no more to possession or control in Santosh than in the others who had equal access with him to this place." The judgment in appeal also holds that in such a case the *karta* or managing head of the family is *prima facie* responsible. But in this case the learned Judge holds that he was not, and as the Appeal Court held that the discovery of the bomb in the *boitakhana* did not indicate an exclusive possession by Santosh, it follows according to the judgment that the bomb must be deemed to have been in the possession of nobody, and nobody was liable to account for it. But if the bomb was there, it was obvious that some one was accountable for it. The grounds for this conclusion are that the Police having acted on information showing that the article was in the exclusive possession of Santosh, they were not entitled to arrest the plaintiff merely on the ground that the bomb was in fact found in a public room in the house of which he was the owner. The answer, however, in the first place is that this does not correctly represent the information which the Police had. The reports, it is true, do not mention the plaintiff and show that it was Santosh who took the bomb to the house. The reports do not state that the plaintiff had no responsibility, nor do they, nor could they, state that after the bomb was taken by Santosh to the house, it remained in his exclusive possession. They deal with the movement of the bomb only during the period antecedent to that act. What they say is that the bomb was taken by Santosh to the *boitakhana*, a room which is a public room, where it was found. And for a finding in such room the owner of the house was responsible. It is quite possible that information may show that an explosive substance is taken to a house by a particular person, and that when it gets there, another person may also become liable for its possession. The bomb having been found in what is by law the plaintiff's possession, the latter was called upon to account for such possession, though information showed that before it came into his possession, it was in the possession of someone else, namely, his son, who was also the means by which it came there. It may well be that a person may take a bomb to the house of another and ask the latter to keep it for him, and the latter may do so or permit it to be kept in a place which the law deems to be his custody. In short, the finding of the bomb in the possession or control of another justifies his arrest.

The learned Judge, however, next holds that the arrest was not justified as the pleadings show that the defendants did not arrest the plaintiff as the owner of the house under section 5, but as an accessory under section 6 of the Explosive Substances Act. He is of opinion that a different defence has been set up to that raised in the pleadings. Had this been so, I should have been ill-disposed to shut the defendants out on a merely technical plea, seeing that it in no way affected the evidence which the plaintiff had given or might give, and that the plaintiff has shifted his own case from that stated in the plaint throughout the whole trial. In my opinion, however, the learned Judge's finding is not justified.

In the first place it is, in my opinion, immaterial in this case under what section of the Act the arrest was made, if, in fact, the circumstances were such that the Act justified arrest. If a person were arrested, say, on a charge of theft, but it turned out that he should have been arrested for criminal misappropriation, it seems to me, apart from any question of surprise and the necessity for calling any particular evidence, to be hardly possible or sensible that he could bring a suit for malicious arrest, claiming Rs. 10,000 for other damages saying: "It is

quite true you could have arrested me for criminal misappropriation, but as you did not and pursued me for theft, I want my damages, because, though liable in fact to arrest, the warrant was issued under the wrong section." Such a conclusion would, it appears to me, stultify the law. I may cite in this connection the observations of Mr. Justice Harington in *Clarke* v. *Brojendra Kishore Roy Chowdhry* (3) the appeal in which has recently been decreed by the Privy Council*: "In the course of the argument there was some discussion as to which of these Acts the defendant purported to act under. That to my mind is of very little importance. The defendant is entitled to call in aid any Statute which justifies his action, quite irrespective of whether it was present or not to his mind, when he made the search." The present case is not even one of different Acts, but of different sections under the same Act. It is, however, unnecessary to decide this question in the present suit, as the learned Judge is in error in supposing that the warrant was under section 6 and not under section 5.

* * *

The learned Judge, however, gave effect to this belated argument and has held that notwithstanding the application for warrant arrest and proceedings were under sections 4 and 5; that the plaintiff himself stated and understood that he was being proceeded against under sections 4 and 5, and that his Counsel at the trial proceeded on the same basis—the defendants were not entitled to say that they acted under sections 4 and 5, because they are held to have pleaded (apparently in ignorance of the plain facts), that the plaintiff was arrested as an accessory under section 6. There is no mention of that section in the written statement, but the learned Judge reads the reference to accessory as implying action under that section. The word accessory is, however, there used, not with reference to the warrant but to the information which the Police had received, prior to the application for a warrant. It was thought that that information, coupled with the circumstances of the case, including the fact of the bomb being in the house, of which the plaintiff was owner, raised a reasonable suspicion against the plaintiff that he was fully aware of what was being done. The application for the warrant was actually under sections 4 and 5 and against the plaintiff as owner of the house. If the proceeding had been under section 6, presumably the written statement would have so said. It could not have done so, however, unless the gentleman who drew it had never seen the application, warrant, and proceedings in the case, including the plaintiff's own petition. However this be, it is plain that an erroneous statement in the pleadings (assuming that for the sake of argument, though not holding that there was one) cannot overcome the actual facts apparent on the face of the record and admitted by the plaintiff himself and his Counsel. The latter should not (after having dealt with the case as one under section 5) have been permitted to shift his ground in the last stages of the case in reply. I hold that it is established beyond all doubt that action was taken under sections 4 and 5 and not section 6, and that the defendants are not precluded by anything in their pleadings from avowing that which is plainly the fact. If, as I have found, the defendants were not responsible for the bomb, then section 5 justified the arrest of the plaintiff on its discovery in his house. In fact, Mr. Dutt is recorded as having said in the first Court that "if the plaintiff had been arrested on the 8th July, nothing could have been said;" and this for the reason that the plaintiff was the owner of the house. His case then, and until he shifted it in reply, was that his client should (if the defendant's case be true) have been arrested on the 8th July, but the fact that he was not, but later on, on the 23rd, showed that Mr. Weston had no *bona fide* belief in his right to proceed against him as the owner of the house.

* * *

Mr. Datt who personally cross-examined the witness Paramananda who was making charges against him, suggested to him that Mr. Weston, in concert and conspiracy with the Moulvi and Mr. Hadrill, put up this witness to tell a false story, and either forged or put forward this document knowing it to be forged, which suggestion the witness denied. This suggestion was supported by another

(3) 2 Ind. Cas. 436; 36 C. 433 at p. 451; 5 M. L. T. 367; 13 C. W. N. 458; 9 C. L. J. 298.

* 16 Ind. Cas. 501; 23 M. L. J. 32; 16 C. W. N. 865; 12 M. L. T. 171; 10 A. L. J. 193; (1912) M. W. N. 760; 14 Bom. L. R. 717; 16 C. L. J. 231; 13 Cr. L. J. 693; 39 C. 953—*Ed.*

that Mr. Hadrill and the Counsel then appearing for the Crown, were putting up with Mr. Weston and that the witness Akshoy Pal was there also. As in other cases, an attempt has been made before us to show that what was suggested was not that which the question put obviously meant, and that there was no charge against the defendants of fabricating this document, or using it, knowing it to be fabricated. This explanation I do not accept. The Advocate-General subsequently took exception to the examination. From that discussion, it appears that the charge was understood and stated to be one of procuring false evidence and fabricating a document, or using as genuine a document known to be forged. Instead of Counsel for the plaintiff at once rising and saying that "this is not our charge," they acquiesced in it and stated that they accepted full responsibility for it. In examination-in-chief Mr. Weston was examined as to the charge, which was specifically stated. Again, Counsel for plaintiff acquiesced in the charge being as then stated. Again, according to the transcript, Mr. Dutt repeated his accusation of fabrication when Mr. Justice Fletcher pointed out that it had not been put to Mr. Hadrill, nor, I may add to Mr. Weston, in cross-examination. And the learned Judge in his judgment, while holding the document to be a forgery, added: "But while saying this I am satisfied on the evidence that there is not the slightest ground for suspecting that either Mr. Weston or Mr. Hadrill had anything to do with it, nor did they in any way suspect that it was not a genuine document." An application was made to Mr. J. C. Dutt, Attorney for the plaintiff, to state the grounds on which this question was put, but Mr. J. C. Dutt replied that he was advised not to answer. An application to the Court by Mr. Hadrill for an inquiry was refused, the matter being *pendente lite*. Before us the matter has been put in this form, namely, that the document was put forward at the instance of Mr. Weston, though Mr. Bose says whether Mr. Weston had knowledge that the document was forged, he "cannot say" nor can he say that the document was made at the instance of Mr. Hadrill. In my opinion, this is not a creditable manner of dealing with the question. In the *first* place no attempt should have been made to deny that the charge made was that which appears on the face of the question; which was understood and stated without objection by Counsel for the defence; which was put to Mr. Weston without objection; which was repeated in express terms by Mr. Dutt in his reply; and which was so understood by the learned Judge who rejected it. *Secondly*, the learned Judge having found, as the fact is, that there was not the slightest ground for the charge, learned Counsel should frankly have withdrawn it and then stated to the Court the grounds, if any really existed, on which Mr. Dutt considered himself justified in putting it.

Such grounds as have been put forward by Mr. Bose (for Mr. Dutt has not himself attempted to justify his charge) are no grounds whatever for the charge, which should never have been made. Mr. Garth has, in consequence, asked us to refer Mr. Dutt's conduct in preferring this unfounded charge, to the Court, for consideration whether action should be taken against Counsel in respect of it. I do not, however, propose to do so, notwithstanding the number and reckless character of other unfounded charges, exceeding any in my experience, which have been made in this suit, because I think that, with this expression of opinion, this case, which has already occupied enough of the public time, should in all its aspects now come to a close. I wish, however, to add some observations to what I have said. After this charge had been made the Advocate-General requested the Court to ask Mr. Dutt whether he made the charge on instructions, and if so, on whose. Mr. Justice Fletcher appears to have considered that he was not entitled to do that. In my opinion the Court is so entitled, and that were this not so, it would be powerless to prevent that abuse of cross-examination which the law directs. Instructions to Counsel further are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. If the latter calls for written instructions it cannot obviously use them as evidence in the cause

which is tried, and for the purpose of such trial would have to treat them as confidential. They could, however, in my opinion, be called for then and there, and be used after the trial on the determination of the question whether disciplinary action should be taken against Counsel by the Full Court to which the matter would then have to be referred. If the Court were shorn of this power it might not be able to take such action in a class of cases which most justified it. The learned Judge also appeared to think (see interlocutory judgment not printed, dated 2nd February 1911*) that he was prevented from acting by reason of the fact that the question reflected not on the witness but on a third party, and that section 150 of the Evidence Act must be referred back to section 146 which, in the opinion of the learned Judge, had no application. I am myself not prepared to hold that, even if section 146 did not apply, the Court could not do that which is necessary for the effective exercise of its disciplinary powers over Advocates; but I may further point out that even on a strict reading of these sections, section 146 did apply, for the question, though it did reflect on third parties, also reflected on the witness. I wish further to add that, in my opinion, it is not sufficient even to plead instructions. Counsel have a responsibility in the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

In connection with this question of cross-examination, which appears to have been often conducted both in form, manner and tone in an insulting and provocative way, I notice that Mr. Dutt claimed to be entitled to regulate the civility which he should extend to a witness. On an objection by Mr. Gregory to the offensive tone of Mr. Dutt's examination of Captain Weinman, he is recorded as saying: "I have been more civil than he deserves." I see no ground for this observation in the evidence, and provocative remarks of this kind to witnesses should be disallowed. On another similar objection, in the case of another witness, the Court is reported to have remarked that it must allow some latitude to Counsel. In my opinion, no latitude should be allowed in such matters at all. The cross-examination also contains a large number of unfair and misleading questions. When, moreover, Counsel puts it to the witness that he may take a statement from him, or otherwise states the case, care should be taken to see that the witness may not have ground for thinking that his confidence has been misplaced.

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[After going at length into the arrest of the plaintiff and the reasons given for it by the plaintiff (that Mr. Weston wanted to get a confession from Santosh) his Lordship said:]

How did the plaintiff come to make an honest or any other attempt to get a confession unless the plaintiff believed that his son's guilt was at least in doubt? He protests now that he all along believed in his innocence but how could he as Santosh's father counsel his son of an excellent truthful nature to say that which both he the plaintiff and his son knew to be false? If it be suggested that so far he betrayed the interests of his son as to counsel a falsehood to save himself from arrest then that is a circumstance of additional discredit against his testimony. He says "I came to know what the Police wanted Santosh to state from the date of his arrest. All I came to know was the Police wanted him to make a false statement according to their desire". How then could he counsel his son in any case to confess? Santosh too, is represented as taking a strange attitude. He had, if his evidence be true, been repeatedly tutored to give what he says was false evidence implicating innocent people in an imaginary Bomb Conspiracy. "How" he says, he told the Police, "can I tell such lies". Yet we subsequently find him to state, to use his own words, "all that I should consider reasonable and that I would not be able to implicate innocent people". But what could be reasonable? Who could he at all implicate on the assumption that the plaintiff asks us to make that the reports on which the Police acted are wholly false? Who was there that was not innocent when there was, as we are told, no such thing as a Bomb Conspiracy at Midnapore, or even, if we are to believe some of the witnesses, no such thing as sedition? And then, having pressed his son to confess,

* But this judgment is printed in *Peary Mohun Das* v. *D. Weston*, 9 Ind. Cas. 509.—*Ed.*

he says: "I was very much distressed at hearing Santosh had confessed. I was nearly at the point of death". He might well have been distressed to find his hopes of Santosh's innocence falsified. But it is difficult to piece this evidence with the rest when he says "whatever the confession was that Santosh made, my belief is that it was altogether a false confession". The evidence to my mind shows that the father was pressing his son to confess if he was guilty and of his innocence at that time he was in doubt. He appears according to the under-trial ticket to have seen his son on four dates between the 12th and the 22nd July. I may here note that at page 680 the word "interviews" shown against 22nd July, 1908, is an error. In the original to which I have referred, the word is in the singular, the alleged afternoon visit of which there is no record, is denied. On the 19th he saw Mr. Weston after one of such visits. He intended to and did continue them and asked Mr. Weston if he might see him again after he had seen his son possibly to report the effect, if any, of the attempts to induce his son to confess. These facts have now been twisted into the present story according to which the plaintiff never had any doubts of his son's innocence and that though he continued to induce his son to confess, he protested to Mr. Weston that "if his son was guilty in the least respect, he was ready himself to be hanged". Interviews which are (as were admittedly the first two) of the plaintiff's own seeking are now alleged to have been sought by Mr. Weston who is represented as bringing pressure on the plaintiff to induce his son to make a false confession. Advantage has been taken of the fact that there were in fact some interviews and one chit (both of which, as result shows, would better have been avoided). And to all this is tacked the story that Mr. Weston then discussed the subject of the plaintiff's own innocence also; and after affirming it threatened to send him to Jail because he had failed to get the false confession he was seeking. This last story does not appear at all up to the date of Mr. Macpherson's inquiry and at that inquiry not only is no such complaint put forward as is now done, but Mr. Weston is himself represented as an innocent man, "misguided", as the plaintiff says he himself was, by the Police. The first setting forth of this story that I can discover is in the mendacious article of the Medini Bandhub written shortly before the institution of this suit, with, in my opinion, the object of preparing the ground and inflaming public feeling. When the suit was in preparation it was probably thought inadvisable to leave the case as to the arrest dependent on inferences from the facts only such as the non-arrest of the plaintiff on the 8th July and the fact that Santosh's confession followed the arrest of his father. In order to make the suit sure a new story was set up, simple and if true, conclusive but, in my opinion, clearly invented and false, according to which in express terms Mr. Weston should be made to confess his own wrong and the plaintiff should be able to say that Mr. Weston was guilty because he had told him (the plaintiff) so. This and the Banomali story are not the only instances of concocted evidence put forward in the name of the plaintiff who has made so many unfounded charges against Mr. Weston and numerous unfounded or unproved charges against the Police. As I shall have occasion later to say, the plaintiff has not come to Court with clean hands.

I disagree with Mr. Justice Fletcher's conclusion on this issue as regards Mr. Weston. I hold that he in good faith believed in his right to arrest the plaintiff, that it was not done with the indirect object alleged and that the provisions of the Indian Explosives Act, in fact, justified the arrest.

[As regards the Police in this issue, his Lordships said:] — I hold that the Police defendants are not liable in respect of the alleged malicious arrest or the proceedings which followed it.

[Passing on to the various charges made against the defendants, his Lordship said: —]

There is doubt, though Mr. Dutt denies it, that corruption was assigned against Mr. Weston. If it was not so assigned and Mr. Dutt's statements were correct, how did the learned Judge come to say "I disbelieve altogether the suggestions of a corrupt motive that has been made against the defendant, Mr. Weston." And what further was the object of Mr. Dutt's cross-examination of Mr. Weston regarding the sale of his

motor car? Mr. Dutt must be aware that the sale of Mr. Weston's property is wholly irrelevant, unless some allegation of corruption is associated with it, and this was so understood by the learned Judge who holds that the matter has been satisfactorily explained. The present, however, is an instance of the mode of attack adopted in this case. Charges have been made by way of covert insinuation, "indications" as Mr. Dutt calls them, a method which possesses this unfair advantage that the "charges" may be insisted on or repudiated as never having been made at convenience. There also appears to have been a covert suggestion about which we have nothing in appeal that Mr. Weston had received a bribe from the Rajah of Mahisadal as consideration for not taking proceedings against him. In the cross-examination of the Mouvli, it was suggested that Dr. Bunkim Chandra Ghose had been honoured by Government on the recommendation of the defendants, because he had made a bomb for their alleged conspiracy. That this was a suggestion made clear by the Court's statement of its understanding of the trend of the cross-examination which was not then repudiated by Counsel for the plaintiff. Before us, however, the learned Counsel disclaims that he made any suggestions against Mr. Weston but against the Moulvi only though Mr. Justice Fletcher's statement clearly embraces all the defendants. There is no foundation for this suggestion and I am not aware that the Government grants honours on the recommendation only of a Deputy Superintendent of Police. Those who make charges should also have the courage and sense of fairness to put them squarely and clearly.

In conclusion I would point out with reference to those alleged bribes that the objection to the evidence is not merely that it was not put forward in the first instance but when it was put forward as in the case of Jamini and Rajendra, the case made was different, and the evidence now given in proof of the bribes is otherwise in a high degree unsatisfactory.

I now pass to the alleged tutoring and recording of the confessions of Surendra. I have already made general observations as to the charge of tutoring when dealing with the main case and only now deal with the points directly, touching this witness. Surendra says that after he had been assaulted by the Police he told Ashutosh who counselled him to say what the Police wanted and not suffer and then to disclose the truth in Court. But the witness says he refused on any account to tell a falsehood. What he says induced him to subsequently make a false confession was the fact that in his presence the Moulvi advised Lal Mohan to put a bomb in his house and then arrest the latter's brother. This he says made him anxious and he yielded to the advice of Ashutosh. Then follows the story, with which I have already dealt, of tutoring from large pieces of paper two feet long. This alleged tutoring from large pieces of paper was not, the witness says, mentioned in his retractation statement because he did not then recollect it. Later he says he had not forgotten it but in the hurry he omitted to mention it. In his statement before Mr. Macpherson he says he had forgotten it. When again Mr. Reid, the Magistrate, visited the Jail on complaint of an attempt by the Police to influence his statement was made. Surendra was then taken to Mr. Weston and though the latter is said to have been in the conspiracy, the Moulvi is represented as telling the accused that if the Sahib asks if they had been tutored they were to say "no" and that if he asked what sort of treatment they had received they were to say "excellent treatment." Surendra was taken to the Magistrate's house and there made what is said to be a false confession which was taken by the Deputy Magistrate under the direction of Mr. Weston. On the report of Lal Mohan that the accused wished to make a confession, Mr. Nelson recorded the order "Babu S. N. Chakravarti to record confession, W. H. N. 15-8" Previously Mr. Weston had sent the Magistrate a slip which is in evidence asking to come and see him as he wished him to record a statement in Bengali. A charge is made against Mr. Weston in respect of Mr. Nelson's memo, which is formulated in Mr. Dutt's statement in the lower Court "it must have been done with a view to protect Mr. Weston. I repeat it half a dozen times." Later Mr. Dutt put it to the defendant Lal Mohan "I put it to you that this document has been subsequently fabricated for the purpose of showing that Mr. Weston had

nothing to do as District Magistrate in connection with the recording of Surendra's confession, do you deny it? Answer—That is entirely false. I say this because in that case I would have concealed the fact of going to the Deputy Magistrate." In other words the charge is that Mr. Weston wanted to hide the fact that he was not responsible for the examination of Surendra by the Magistrate. This groundless charge has been persisted in before us. The answer to it is that Mr. Weston in the Sessions Court in December 1908 in examination-in-chief, so far from concealing the fact, stated himself to the Court that it was he who had sent for the Deputy Magistrate and the chit which shows that he did is produced. As Mr. Nelson explains, his formal order was necessary to regularise the proceedings. There is no foundation for this charge of fabrication and so forth which the learned Judge does not notice possibly because he was of opinion that there was nothing in it. It is one of those which I have already said learned Counsel should never have made.

[As regards the other charge made in respect of Surendra that he received three serious kicks from the defendant Lal Mohan, his Lordship observed :—]

It is obvious that the fact that a third party was kicked (if the story be true) on the 11th August, has no bearing on the issue whether the defendants put a bomb in the plaintiff's house prior to the 8th of the preceding July, or arrested without cause the plaintiff on the 23rd of that month, however reprehensible in itself such savagery would be. Objection was also taken to the reference which the learned Judge says he made after the trial was over to some medical works not stated. The objection is well founded, for whatever a Court relies on should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point: *Durga Prasad Singh* v. *Ram Dayal Chaudhuri* (4).

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There is one general remark which is applicable not only to the charges I have mentioned but to other parts of the case. The learned Judge has not considered when and in what form they were first put forth. It is obvious that charges which are brought forward at a later period in neglect of previous opportunities must always be regarded with suspicion. It is true that timidity will account for some such cases of failure. There are others who though not themselves afraid desire to avoid making trouble for themselves. There is also a disposition of which the evidence of the witness, Ram Saran Shaha, is an instance. He says he did not mention a bribe (alleged to have been exacted by the Police) to Mr. Macpherson as "we were not sure then as to what side the Commissioner was going to put his report." This disposition, however, to wait and see which way the wind blows whilst it may sometimes keep back the truth is also responsible for another result. When the investigating authority is deemed to be favourably receptive, all manner of doubtful and even false charges are likely to be made with alacrity. In the present case there are two special circumstances which render belated charges suspicious. *First*, there is the number of them; and *secondly*, there is the fact that we are not here dealing with some one individual but with an organised opposition whose leaders and members are educated professional and in some cases wealthy persons of position who were on the look-out for and presumably quick to put forward charges against the Police if and when made.

I now deal with the question whether Mr. K. B. Dutt should have accepted a retainer in this case; whether he should have been called as a witness; and what is the effect of his not having in fact been called. Though these matters raise questions of professional conduct I am not dealing with them simply on this ground but because they have a most important bearing on the decision of this case. Objection was taken before Mr. Justice Fletcher to Mr. Dutt's appearance as Counsel in this case on the following main grounds: That he had a personal interest in, and had in fact 'engineered' the case; that he had a personal knowledge of the facts of the case; that he was a proper and material and, indeed, necessary witness to facts in the case; that having been concerned in preferring charges,

(4) 10 Ind. Jur. 355 33 C. 153.

he should support them by his testimony, and that both witnesses and Counsel would be embarrassed by his appearance the more particularly so as serious charges such as bribery, were personally made against him. The learned Judge overruled these objections in the following passage: "It was made a matter of deliberate and unrestrained attack on Mr. Dutt that he had not gone into the witness-box. Mr. Dutt has himself explained the reason of his abstention and that reason appears to me to be satisfactory. His client in whose favour his testimony would have been given with full knowledge of this saw fit to retain him as his Counsel and it cannot be suggested that there was anything improper in Mr. Dutt's accepting the retainer."

I will deal first with the question whether Mr. Dutt should have appeared as Counsel in this case. Mr. Justice Fletcher is of opinion that it cannot be suggested that there was anything improper in his doing so. I should have myself in the absence of any other authority thought that under the circumstances of this case to which I shall refer it was not proper. I am however, fortified in this view by the answers which were given by the Bar Council to certain questions put to them on this very matter and in respect of this very case. We have referred to the Bar Council Report with the consent of Counsel of both sides. Their decision is, of course, not binding on us as Judges. But the Bar Council are the recognised authority on all matters of professional conduct and etiquette affecting Counsel, and their opinion, therefore, is of the greatest weight and value. Their reply to the questions put to them is this: (1) If Counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept a retainer therein. (2) If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded, it became apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client. (3) If Counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case he ought not to accept a retainer. (4) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned but finds in the course of the case that it is so impugned he ought to adopt the same course of conduct as is mentioned in clause 2, *ante*. (5) In either of the cases mentioned in clauses 2 and 4 there is no rule of professional ethics which debars a Counsel if he continues to act as Counsel in the case from going into the witness-box and being cross-examined.

I agree with this opinion. The question then is whether Mr. Dutt does not come within rule (1) and of this on the facts there can be no possible question. Mr. Dutt is, I believe, one of the leading citizens of Midnapore and an old resident there, where he is or was the Chairman of the Municipality. He is also engaged in politics, was Chairman of the Midnapore Conference and the chief of what is called the Moderate section of Nationalist politicians. His position is set out in the statement which he had made under section 161 of the Criminal Procedure Code to the defendant Lal Mohan Guha. Mr. Dutt took some part in what are called Swadeshi cases. He must be from his position, of course, well aware of the political condition of Midnapore and the ins and outs of Nationalist politicians, whether Moderate or Extreme in the District. He was himself implicated in the informer Laha's report as being a member of the so-called Bomb Conspiracy. It is in evidence that from the 9th July to the 23rd July the plaintiff consulted him almost daily and reported to him what was being done as regards his son in prison, the alleged misdoings of the Police as also the plaintiff's own alleged conversations with Mr. Weston in particular; and this is extremely important; he was according to the plaintiff told that Mr. Weston had declared to the plaintiff that he knew him to be innocent,

that he need not be nervous but had notwithstanding told the plaintiff that he would arrest him if he did not get his son to make a confession which the plaintiff understood Mr. Weston to know to be a false one. Mr. Dutt was one of the spokesmen of the alleged grievance of Midnapore at the visit of Mr. Maddox on the 4th of August 1908. If we are to believe Maity, he can also speak to the fact that Mr. Weston sent more than one chit to the plaintiff and the contents of them. He was present at the Pleaders' Library on the 15th August when Ashutosh made his alleged revelations about the Police. On the 16th August he telegraphed and thereafter communicated with Government on the subject of the alleged misconduct of the Police. He appears to have been concerned in the preparation of the statements of witnesses sent to Government against the Police on the 27th August. He is said to have directed that note books should be kept recording complaints against the Police. He was present as Counsel on the 31st August when it is alleged that the Court was of set purpose kept by him in ignorance of the fact that his clients were filing petitions of retractations of confession. He is concerned in the subsequent proceedings. He was present as a spokesman and gave evidence at Mr. Macpherson's inquiry. He is said to have had information of a large number, if not all, of the principal incidents in this case such for instance as the alleged kicking of Surendra and to have had personal knowledge as to others. He is charged with having written a letter offering a bribe to the witness Akhoy Pal and is alleged to have bribed a large number of other witnesses in the case. In addition to his own personal interest, a number of the actors and witnesses in this case are Mr. Dutt's relations or connections, such as Madhusudan Dutt in charge of the room where a bomb at Saroda Dutt's house was found; Rash Behari Ghose who Mr. Justice Fletcher thinks sent the "stabbing portrait" to Mr. Weston threatening his life, Sreenarain Pal implicated by the reports, Jogjiban, an accused in the Arms Act Case and the Midnapore Bomb Conspiracy Case, Santosh, the latter's mother-in-law and Nibaran Chunder Mitter. The circumstances point to his having an interest in and having taken an active, and I think a leading, part in the institution and prosecution of this suit which represents in effect his own claims and grievances and those of others. It is not necessary, therefore, to go into every detail. It is sufficient to say that Mr. Dutt's name crops up in every part of the evidence either as the person directly connected or as having personal knowledge of the facts or as being in a position to corroborate them.

It is obvious that under these circumstances Mr. Dutt must have known that he was an important witness in the case and it was, therefore, not proper of him to have accepted a retainer in the action. I wish to add a reference to a decision of this Court. One of the results of Mr. Dutt's appearance was this, that he had to examine and cross-examine as to matters on which he had personal knowledge, such as alleged conversations between him and the witness. And he actually cross-examined a witness who made charges of personal corruption against himself—a most unseemly spectacle. In the decision to which I refer which is unreported *In the matter of certain Counsel* (4th August 1908) the Full Bench observes as to the unprofessional conduct and objectionable character of Counsel cross-examining a witness as to facts within his personal knowledge. Sir Francis Maclean, C. J., then said, delivering the judgment of the Court "I agree with what has fallen from the Advocate-General that the effect upon the minds of a Jury of a cross-examination conducted in this method might prove injurious to the administration of justice." The Chief Justice here refers to its effect on the Jury but as I will later show the fact that Mr. Dutt has conducted this case, has had a prejudicial effect on the mind of the learned Judge. The Chief Justice continued: "Suppose for a moment that a leading Advocate were in cross-examination to put to witness in the box a question of this sort, why did you not tell me so-and-so and so and-so." The possible effect upon the mind of the Jury (and I myself may add to the Chief Justice's observation, the Court) might be that they might regard the suggestion of Counsel as being pitted against the statement of the witness, an entirely fallacious view with the result that in consequence, they might disbelieve the latter. The Chief Justice then considered the effect which might be produced upon the

mind of the witness himself; how such an examination might be very embarrassing and conducive to his giving answers he might not otherwise have given. To these I add the obvious embarrassment of Counsel on the other side in examining or cross-examining to personal charges against their opponent. The objection I may lastly add was not removed by Mr. Dutt saying instead of "Did I not do so" "Did I not say so," "Did not Mr. K. B. Dutt do or say so?"

I next deal with the question of whether having accepted such a retainer Mr. Dutt should nevertheless have gone into the witness-box. Mr. Justice Fletcher then says: "having done this (that is, accepted the brief) it was in strict accordance with the rules of professional ethics of almost universal application that having taken up the position of an Advocate, he should refrain from testifying at a trial which was being conducted by him." The learned Judge places the matter too high, as amongst other matters a reference to clause 5 of the Bar Council's reports shows. There is nothing necessarily unprofessional in Counsel giving evidence in a case in which he appears as such. There have been several cases both in England and this country, in which this course has been taken without objection. Two unreported instances are noted in *R. D. Sethna* v. *Mirza Mahomed Shirazi* (5). It is true that in that case Mr. Justice Beaman held absolutely that the Court would not allow Counsel conducting cases to give evidence on behalf of their clients in respect of matters with which they were acquainted before they were retained but that they might do so as regards matters occurring after their retainer. But such decision is, in my opinion, erroneous. It omits to notice that *Stones* v. *Bacon or Byron* (6) and *Dunn (Deane)* v. *Packwood* (7) were not followed in *Cobbett* v. *Hudson* (8). It is opposed to Mr. Inverarity's case which the learned Judge cites. Considered as a rule of absolute exclusion as opposed to an expression of opinion of what is desirable the decision is in direct conflict with the Evidence Act and both with the Privy Council decision to which I next refer and the opinion of the Bar Council regulating questions of professional conduct above cited. The learned Judge who decided that case failed to distinguish between competency and the opinion that as a general rule it is desirable that the same person should not be both Advocate and witness. In the Privy Council decision *Corea* v. *Peiris* (9) a gentleman, named Schroder, was examined as witness though Counsel in the case. The Judicial Committee did not disapprove of this as contrary to the professional ethics of which Mr. Justice Fletcher speaks, but on the contrary there stated that Counsel had been properly examined.

The true rule in such matters is, in my opinion, as follows:—Counsel though they may be engaged in the case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer: [See section 118 of the Evidence Act, *Cobbett* v. *Hudson* (8)]: the Court has no authority to exclude such evidence if tendered. It is not in all cases a breach of professional ethics for a Counsel retained in the case to give his evidence in it. There are cases in which he properly may and indeed should do so. At the same time it is recognised by both the Court and the Profession that as a general practice it is undesirable, when the matter to which Counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting. In judging the matter from the point of view of what is desirable as opposed to what is legal, much must depend on the circumstances of each case. In the present case, having regard to Mr. Dutt's interest in the proceedings, the fact that he has taken part in the events referred to in them and has both personal and reported knowledge of a very large number of the facts testified to in the evidence, it was in a high degree undesirable that he should have been both Counsel and witness. The real objection in Mr. Dutt's case is that he was Counsel in the case and not, therefore, as he would properly

(5) 9 Bom. L. R. 1044.

(6) 4 D. & L. 393; 1 B. C. Rep. 248; 16 L. J. Q. B. 32; 11 Jur. 44; 75 R. R. 881.

(7) 4 D. & L. 395; 1 B. C. Rep. 312; 11 Jur. 242; 75 R. R. 883*n*.

(8) 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 488; 1 W. R. 54; 93 R. R. 1; 118 Eng. Rep. 341.

(9) 5 Ind. Cas. 50; 14 C. W. N. 86; 12 New Law Rep. (Ceylon) 147; 79 L. J. P. C. 25; (1909) A. C. 549; 100 L. T. 790; 25 T. L. R. 631.

otherwise have been, a witness. I may add that *Curry* v. *Walter* (10) to which Mr. Bose referred, has no bearing. There Counsel was subpœnaed to prove what had been stated by him on motion in Court. The Court was of opinion that on such a matter Counsel should not be called but that the party should prove it by other means or witnesses who were present; but it should be at the option of the Counsel whether he would give his testimony or not. The Court, therefore, decided that it was not obligatory on Counsel in such a matter to give evidence though he might do so if he liked. It did not decide that he could not give evidence. It is further of no authority in this country where a Counsel must obey a subpœna to give evidence as any one else must do.

The next point (which is the material one here) is whether the appellants were entitled to ask the learned Judge to draw inferences adverse to the plaintiff from the fact that Mr. Dutt had not been called. This they were clearly entitled to do, if it be a fact that under the circumstances of the case Mr. Dutt could not properly have been both Counsel and witness though circumstances also show that it was improper for him to have been Counsel at all. And if he were not Counsel, there can be no possible question but that he was a material and necessary witness. It was not open to Mr. Dutt to act in breach of a professional rule and then to plead the fact of such breach both as a reason why he could not be a witness and also why adverse comments should not be made upon the fact that he was not a witness. If it be that as Counsel he ought not, under the circumstances of the case or otherwise, to have been a witness then it was the act of his client which made Mr. Dutt Counsel and he cannot plead his own act against such comment. If Mr. Justice Fletcher's view were correct then if a litigant is aware that a particular Counsel has knowledge of a fact which he does not wish to disclose or that such Counsel's evidence is given to contradict him, he has only to retain him and then to say to the Court: "You must not draw inferences against me, because I do not call the man who can speak to the facts which I asked the Court to believe, for I have made him my Counsel."

(10) 1 Esp. 456; 5 R. R. 743.

The next question is what is the nature of the inference which should be drawn from the fact that the plaintiff has put forward Mr. Dutt as his Counsel and not as his witness. The learned Judges says "Mr. Dutt has himself explained the reasons of his abstention (from the witness-box) and that reason appears to me to be satisfactory." What those reasons were are not stated and the learned Judge has, therefore, not placed us in a position to appreciate them. But if those reasons were that Mr. Dutt had not in fact personal knowledge of the facts, or were a statement of the extent to which he was concerned with those facts, or as the nature of those facts, such a statement being in the nature of evidence should have come from him in the stand and not from his place at the Bar. The learned Judge next says "His client in whose favour his testimony would have been given with full knowledge of this fact saw fit to retain him as his Counsel." How and on what grounds could the learned Judge assume, as he here does, that had Mr. Dutt been a witness, which he was not, his testimony would have been given in favour of his client? This observation indicates the danger to which Sir Francis Maclean, C. J., in the case cited referred, namely, that inferences unsupported by the evidence of Counsel himself may be drawn from his mere appearance in support of a case of the facts of which he is alleged to have personal knowledge. So far from the inferences being what the learned Judge states it is precisely the other way. The learned Judge has himself correctly stated the rule when dealing with the defendants' case, namely, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The same rule applies to Mr. Dutt for whether he could or could not as Counsel have given evidence in this case, he should not have been Counsel and could and should have given evidence for the reasons I have given.

On this matter it only remains to indicate on what points such presumption should in this case work. It works as regards every of the facts to the chief of which I have alluded in which Mr. Dutt was himself an actor for alleged personal or reported knowledge, I need not repeat them here. They are also mentioned in detail in the evidence,

I only say here that, in my opinion, the most important points affected by this presumption are the alleged reports made to Mr. Dutt between the 8th and the 23rd July as to the alleged conduct of Mr. Weston and the Police, subsequent information on the same points received by him; the circumstances leading to the institution of this suit; and matters in the suit itself such as the incident of the 31st August which Mr. Dutt who was then Counsel makes the basis of a charge of dishonesty against the defendants and the presiding Magistrate Mr. Nelson. So far from presuming as the learned Judge does that Mr. Dutt's testimony on these and other points would have been in favour of his client, I presume the other way and the learned Judge might have himself so found if Mr. Dutt had gone into the stand. One of the chief grounds on which this suit has been decreed against Mr. Weston is the alleged conversations he had with the plaintiff when he is supposed to have repeatedly told the latter that he was innocent, that there were, therefore, no grounds for proceeding against him and that he need not be nervous and yet that he expressly avowed his alleged illegalities in telling the plaintiff that he would arrest him nevertheless if he did not get a confession from his son. These conversations are said to have been reported to Mr. Dutt at the time. Is it to be conceived that if Mr. Dutt had been told about these at the time, it would not have been of the first importance that this should be proved? Would not Mr. Dutt have been called to give that presumptively independent evidence which the suit now lacks. I assume that Mr. Dutt was not called because he could not corroborate the plaintiff or his case on this and other points. Had he done so it would have been necessary for him to explain how he did not mention the subject of the alleged reported conversations to Mr. Maddox on the 4th August, but had, on the contrary, no complaint to make against Mr. Weston; how he did not mention it in his letter to Government of the 27th August; how it finds no place in the subsequent proceedings and does not see the light of day until this suit, and then, when after Bonomali's charge had failed it is put forward as the basis of the new case on which the suit has been decreed.

In this connection I desire in justice to Counsel for the appellants in the first Court to deal with another matter. Mr. Justice Fletcher, who has, in my opinion, erroneously approved of Mr. Dutt's conduct, has, on the other hand, passed in my opinion, an undeserved judgment on the conduct of Counsel for the defence. After having observed that Mr. Dutt had followed the rule of professional ethics he continues: "I may observe that this rule of professional conduct was not, I regret to say, observed by Mr. Dutt's opponents." This observation is based on the fact that Mr. Norton called Mr. Gregory (a junior Counsel in the case) as his witness, and the latter gave his evidence. Mr. Gregory was called to repel a suggestion of Mr. Dutt, who in his numerous charges has not spared members of his own profession, that Mr. Gregory had not in respect of a particular matter, *viz.*, that arising out of Exhibit 61, properly and fairly conducted the case before the Sessions Judge and had attempted to keep back the document from the Court. Mr. Gregory from his place in the Bar gave his explanation. Though not so bound it was properly open to Mr. Dutt to accept a statement made in such a matter and in such circumstances from a fellow member of his own profession. He refused and objected to the statement being made. Thereupon Mr. Norton put Mr. Gregory in the witness-box, when he was cross-examined at length by Mr. Dutt, who, amongst other matters, thrice made to him the misleading suggestion that the Counsel Mr. Morrison was not present in Court on the 23rd when A. K. Pal who speaks to this document was examined though it is clear from the record that he was in fact present. I have already stated what, in my opinion, the general rules are as regards the calling of Counsel as witness. In my opinion Mr. Norton was fully justified in calling Mr. Gregory both in protection of the latter's professional reputation which had been in fact groundlessly assailed and of his own clients' interest. In this connection I may cite an observation of Sir Francis Maclean, C. J., in the case of *Nundo Lall Bose* v. *Nistaranee Dassi* (11)—"I can scarcely suppose that any Counsel, if

(11) 4 C. W. N. 169 at p. 183; 27 C. 428 at p. 439.

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he understood that the other side were not prepared to accept his statement made upon his word of honour, would not himself ask that he might be allowed to give his evidence in the usual way."

Mr. Norton has also invited our opinion on another matter on which the learned Judge has censured him. During the examination of the witness Mr. Wilson, the latter produced at the request of Mr. H. D. Bose who was cross examining him, a private pocket book. An irrelevant cross-examination on it followed. The book being a private one, Mr. Norton marked the pages to which Counsel might refer in respect of the subject of his cross-examination, the other pages referring to other matters. Mr. Bose, however, looked at pages which had not been so marked. On the face of it this was highly improper on the part of Mr. Bose and Mr. Norton appears to have naturally expressed his opinion strongly to this effect. The learned Judge is, however, stated, not to have then and there, as should have been done, determined who was in fault. Mr. Bose brought in next day a written explanation of his conduct which the learned Judge is said to have refused to have gone into and then the matter ended until the judgment when the learned Judge observed as follows:—"I may further add that I viewed at the time and still view with complete disapproval Mr. Norton's unfounded and abusive attack on Mr. Dutt's junior, Mr. H. D. Bose." I do not know what the explanation was which Mr. Bose offered and on which the learned Judge refused to adjudicate and I am not, therefore, in a position to say whether Mr. Bose was to blame. *Prima facie* and in the absence of proper explanation, Mr. Norton was justified in taking strong exception to Mr. Bose's conduct. The matter ought to have been decided then and there, but as it was not, Mr. Norton was not, in my opinion, open to censure in the judgment which I may further observe states no ground on which it is based, though it is clear that the admitted fact, that Mr. Bose from one cause or another looked at the unmarked pages, called for such grounds.

* * * *

[Summing up his conclusions, his Lordship said:—]

It is natural to assume that there must be some basis for an action in which, as appears from the record, so much feeling has been displayed. It is well at the time to remember that every where in all countries, but particularly in this, the smoke is always disproportionate to the fire. On this matter we can only look to the record. It may be, though I do not desire to express a positive opinion on the point, that Mr. Weston as an Executive Officer perhaps possessed in excess the qualities which are supposed to be requisite for such a service. He acted conscientiously with great vigour and perhaps vigour in his general dealings with the disaffection in his District? These remarks are not made as a criticism, for it must be remembered, that, as the learned Judge points out, Mr. Weston's position was a peculiarly difficult one. As a result, however, of his uncompromising attitude, Mr. Weston got himself very much disliked by those whose views and actions he opposed; and that, as also the disaffected state of many minds, produced many a threat against his life, which I believe not to have been idle, but prevented from execution by the measures of his safety which Mr. Weston rightly took. In the matter also of the particular conspiracy dealt with in these proceedings, there has been in one case excessive rigour and in some others irregularity; I think in particular that the plaintiff, an old man of about 70, was treated with unnecessary harshness in being kept in Jail pending the investigation of the charge against him. He might and I think should have been let out on bail and thereby much ill-feeling spared. I think also that Mr. Weston acted with indiscretion in seeing or communicating with the plaintiff at all during the pendency of the proceedings against the latter's son, though as I find, such interviews were brought about at the instance of the plaintiff and not of himself. The circumstance was one likely to afford a handle to the charge actually made and may have in other minds given rise to suspicion. Though I am fully satisfied with the explanation he has given, his action in arresting the plaintiff when he did was also open to misconstruction.

* * * * *

This is not the common case of an individual alleged to be oppressed by the Police.

It is one in which there is an original and powerful combination against these two Police defendants. Whilst it is possible that such combination was brought about by what they did, it is also possible that it was in the nature of a reprisal against them for having made and failed to prove charges, which under more favourable circumstances they might have established; for I am fully satisfied that this combination has been itself doing some of the things it charges against the Police, getting at their informer and witnesses or attempting to do so in the case of the latter and putting up false charges such as that of Bonomali against the Moulvi, Mohesh Rout, against Inspector, Kedareswar, and other cases. It appears further that the charges made against the defendants were again most mendaciously exaggerated in the "prison story" of the plaintiff's son in Deb Das Karan's paper the "Medini Bandhab". This I believe has been done to prejudice the defendant's case before it was tried and indicates how readily admittedly false charges were preferred against the Police. The exaggeration which there describes the Police as fiends (*rakshasas*) showing their "fierce rows of teeth", Lords of Ghosts (*bhuta*) and so forth, affects every incident with which they are there charged and others which, if Santosh is to be believed, are the pure invention of the Editor. But these very falsities, if they have proved embarrassing by their absurdity to the plaintiff and his family in giving their evidence in this case, were probably on account of this very exaggeration and appeal to prejudice, the more suitable for the purpose for which they were put forth.

It was under such circumstances that this suit with its many charges was filed and we have next to see what has become of them in Mr. Fletcher's judgment. I take first the case against Mr Weston.

The following are Mr. Justice Fletcher's conclusions either directly expressed or to be implied from his judgment. He has found that the story of the primary conspiracy to falsely implicate the people of Midnapore and other parts of India is untrue as also is the alleged secondary conspiracy for the same purpose. He has said that he disbelieves altogether the suggestions of a corrupt motive which he finds were made against Mr. Weston. He holds, on the contrary, that his District was in a very seditious state and that there was in fact a conspiracy in it. He finds that on the information then in his possession, he was bound to be very watchful over the district of which he had charge. He holds that he did not concoct or have any hand in the concoction of false reports nor in the passing of reports known to be false. On the contrary, he is of opinion that Mr. Weston honestly believed in the truth of the reports, and that if he had not, he would not have acted on them He finds that he took steps to test the truth of the reports and that if such testing was, as the learned Judge thinks, insufficient, it was due to no dishonesty on his part, as the plaintiff alleges, but to the want of opportunity which the administration of an excessively heavy district deprived him, and to his inexperience. Whilst the learned Judge is of opinion that the alleged introduction of the bomb in the plaintiff's house and in the house of the Dutts, is not proved, he also finds that Mr. Weston who believed the truth of the reports in no case had any hand or part in such alleged crime. He finds that there was no such malicious search or trespass as is alleged. He is of opinion that Mr. Weston believed that Santosh Dass was guilty and that he was entitled to arrest him as he did. As regards the proceedings which followed Santosh's arrest, the learned Judge, touching Santosh's confession, says that he altogether disbelieves the suggestion that Mr. Weston and Mr. Nelson or either of them put to Santosh questions which they knew to be untrue and he does not find, and, therefore, pronounces against, the other allegations of misconduct which Santosh Dass makes against these two officers. He holds also that the allegation that Mr. Nelson and Mr Weston attempted to suppress the petitions of retractation of the 31st August is not true and that the incident arose out of a misunderstanding. Lastly he finds that Mr. Weston did not, as alleged, arrest the plaintiff with the knowledge (as alleged in the plaintiff that he was innocent because he had conspired to put the bomb in his house, and that his motive in arresting the plaintiff was not (as also alleged in the plaint) to extort a false confession

from his son. Every one of these charges goes by the board in Mr. Justice Fletcher's judgment. All of them are not only, in my opinion, false, but very malicious and wicked charges for which there is no foundation, of which fact the plaintiff or others who are responsible for them must have been well aware. The motive for such charges is obvious. There was, as I have pointed out, an ill-feeling against Mr. Weston which matured into actual threats against his life. The reasons for this I have given. But it is not only by such acts of violence that injury either to an individual or a class may be done. Not the least dangerous or malicious to either is that which clothes itself in the legal form of a false accusation. The suit on these findings should have been dismissed outright. What, however, the learned Judge had done is this:—He has, as I have pointed out, put aside as false the charges on which the suit is based and pronounced against Mr. Weston on another and a different charge, *viz.*, an illegal arrest of the plaintiff without authority in fact, or belief in his right to do so, and as a means of obtaining a true disclosure from his son Santosh of a conspiracy which he (Mr. Weston) honestly believed to exist. As incidental to this finding, his view must necessarily be that Mr. Weston has perjured himself. Had the plaint been framed on these grounds, it might have, as already pointed out, been instituted without such malice, as I find in the case of the other charges, though such a suit would, for the reasons I have given, have equally failed. I have found, however, that an explanation on this matter has been given which entirely satisfies me as to Mr. Weston's *bona fides*. Apart from the fact of the conflict of testimony, not a single instance has been proved which convicts this defendant of an untruth. Indeed, as I have said, had one single instance of deliberate untruth been established against him (his position being what it is). I should not have accepted any portion of his testimony without good and reliable corroboration. On the other hand, the plaintiff has put forward numerous charges against Mr. Weston, all of which have been found both by the learned Judge and myself to be untrue. It has been to me a matter of surprise that the learned Judge has not, either in the case of Mr. Weston or the Police, considered this circumstance in judging of the relative value of their testimony and that put forward on behalf of the plaintiff. It is, in my opinion, impossible to hold that a man who has himself and through the witnesses he has put forward, made so many clearly false and malicious charges, is entitled to the same credit as if he had never made them. On the contrary they discredit his case. In my opinion, further, the evidence of the plaintiff himself with its prevarications and untruths cannot be accepted. In particular, his account of the alleged conversations which he had with Mr. Weston, when the latter is charged with persuading and threatening him and then owning to his (Mr. Weston's) alleged guilty intentions towards him, has for the reasons I have given been conclusively proved to be untrue. Though, therefore, the charge on which Mr. Weston has been convicted ought not, in my opinion, to have been tried in this suit, it has also, in my opinion, been shown to be, as the others against this defendant have been found by Mr. Justice Fletcher and myself to be, untrue.

I pass now to the case against the Police. The learned Judge has not found against them, either the alleged primary or secondary conspiracy, or that they concocted their reports or that they put bombs in the house of the plaintiff or of the Dutts. In my opinion all these charges have been shown to be untrue. He has found that they conspired with Mr. Weston to effect the illegal arrest above stated. In my opinion Mr Weston was alone responsible for that arrest and the Police defendants acted only as his subordinates. Mr. Weston is not liable nor are they.

* * * *

In conclusion I may say that if there be any truth in these numerous charges which have been preferred against the Police, they have not been made out by credible evidence in this case. I decide accordingly the first and second issues of fact in the negative. The sixth issue of fact as to damages is dealt with upon the issues of law to the consideration of which I next pass.

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[Passing over the third and fourth issues as unnecessary, his Lordship continued:—

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The fifth issue raises the question of limitation. The Advocate General contended and in my opinion rightly, so far as regards the causes of action for malicious arrest and prosecution, that the suit was barred. Upon these causes of action, the suit should have been dismissed *in limine*. The learned Judge, however, stated that he would subsequently hear the argument about limitation, and would meanwhile hear the evidence. The plaint is not, as the learned Judge has stated a "mofussil pleading," which according to Privy Council rulings of about the middle of last century and later (when such pleadings were often very imperfect) should not be read too strictly. It was, no doubt, filed in a Mofussil Court, but is in the English form of pleading, and I should say had been settled by Counsel, as one would also naturally expect in a case of this importance. Now the suit is described in the plaint as "valued at Rs. 10,000 on account of damages for wrongful confinement and malicious prosecution." Though the plaint also alleges trespass, it seems that the suit was really based on the two other torts, as it is in respect of these that damage is alleged to be suffered, and the cause of action is said to have arisen on the 31st August 1908, when the plaintiff was set at liberty. I will, however, assume that with malicious arrest and prosecution was included trespass. All these acts are well known torts, and the only peculiarity about the suit is that the plaintiff alleges that these torts were committed by three men acting in conspiracy, instead of by one. In one sense this allegation of conspiracy is immaterial to the action, for the acts alleged are such that if proved against any one defendant, he is entitled as against that defendant to a decree. The reason, however, why conspiracy is alleged is obvious. According to the plaintiff it was the Moulvi who was directly responsible for the bomb; so, in order to implicate Mr. Weston and the other defendants in the charge, it had to be alleged that there was a conspiracy between him and them to do this act. Similarly, it was Mr. Weston who ordered the arrest which is alleged to be done in conspiracy with the other defendants to bring them into the charge. But the suit remains what it is—a suit against joint tort-feasors. If it was a suit against one person, would be admittedly barred as regards the arrest and prosecution. I may leave out of account the alleged trespass if that was part of the cause of action, as the result of Mr. Justice Fletcher's judgment is that there was no trespass in fact, and that also is what I have held. If the suit is barred as against one person, the period of limitation is not extended because it happens to be against three. This is admitted. But then it is said and Mr. Justice Fletcher has held, that there is another cause of action which the plaintiff has himself nowhere stated. It is said that besides the cause of action on the torts, there is a cause of action to recover special damage by reason of a conspiracy to cause damage. The learned Judge accordingly framed an issue which does not arise on the pleadings alleging a general conspiracy to cause damage of which the trespass, arrest and malicious prosecution were merely the overt acts. I have asked learned Counsel to produce to the Court authority for the proposition on which the learned Judge has proceeded, *viz.*, that the same set of facts may constitute two causes of action, *viz.*, for a tort and for a conspiracy to cause damage. And none has been produced. The reason of this is that the two exclude one another. If a joint tort is committed, there is no necessity to have recourse to any law of conspiracy. And on an action to recover damage resulting from a conspiracy, as distinct from an action on a joint tort, the conspiracy is one to do an act, which, if done by an individual, would not constitute a tort, but is actionable by reason of special damage having been caused thereby. The two in fact are mutually exclusive. There is a conspiracy to commit a crime, a conspiracy to commit a tort, and a conspiracy for an unlawful purpose in respect of an act which, if done by an individual, would neither be a crime nor a tort. All these may be the subject of criminal prosecution. In respect of the civil remedy, where there is a joint tort, the action is on the tort against the joint tort-feasors. In any other case, where in carrying into effect the conspiracy, the conspirators inflict damage on an individual, he may sue for the particular damage he has thus separately suffered. In the former case the cause of action is on the tort, and in the latter on the special damage. There is a further difference in that in actions

on tort, general damage is, except in special cases, sufficient, whereas in such a conspiracy there must be special damage. The class of cases to which the learned Judge refers, establishes that there are instances in which two or more persons can render themselves liable to civil proceedings by combining to injure the plaintiff, although if one of them did the same act by himself and without any pre-concert with others, he would escape liability, both civil and criminal. I agree with the learned Judge in thinking that an action on such a conspiracy would lie in this country, but the point here is different, *viz.*, what is the plaintiff's cause of action, and what is the limitation applicable? It appears to me to be quite clear that the suit is on joint torts, and that the arrest, imprisonment and prosecution are governed by the one-year rule under Articles 19 and 23 of the Limitation Act. Mr. Justice Fletcher is of opinion that though the suit is described as a suit for malicious prosecution, it is in fact not one. Whilst the learned Judge assigns no grounds for this view, it also appears to be inconsistent with a previous statement made by him, that the plaintiff had two causes of action—one for damage and one for malicious prosecution. As the learned Judge's finding as regards trespass and search was a dismissal on the facts, it is not necessary to inquire whether Articles 36 or 39, or both, would apply so far as the suit alleges wrongful search and trespass. In my opinion, the suit is barred on the other causes of action, and should not have been entertained on that cause of action on which it has been decreed. On the sixth and last issue, I am of opinion that if it was necessary, as according to the learned Judge's view of the case it was, to prove special damage, such damage has not been proved. Portion (but what, is not stated) of the Rs. 1,000 which the learned Judge has given the plaintiff was, it appears, spent to obtain the release of his son, which is not damage to the plaintiff in this suit, and no evidence strictly so-called has been called to prove the expenditure of the residue. These findings dispose of all the issues, both of fact and law, before us.

[Having dealt with the question of law, his Lordship concluded as follows:—]

I would accordingly decree this appeal and dismiss the suit, the plaintiff-respondent paying all (including reserved) costs in both Courts.

COXE, J.—I entirely concur with the judgment of Mr. Justice Woodroffe both as to the order and as to the grounds therefor.

D. CHATTERJEE, J.—This appeal arises out of a suit described as one for damages for wrongful confinement and malicious prosecution. The defendants pleaded limitation before the Court below, but were overruled. The question of limitation has been pressed before us and I shall deal with it first.

The plaintiff was arrested on the 23rd of July and discharged on the 31st of August 1908. The suit was filed on the 15th of November 1909, *i.e.*, more than one year after the discharge, and would, therefore, be barred in so far as it was one for wrongful confinement, or false imprisonment and malicious prosecution under Articles 19 and 23, Schedule I, of the Limitation Act. The plaintiff's legal advisers evidently saw this, and it was stated in the 14th paragraph of the plaint, that the period of the notices served under section 80 of the Civil Procedure Code being excluded, no part of the plaintiff's case was barred. The Court below has held, however, that no such notice was necessary, and no exception has been taken to that view of the law before us, and no reliance has been placed upon any such notice as an answer to the plea of limitation. It has been contended, however, that the suit was based on a conspiracy between the several defendants, and as conspiracy is a distinct cause of action by itself, the suit must fall either under Article 36 or Article 120, and is, therefore, not barred; it has been further contended that the illegal search of the plaintiff's house is a cause of action which at least is not barred, as it would fall either under Article 36 or Article 39 or Article 120. The first contention as regards conspiracy has found favour with Mr. Justice Fletcher, and I shall deal with it first. The learned Judge has relied on the case of *Quinn* v. *Leathem* (12) and Mr. Dutt has also relied on the same in support of his argument. The learned Judge says: "The truth of the matter is that in a case like the present the plaintiff has two causes of

(12) (1901) A. C. 495 at p. 537; 70 L. J. P. C. 73; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

action, one to recover the damage that has been occasioned to him as the result of the conspiracy, and the other to recover damages for malicious prosecution against the defendants as joint tortfeasors. This is well illustrated by the case of *Quinn* v. *Leathem* (12)." With great deference I think that that case itself contains an answer to the argument. Lord Halsbury, in delivering the first judgment in that case, says: "There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." Now what are the facts in *Quinn* v. *Leathem* (12), and what does the case decide? The defendants were the office-bearers of a trade union; they threatened the plaintiff with injury if he employed men who were not members of the union; the plaintiff was willing to have his men enrolled as members, but defendants insisted on his dismissing them and taking members of the union in their place; the plaintiff refused, and they then threatened a large customer of the plaintiff with injury if he dealt with the plaintiff, and thus compelled him to cease to deal with the plaintiff. The plaintiff brought a suit for damages. The plaintiff had every right to carry on his trade in the way most profitable to him, provided he did not infringe on the right of other people, and so had the customer of the plaintiff every right to deal with whomsoever he pleased under similar restrictions, and the defendants had maliciously invaded this right of the plaintiff and injured him by unlawful means, and the defendants were, therefore, held liable. It was found that there was conspiracy and threats carried into execution by the defendants to the injury of the plaintiff, the object being not to serve any trade interests of their own, but to injure the plaintiff, because he would not comply with their requisition to dismiss his innocent servants. It is true that the concerted action of a number of men has an element of aggravation, and is more irresistible than the unaided act of a single individual, and some of the cases support the view that a combination of several persons to do an unlawful act may be actionable when a similar act by an individual is not, but I do not think there is any authority for holding that a tort, when committed by several persons acting in concert, is different from the same tort committed by a single individual. A trespass is a trespass, whether it is committed by one person or by more, and so is a malicious prosecution or false imprisonment. The combination in such cases may be an element for aggravation in the assessment of damages, but does not to my mind suffice to make it a different tort. In the very case of *Quinn* v. *Leathem* (12), Lord Lindley said: "It was contended at the Bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many, acting in concert, makes no difference. My Lords, one man without others behind him, who would obey his orders, could not have done what these defendants did. One man exercising the same control over others as these defendants had, could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."

In a similar case, *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (13), Lord Justice Romer said: "I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of;" and Lord Justice Stirling said: "I am far from satisfied that they are not such as to be illegal, even if done by a single individual." Read by the light of the facts, the case decides no more than this, that a number of persons who, without justification, intimidate a third person by threats of doing him harm, and thereby coerce that third person into causing harm to the

(13) (1903) 2 K. B. 600 at pp. 619, 623; 72 L. J. K. B. 907; 89 L. T. 386; 19 T. L. R. 708.

plaintiff, are guilty of an actionable wrong. *Giblan's* case (13) shows that conspiracy or wrongful combination is not a material element in the constitution of the wrong. In this country the Legislature has made a general provision that suits for damages for false imprisonment or malicious prosecution must be brought within a certain period, and no distinction is made in respect of the number of persons by whom the wrong may have been perpetrated. If it were not so, the greatest uncertainty would be introduced into the law of limitation applicable to a particular case, for, a plaintiff might easily take his case out of the statute by charging more than one person with a wrong, and a defendant would not know when he is secure against a charge. But supposing that conspiracy to perpetrate a wrong was a separate cause of action by itself, it would not be actionable unless it caused special damage by itself. In the present case, however, the whole damage caused is by reason of the imprisonment and prosecution. The plaintiff deposes that the imprisonment cost him Rs. 1,000 in law charges, and that is the only damage proved and decreed. The present case, therefore, considered as a suit for damages for wrongful confinement and malicious prosecution is barred by limitation under Articles 19 and 23 of the first Schedule to the Limitation Act.

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[After dealing with the facts of the case, his Lordship observed :—]

It is alleged that the Moulvi had caused the bomb to be placed in the house of Peary Mohun Das, and that knowing that bomb had been placed there he caused the house to be searched. If that is true, there is a good case against the Moulvi.

I shall first consider whether the Bonomali incident is true. * * * [After stating the plaintiff's case on this point his Lordship observed :—] Bonomali has made various contradictory statements at various stages and no reliance can be placed upon him. * * * I am of opinion that Bonomali's story is false one. * * * * * * * The case of illegal search and trespass, therefore, fails. [In this connection his Lordship added :—] Mr. Weston was not aware of the search at all till it was made.

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[His Lordship next dealt with the report supplied by the informers. On this his Lordship observed :—]

I agree with Mr. Justice Fletcher that the whole story about the bomb is a pure invention and entirely false. * * * * * * * * * The informer Rakhal Laha is an avowed drunkard and such a man is appointed to rule over the destinies of most respectable men at Midnapore. * * * * * * * * Although I have said that the Bonomali incident is false, I cannot believe the bomb story as stated by the informer. * * * * * * *

[Regarding the taking of the bomb to the house of Kamini, a woman of the town, his Lordship observed :—] Such a house could never have been selected for the purpose and respectable persons would not consent to go there.

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[Continuing, his Lordship said :—] *Zemindars* and educated men could not believe that they would be able to gain their object, as was alleged, by means of some bombs. As regards the *Zemindars*, their interests were linked with the British Permanent Settlement. They had secured their money in Government promissory-notes and they must know that the moment the British Government would go, their belongings would also go. There was no reason why they should join in such a conspiracy. As regards the Raja of Narajole, he encouraged the indigenous industries but there was nothing to show that he joined the conspiracy. * * * * * * * * To my mind the story told by the informer is an absurd one and cannot be believed.

[Regarding the non-appearance of Mr. K. B. Dutt, his Lordship observed :—] Mr. Dutt ought to have appeared as a witness in this case, for thereby he could have thrown much light in the case. It is a pity that Mr. Dutt considered himself debarred by professional etiquette from giving his evidence. * * * * *

[Continuing, his Lordship observed :—] It is quite clear that the Police defendants had unlimited access to the Jail. I have no doubt that they hurled threats on the prisoners for procuring confessions, but without success.

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* I also have no doubt that the imprisonment and arrest of the plaintiff had a decisive effect upon Santosh and Surendra.

* * * * * * *

I, however, hold that no case has been made out against Mr. Weston, who, considering the surrounding circumstances, acted with great difficulty.

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The Moulvi also cannot be blamed for taking the report as the basis to work upon.

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* It cannot be positively found that the Police defendants knew that the reports were false.

There is a side issue as to whether Mr. Dutt ought to have appeared as a witness in the case and not as Counsel? I think he ought to have appeared as a witness. He could have thrown light on many parts of the case in which we have had to grope in the dark. I think, the case of the plaintiff on the facts has suffered materially by reason of his absence from the witness-box, whilst he himself has been made the subject of repeated attacks without any means of adequately answering them. I think, he has been sadly misadvised in this matter. There was a reference to the English Bar Council by the legal advisers of the appellants and an opinion obtained which will be found on page xlvi, 16 Calcutta Weekly Notes. This, I have no doubt is, no authority for the Court, and was allowed to be read only with the consent of Mr. Dutt. The opinion of the Counsel is against Mr. Dutt. The opinion of the Privy Council in the case of *Corea* v. *Peiris* (9) also seems to support the same view. There the respondent tendered his own Counsel as a witness and the District Judge refused to admit his evidence. The Supreme Court of Ceylon, on appeal, had him examined, and the Privy Council say as to this: "He was tendered as a witness for respondent at the trial but the District Judge ruled, on some quite unsustainable ground, that, being the respondent's Advocate, his evidence was inadmissible. The Supreme Court most properly, in their Lordships' opinion, permitted him to be examined." It is a pity, therefore, I repeat, that he considered himself debarred by any rule of professional ethics from giving his evidence in the case.

Complaint has also been made that some of his questions in cross-examination were without justification. It may be that his own personal knowledge of the facts supplemented his instructions in these matters, but that is the more a reason why he should have given his evidence under the sanction of an oath and subject to the test of cross-examination. The suggestions made, however, have been abandoned.

* * * * * * *

I, however, differ from Mr. Justice Woodroffe in his appreciation of the evidence of the Pleader witnesses, especially Upendra Nath Maity, the leading Pleader of Midnapore They are Pleaders of position and it is not probable that they would deliberately give false evidence. They may have committed mistakes from lack of memory. I cannot hold that they have deliberately told falsehood.

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As regards the smuggling in of the petitions for bail, I agree with Mr. Justice Fletcher and hold that those petitions were not smuggled into the records, but were admitted.

The result is, that although upon the findings arrived at, the plaintiff was innocent of the bomb and has suffered in various ways, his suit must be dismissed and the appeal allowed.

[In reply to a question asked by Mr. Gregory, Mr. Justice Woodroffe said that the costs would be on scale No. II.]

Appeal decreed with costs.

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CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 500 OF 1912.

February 13, 1914.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Beachcroft.

PROTAP CHANDRA ROY—DEFENDANT—APPELLANT

versus

JUDHISTER DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Jurisdiction—Remand—Suit originally heard by District Judge—Remanded to him by High Court—Transfer by him to Sub-Judge—Trial by Sub-Judge with consent of parties—Jurisdiction of Sub-Judge to try suit—Onus of proof—Suit for possession—Defendant setting up tenancy—Defendant found to be tenant of plaintiff—Onus, on whom lies.

A suit valued at Rs. 1,368 was dismissed by a District Judge on the ground of limitation. The High Court on appeal set aside the decree and remanded the suit to him for trial. The District Judge transferred the suit to the Sub-Judge who tried it after taking the consent of the parties:

Held, that the validity of the proceedings before the Sub-Judge could not be questioned by the parties, as the case was not one of the exercise of jurisdiction by a Court which had no local or pecuniary jurisdiction over the subject-matter of litigation, but one of irregular assumption of jurisdiction by a competent Court though with the consent of the parties.

Gurdeo Singh v. *Chandrika Singh*, 1 Ind. Cas. 913; 36 C. 193 at p. 200, 5 C. L. J. 611, relied upon.

Where a defendant in a suit for possession of land is found to be a tenant of some land under the plaintiff, the burden is not cast thereby upon the plaintiff to establish that the land he seeks to recover is outside the tenancy of the defendant, but the defendant must prove that the land falls within his tenancy.

Sheodeni Roy v. *Chowhury Chatoorbhuj Roy*, 8 Ind. Cas. 785; 12 C. L. J. 376 and *Gopini Debi* v. *Lokenath Tewari*, 11 Ind. Cas. 696, followed.

Rajendra Kumar Bose v. *Mohun Chandra Ghose*, 3 C. W. N. 763, distinguished.

Appeal from the decree of the District Judge of Murshidabad, dated January 26th, 1912, reversing that of the Sub-Judge of that District, dated December 19th, 1910.

Babus *Dwarka Nath Chakravarti* and *Kali Kinkar Chakravarti*, for the Appellant.

Mr. *Sinha*, Babus *Mohini Mohan Chatterjee*, *Gurudas Sinha* and *Probodh Chandra Dutt*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant in a suit which was commenced so far back as the 11th July 1906, for declaration of title to immoveable property, and for recovery of possession thereof. The relief claimed in the plaint was valued at Rs. 1,368. The suit was tried in the first instance by the District Judge and was dismissed on the ground that the claim was barred by limitation. On appeal to this Court, it was held by a Division Bench, on the 19th August 1909, that the decision of the District Judge upon the question of limitation was erroneous, and the case was remanded to him in order that it might be tried on issues other than that of limitation and disposed of accordingly. The case thereupon went back to the District Judge, who recorded the following order on the 5th January 1910: "As the suit belonged to the file of the Subordinate Judge, let it be re-heard and disposed of by him in accordance with the order of the High Court". It is not clear whether this order was recorded as a matter of form or whether the District Judge had considered the terms of the order of remand by which the case was remitted to him for decision. However that might be, when the matter came before the Subordinate Judge, he felt some difficulty and asked the parties if they had any objection to the trial of the suit by him in view of the terms of the order of remand made by the High Court. They stated that they had no objection; the Subordinate Judge accordingly proceeded to try the suit, and partially decreed it. Against this decree an appeal was preferred by the plaintiff and a cross-appeal was filed by the defendant. The District Judge modified the decree of the Subordinate Judge, allowed the appeal of the plaintiff and dismissed the cross-appeal of the defendant.

The defendant has now appealed to this Court, and on his behalf the decree of the District Judge had been assailed on the ground that the proceedings before the Subordinate Judge as also before the District Judge were held in contravention of the terms of the order of remand, that in substance the proceedings were without jurisdiction, and that consequently the decree of the District Judge should be discharged and the suit retried by him in accordance with the order made by this Court. This position has been contested by the plaintiff-respondent and we have arrived at the conclusion that the contention of the appellant cannot possibly succeed.

The order of remand made by this Court is capable of one of two interpretations, neither of which is of any assistance to the

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defendant-appellant. In the first place, if the order be interpreted to mean that it was the intention of this Court that the suit should go back to the District Judge with liberty to make such order as he was competent to pass under the law, it is plain that under section 24 of the Code of 1908, the District Judge could re transfer the suit to the file of the Subordinate Judge. The terms of section 24 are comprehensive enough to cover a case of this description, inasmuch as it provides that the District Court may, at any stage, transfer any suit pending before it, for trial or disposal, to any Court subordinate to it and competent to try or dispose of the same, or to withdraw any suit pending in any Court subordinate to it and try or dispose of the same or transfer the same for trial or disposal to any Subordinate Court competent to try or dispose of the same or re-transfer the same for trial or disposal to the Court from which it was withdrawn. An order of this description could be made at any stage and it was immaterial in this case that the suit had to be tried on the evidence recorded by the District Judge who heard the case in first instance. Order XVIII, rule 15, sub-rule 2, authorises the Court to which the case might be transferred to try it on the evidence previously taken. In this view the proceedings before the Subordinate Judge were in all respects regular. In the second place, the order of remand may be interpreted to mean that this Court intended that the suit should be heard on the merits by the District Judge, and that he was not at liberty to transfer the suit to a Subordinate Court under section 24 of the Code of 1908. If this be the true meaning of the order of remand, it is clear that the validity of the proceedings before the Subordinate Judge cannot be questioned by either of the parties. They agreed before the Subordinate Judge that the suit should be tried by him, and they are not entitled to resile from the position they deliberately took up before him. The case before us is not one of exercise of jurisdiction by a Court which had no local or pecuniary jurisdiction over the subject-matter of litigation, the case is one of assumption of jurisdiction by a competent Court in an irregular manner. It cannot be disputed that if the District Judge had reported to this Court that he was not in a position to re-try the suit in accordance with the order of remand, it would have been open to this Court, in modification of its previous order, to transfer the case to the Subordinate Judge for disposal. In other words, the assumption of jurisdiction by the Subordinate Judge would have been perfectly regular, if he had been authorised by this Court instead of by the District Judge. Consequently there is no force in the argument that the parties could not, by their consent, confer jurisdiction upon a Court which had no jurisdiction to try the controversy between them, and the case is fully covered by the principle explained in the case of *Gurdeo Singh* v. *Chandrika Singh* (1). It has been contended, however, that the case mentioned is distinguishable, because here the effect of the trial of the suit by the Subordinate Judge has been to change the forum of appeal. If the District Judge had tried the suit, an appeal against his decree would, no doubt, have lain to this Court, on the other hand the result of the trial by the Subordinate Judge has been that a first appeal lay to the District Judge and a second appeal lies to this Court; in other words, this Court is not placed in a position to examine the case on the evidence so far as the facts in controversy are concerned. But this circumstance does not affect the position of the parties in so far as they consented to re-trial of the suit by the Subordinate Judge. It is true that the forum of appeal has been altered, but the appeal has been heard by a Court which would have been competent to hear the appeal if the Subordinate Judge had been authorised by this Court to assume jurisdiction in this matter. On these grounds we hold that the contention of the appellant, that the proceedings before the Subordinate Judge and the District Judge must be set aside as wholly irregular, cannot be sustained.

We now turn to the merits of the appeal. The history of the question in controversy between the parties may be very briefly narrated. The plaintiff claims to be a lessee from one Sakhichand under an instrument taken on the 21st April 1906. The property in suit belonged originally to Mrs. Larruhta whose right, title and interest was purchased by one

(1) 1 Ind. Cas. 913; 36 C. 193 at p. 200; 5 C. L. J. 611.

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Howard at an execution sale on the 15th March 1881. Howard was unable to obtain possession and commenced a suit on the 11th August 1888, for recovery of possession as against persons now represented by the plaintiff. He obtained a decree on the 20th September 1889, which was subsequently affirmed on appeal on the 30th November 1891. On the 28th October 1892, Howard transferred the decree to Sakhichand who was placed in actual possession by the execution Court on the 14th November 1894. The case for the plaintiff is, that he has been wrongly kept out of possession, by the defendants, of 76 *bighas* of land included within the lease granted in his favour by Sakhichand. The case for the defence in substance is, that the land in dispute is included in a lease granted by the plaintiff or his predecessor on the 7th February 1888. It is plain that if it is established as a fact that the land is included within the lease granted to the defendant, the latter would be entitled to succeed, because although at the time of the grant the plaintiff had no title, the subsequent title acquired by him would, under section 43 of the Transfer of Property Act, enure for the benefit of the defendant. The question in controversy consequently is, whether the land claimed by the plaintiff is or is not included in the lease granted to the defendant on 7th February 1888. It is unfortunate that no express issue was raised upon this point in the Court of first instance, which dismissed the suit on the ground of limitation. When after remand, the case was taken up by the Subordinate Judge, the plaintiff prayed that there might be local investigation and he stated in his petition dated the 24th January 1910, that the allegation of the defendant was untrue and that the land covered by the lease of 7th February 1888 was altogether different from the land in suit, although adjacent thereto. This application was opposed by the defendant, who contended that local investigation was not necessary. The plaintiff thereupon stated that he would not press his application for local investigation. The Pleaders on both sides further intimated to the Court that the parties would not examine any witnesses in the case, with the result that the suit was re-heard on the evidence on the record. The Court of first instance came to the conclusion that upon the evidence as it stood, there was reason to hold that a part of the land in controversy was identical with a part of the land covered by the lease of 7th February 1888, although it was impossible to identify accurately the land covered by the lease with the land in suit and the Court directed that this question of identity be determined in the execution proceedings. The District Judge on appeal has set aside this decree on the ground that the evidence does not establish the identity of the land and that the plaintiff is consequently entitled to an unconditional decree.

The view taken by the District Judge has been assailed before us on the ground that the burden of proof has been erroneously placed upon the defendant, and on the authority of the decision of this Court in the case of *Rajendro Kumar Bose* v. *Mohim Chandra Ghose* (2), it has been argued that inasmuch as the defendant has been found to hold some land as a tenant under the plaintiff, the burden is upon the plaintiff to establish that the land now in dispute is not included within the tenancy of the defendant. The contention thus broadly formulated is plainly erroneous. As was explained in the case of *Nand Lal Goswami* v. *Jajneswara Halder* (3), the case of *Rajendra Kumar Bose* v. *Mohun Chandra Ghose* (2) must be taken to have been decided on its own special facts. In that case, the plaintiff sought to eject the defendant who had admittedly been in long and peaceful occupation of the disputed property, and what was held was that when a tenant has been in such possession of the land ostensibly as part of an admitted tenure, it lies upon the landlord in a suit in ejectment to prove in the first instance that the land is his *khas* property. We are not prepared to assent on principle to the proposition that because a defendant is found to be a tenant of some land under the plaintiff, the burden is thereby cast upon the plaintiff to establish that the land he seeks to recover is outside the tenancy of the defendant. The contrary view is supported by the decision of this Court in the cases of *Sheodeni Roy* v. *Chowdhury*

(2) 3 C. W. N. 763.
(3) 6 C. W. N. 105.

Chatoorbhuj Roy (4) and *Gopini Debi* v. *Lokenath Tewari* (5). We must, therefore, overrule the contention of the defendant that the District Judge has erroneously thrown the burden of proof upon him.

The question remains, however, whether the decree of the District Judge should be affirmed. Upon an examination of the proceedings in the case, it appears to be reasonably clear that when the defendant on the 12th April 1910, opposed the application of the plaintiff for local investigation, she did so on the view of the law expounded in the case of *Ranendra Kumar Bose* v. *Mohun Chandra Ghose* (2), namely, that the burden was upon the plaintiff to establish that the disputed land was beyond the limits of the tenure of the defendant. The conduct of the parties is unintelligible on any other hypothesis. It is also plain that the form of the issue, which was vaguely framed, misled the parties, and the evidence was not specifically directed to this point. In these circumstances, we are of opinion that an indulgence may be shown to the defendant and a fresh opportunity given to him to establish that the disputed land is included wholly or partially in the lease of the 7th February 1888, the burden is clearly upon the defendant to establish this allegation and in the interest of justice we think that an issue should be remitted to the District Judge upon this point. The issue will be in these terms: "Is any portion of the disputed land covered by the lease granted to the defendant by Rakhal Das Boral on the 7th February 1888; and, if so, which portion." The parties will be at liberty to adduce evidence, oral and documentary, in support of their respective cases on this point. The defendant has in this Court expressly desired to have a local investigation and we think that a local investigation should be held at her instance; but the costs of the local inquiry must in the first instance be paid by her. We accordingly remit the above issue to the District Judge with the direction that a local inquiry be held at the instance of the defendant, and that liberty be reserved to the parties to adduce evidence, oral and documentary, in support of their respective cases. The District Judge will receive the evidence, come to a finding upon the issue and send up the records to us for final disposal of the appeal. As the litigation has now lasted nearly for eight years, the District Judge will expedite the inquiry before him, and liberty will be reserved to him to transfer the matter to the Subordinate Judge, if he considers it necessary to do so; but in any event the finding must be arrived at by the District Judge himself and returned to this Court within two months after the receipt of the record by him.

This order, however, is made subject to the following condition. The defendant must, on or before the 27th February next, deposit in this Court to the credit of the respondent the sum of Rs. 185, *viz.*, Rs. 41-8 as the costs of this appeal, Rs. 95-6 as the costs of the appeal before the District Judge and the balance as part of the costs incurred by the plaintiff in the Court of first instance. If the deposit is made as directed, the issue will be remitted. If it is not so made, the appeal will stand dismissed with costs in all the Courts. As soon as the sum payable by the appellant is deposited in this Court, the respondent will be at liberty to withdraw the same.

Case remitted.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 924 OF 1913.

January 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

SUNDARAMBAL AMMAL AND ANOTHER —APPELLANTS—PETITIONERS

versus

YOGAVANAGURUKKAL—DEFENDANT—RESPONDENT.

Hindu Law—Religious office—Alienation of religious office—Custom—Heredity, devolution of religious office by—Disqualification, personal, permanent or temporary, effect of—Puja miras, *meaning of*—*Civil Procedure Code*

(4) 8 Ind. Cas. 785; 12 C. L. J. 376.
(5) 11 Ind. Cas. 696.

SUNDARAMBAL AMMAL *v.* YOGAVANAGURUKKAL.

(Act V of 1908), *O. XXIII, r.* 3—Razinama—*Lawful agreement—Plaintiff representing public—Compromise by such plaintiff, whether binding on public—Contract Act (IX of* 1872), *s.* 16—*Undue influence—Pressing necessity of borrower.*

Per *Sadasiva Aiyar, J.*—The mere fact that a man is obliged to part with his properties for what he considers an unduly low price owing to his pressing necessities, is not a ground for holding that the contract by which he parts with his rights is affected by undue influence within the meaning of section 16 of the Contract Act.

A *pujah miras* involves the duty of touching, bathing and adorning, etc, the idols in a temple, the making of offerings to the idols, the reciting of *mantrams*, and the doing of other similar services.

While sex is no disqualification for a woman to hold the office of management of a religious trust, whether Hindu or Musalman, a disqualification to inherit by reason of sex exists in the case of the office of temple *pujari* or *acharya pursha* or other priestly office in a temple or a mosque. Just as an outcaste cannot inherit a religious office by reason of his permanent disqualification, women also cannot.

It is settled custom that females by reason of their sex are permanently disqualified from performing the duties of the office of *archaka* in a *saivite* temple which has been established according to both Vedic and Tantric rites.

Temporary disqualifications, such as minority or curable insanity, death pollutions and birth pollutions and so on, are not obstacles to obtain a right to a religious office by heredity. But permanent personal disqualifications (*e. g.*, conversion to another religion, or female sex), do prevent the acquisition of the right to hold a religious office, notwithstanding that the condition of being the next heir to the previous holder of the office is fulfilled.

A religious office in a Hindu temple can be held by a right of heredity but mere heredity *alone* cannot form a complete qualification entitling the heir to become the owner of such an office, that is to say, though the office is hereditary, it cannot be acquired through mere heredity.

A personally disqualified heir (*e. g.*, a woman who is permanently disqualified to do the duties of an office) cannot inherit the office and at the same time perform the duties of the office through a male proxy.

A permanent personal disqualification to perform the duties of a religious office is also a disqualification to inherit the right to enjoy the emoluments attached to the office.

As the duties of the *archaka* office are more important than the *rights* of the office-holder, that is, as the *rights* of the deity to have the office performed are entitled to much more consideration than the so-called hereditary *rights* of any particular person to hold the office, a dispute involving the right to such an office, when it has once been brought before a Court for adjudication, cannot be settled lawfully by a mere *razinama* between the parties.

The alienation of a religious office by which the alienors obtain a pecuniary benefit cannot be upheld, even if a custom is set up sanctioning such an alienation. Such a custom, even if established by practice, would be illegal.

In a case in which a plaintiff is allowed to represent the public, a judgment by consent will not bind the public even if the consent was not purchased, and *a fortiori* if such consent was purchased.

In this case a *razinama* was held to be unlawful, because:

(1) it was really an alienation of a portion of a religious office;

(2) the alienation was made in favour of persons permanently disqualified to hold the office;

(3) there can be no lawful compromise of a dispute in respect of a religious office, the proper performance of the duties of which concerns not merely the parties to the compromise but principally affects the religious trust itself and the Hindu public for whose benefit the religious trust exists.

Per *Tyabji, J.*—It is not in every case opposed to public policy to provide that a religious office should devolve hereditarily even on persons not themselves qualified to discharge the duties of the office. The question must, in each case, be decided with reference to the particular facts of that case, including the nature of the functions to be performed by the office-holder according to the directions of the founder, the remuneration provided for the performance of those functions, and similar other matters.

Where the functions of an office are of such a nature that they can be performed equally well by any one of a large body of persons, and where the emoluments, provided for the performance of those functions, are far in excess of the necessary usual fees to be paid to the person who is engaged to perform them, the heir of the last office-holder should not be deprived of the office. But where the functions of the office are such that they require peculiar qualifications, intellectual or moral, for performing them, and accordingly a large income has been set apart by the founder for remuneration of the office-holder, the heir of the last office-holder should be superseded in favour of another, sufficiently competent.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to pass a decree in terms of the *Razinama* petition in Second Appeal No. 1333 of 1912, preferred to the High Court against the decree of the District Court of Trichinopoly, in Appeal Suit No. 53 of 1911, (Original Suit No. 39 of 1910, on the file of the Court of the District Munsif of Trichinopoly.)

Mr. *M. B. Doraisawmy Aiyanyar* (with him Mr. *C. Pattabirama Aiyanyar*), for the Petitioners.

Mr. *S. T. Srinivasagopalachariar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—This is a petition put in by the plaintiffs-appellants in the Second Appeal No. 1333 of 1912, praying for the passing of a decree in accordance with the terms of a compromise signed by

the two plaintiffs and by the 1st defendant. The 1st defendant, though he signed the compromise petition, opposed the application on the grounds (a) that he was induced to sign the compromise through undue influence exerted on him by the 2nd plaintiff's husband, (b) that the agreement was not the result of a *bona fide* compromise of doubtful claims but was really a sale of a portion of the 1st defendant's rights for a very low consideration and that the sale was also invalid for want of proper consideration and (c) that the compromise is further illegal as it is really an alienation of a religious office to persons legally incompetent to hold the office (See 17th paragraph of the 1st defendant's affidavit dated 2nd October 1913).

Having considered the affidavits on both sides, I do not think that there is any force in the objections (a) and (b). No doubt, it appears that the 1st defendant was in great pecuniary difficulties when he entered into the compromise, having been arrested by a decree-holder for a debt and having even been obliged to put in an insolvent petition. But the fact that a man is obliged to part with his properties for what he considers an unduly low price owing to his pressing necessities, is not a ground for holding that the contract by which he parts with his rights is affected by undue influence. Under section 16 clause 2 of the Contract Act, unless the 1st defendant shows that his mental capacity was temporarily affected by mental distress or that the 2nd plaintiff's husband stood in a fiduciary relation to the 1st defendant or held a real or apparent authority over him, he (the 1st defendant) cannot get rid of the bargain which he entered into by this agreement or compromise petition.

The real important objection, therefore, is the 3rd objection, namely, that the compromise is in the nature of an alienation of a religious office, and is unlawful and that it cannot, therefore, be accepted by the Court under Order XXIII, rule 3, which provides that it is only when a suit is adjusted by a lawful agreement or compromise that the Court can order such a compromise to be recorded and can pass a decree in accordance therewith. There is also another objection, or rather another aspect of the same objection, argued before us, namely, that a dispute relating to a religious office, cannot be lawfully compromised at all between the parties to the litigation in which the right to the religious office was submitted for the adjudication of the Court. The replies to these two contentions by the appellant's learned Vakil may be summarised thus:—(a) the compromise agreement is not in the nature of an alienation of a religious office, but it was a real compromise of a doubtful claim and it merely admits the right of the plaintiffs to a portion of the claim put forward by them in the suit; (b) there is no illegality in compromising the claim to a religious office under litigation, the office being in the nature of a private civil right; (c) even if it is not wholly in the nature of a private civil right, still there is no illegality in the compromise of such a claim under litigation.

As regards the first question, I have read the *razinamah* carefully and I feel very little doubt that the 1st defendant for some consideration, really parted by way of alienation with a portion of his title to the office of *archaki* in certain temples. Though the *razinamah* begins by saying that the parties in consideration of the costs, losses and worry likely to occur to both of them in the prosecution of this second appeal, have made "the undermentioned arrangements", it proceeds to say that the plaintiffs (appellants) have consented to discharge the 1st defendant's portion of a common debt and that that is also one of the considerations which led to the compromise. It further appears from the affidavits on both sides that the signing of the compromise petition by the plaintiffs and the 1st defendant in March 1913, was the result of a more comprehensive agreement which had been effected by the 2nd plaintiff's husband acting on behalf of the plaintiffs in February 1913. In fact, the document of February 1913, marked as Exhibit A and attached to the affidavit of the 1st defendant, clearly shows that the 1st defendant (a) agreed to part with a portion of his rights to the *pujah* rite

declared in his favour by the decrees of the lower Courts in favour of the plaintiffs and (*b*) further agreed to sell the remaining portion of his rights to the 2nd plaintiff's husband, both agreements being a part of a single transaction in consideration of a sum of Rs. 2,500 promised by the 2nd plaintiff's husband.

These promises, therefore, are clearly in the nature of alienations of rights for a single transaction and neither of them is strictly a compromise of a doubtful claim.

The claim in dispute in this suit is one-half share of *puiah miras* in Rock Fort temple, Trichinopoly. Now this *puiah miras* involves the duty of the touching, the bathing and the adorning etc. of certain idols in the Rock Fort temple, the making of offerings to the idols, the reciting of *mantrams*, and the doing of other similar services. These duties form part of the daily temple services and there are other similar services to be performed on occasions of festivals. For the performance of these services, certain emoluments in the shape of fees are given out of the temple funds etc. The *pujah* office is hereditary, *i. e*, it descends in the line of heirs according to the Hindu Law; but it is admitted that if the next heir under the Hindu Law is a female, she is incapacitated by her sex from performing personally the duties of the office which, as I said before, include the touching of the idols and the recital of the *mantrams* personally. That is, she cannot do the duties of the office personally and cannot hold the office personally. I might at once say that in respect of such a religious office, it is not the right of the office-holder to receive emoluments which is the important or principal right but, in my opinion, it is the right of the deity to have certain services performed to it which is the primary right. I also think that as regards the religious office itself, the duties of the office should be considered as the substance of the office, the right to receive the emoluments being only an appurtenance of the said duties. Even as regards a secular office, say, the office of a clerk in a private Bank, when we think of the office, we have more in view the duties of the said clerk than the emoluments which the clerk is entitled to get from his employer. Of course, in the case of a hereditary office, the idea of "rights" comes a little more into prominence than the idea of the duties attached to the office, but even in such cases, I am inclined to hold that it is the rights that are subordinate and appurtenant to the duties and it is not the duties that are subordinate and appurtenant to the rights. That even a religious office can be held by a right of heredity, has now been too well established to be put in question again, though I have in a recent case [*Phatmabi* v. *Haji Abdulla Musa Saib* (1)] tried to point out the inconveniences and anomalies flowing from the recognition of a hereditary right in respect of such offices. I said in that decision "that a claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavour by Courts, whether the office was created by a Hindu or a Mussalman or an adherent of any other creed. The holding of any office should depend upon necessary qualifications, and, while heredity might raise a feeble presumption of fitness to be considered by Court in arriving at a decision on the question of the successorship to the office, it should not be raised to the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the Courts to treat heredity as the factor to be considered in deciding on the right to the office or unless there has been such a precise and uniform course of descent by heredity (almost irrespective of any consideration as to the personal fitness for holding the office) as to raise an irresistible inference as to the intention of the original creator of the office." Of course in the case of religious offices, mere heredity *alone* cannot form a complete qualification entitling the heir to become the owner of such an office. A religious office in a Hindu temple, though it is a hereditary office, cannot surely be acquired through mere heredity. Let us suppose that the son of the last office-holder has be-

(1) 21 Ind. Cas. 964; 14 M. L. T. 568; (1914) M. W. N. 75; 26 M. L. J. 115.

come a convert to another religion. Even though Act XXI of 1850 removed the disqualification to inherit properties (disqualification formerly existed) on the score of conversion to any other religion, it did not and could not remove the disqualifications to inherit an office owing to the nature of the office being connected with the Hindu religion. A temporary disqualification such as minority or curable insanity, death pollutions and birth pollutions and so on, are, no doubt, no obstacles to obtain the right to a religious office by heredity. But permanent personal disqualifications do, in my opinion, prevent the acquisition of the right to hold a religious office notwithstanding that the condition of being the next heir to the previous holder of the office is fulfilled.

As regards the *archaki* office in a *suvite* temple which has been established according to both Vedic and Tantric rites, it is the settled custom that females by reason of their sex are permanently disqualified from performing the duties of the office of *archaki*. This proposition is not only disputed by the appellants but the affidavits filed on their own side establish it. It is, no doubt, an interesting question whether this disqualification by custom is really in accordance with the ancient Shastras. I am inclined to the view that *Brahmin* ladies who have become twice-born by the proper sacraments (the marriage sacrament being in later days considered as the only sacrament proper to all ladies even *Brahmins* by birth) are entitled to pronounce Vedic *Mantrams* and to hold religious offices, but a discussion of such a question is purely one of academical interest now and I must resist the temptation to enter upon such a discussion, as the question is now settled against the rights of the fair sex on the strength of mediæval legal authorities. These legal authorities have twisted even a Vedic text (which related to the disqualification of a lady in the Vedic days by reason of the feebleness of her nervous organization to share in the Soma drinks) as a disqualification to her inheriting any property, though the unnatural vigour of that monstrous rule was qualified in favour of the wife, the mother and the grandmother by the argument that these ladies are entitled to inherit by reason of special texts. Taking it then that a woman is disqualified by her sex from doing the duties of a religious office, can it be said that she can still be the owner of that office by inheritance, overcoming the disqualification to perform the duties of the office by the expedient of having them performed through a male proxy? I am clearly of opinion that on principle, a personally disqualified heir, *i.e.*, permanently disqualified to do the duties of an office, cannot inherit the office while at the same time delegating the duties to others. Whether the permanent disqualification is the result of conversion to any other religion or insanity or sex, I am unable to see why any distinction, should be made in the results of such disqualification. I do not see any reason how the disqualification to perform the duties can be logically separated from the disability to inherit the rights, consequent on such disqualification. Coming to the authorities, I shall consider them under three headings: (*a*) those which relate to the alienability of a religious office, (*b*) those which relate to the disqualification by sex to hold a religious office and (*c*) those which relate to a compromise of litigations involving rights which are not ordinary rights but rights connected with public or *quasi* public duties (I shall quote only a few authorities under each head).

In *Kuppa Gurukal* v. *Dorasami Gurukal* (2) it was held following *Keyake Ilata Kotel Kanni* alias *Grani* v. *Yadathil Vellayangot Achuda Pisharoti* (3) and the decision in Special Appeal No. 759 of 1876 that the sale of the office of temple *pujari* was invalid. In the case of *Kuppa Gurukal* v. *Dorasami Gurukal* (2), no objection had been taken in the lower Courts to the validity of such a sale and yet this High Court upholding the objection raised in second appeal, dismissed the alienee's suit. The learned Judges doubt the correctness of the decision of *Mancharama* v. *Pranshankar* (4), to the effect that the sale if made to a person in the line of heirs and qualified to perform the duties of the office is not illegal. In *Rajaram* v. *Ganesh* (5) Parsons and Ranade, JJ., approve of the decision in *Kuppa Gurukal* v. *Dorasami Gurukal* (2). That decision related

(2) 6 M. 76; 7 Ind. Jur. 75.
(3) 3 M. H. C. R. 380.
(4) 6 B. 298.
(5) 23 B. 131.

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to the sale of a *vritti* office. The learned Judges consider the Bombay decision as to the alienation of a religious office and make the following remarks:—"It appears from the authorities cited, and from others which will be noticed further on, that a distinction has been made by the Courts between *vrittis* such as those in dispute in this case, and defined in *Ganesh Ramchandra Date* v. *Shankar Ramchandra* (6), and the right of hereditary service in temples, private and public, and between alienation to strangers and to members of the family, and, lastly, between compulsory and private alienation." Then the learned Judges say that custom and practice must be followed in such cases. In *Senndyan Chetty* v. *Sinnappan Servai* (7) Munro and Sankaran Nair, JJ, upheld the contention of the respondent's Counsel as to the inalienability of a non-hereditary religious office and that a renunciation in favour of even the next senior member of the family by the eldest member who held the office was invalid. Thus the Madras High Court, to use the argument of respondent's Counsel in that case "has not accepted the position taken by the Bombay and Calcutta High Courts," namely, that alienation to the next in succession is valid. That the office of *archakas* differs in many respects from a purely secular private office goes without saying. In *Seshadri Aiyangar* v. *Ranga Bhattar* (8) it is stated "The position of an *archaka*, on the other hand, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant." He is subject to the discipline of the trustee of the temple. And it is impossible to admit that a servant can alienate his office with its appurtenant emoluments at his pleasure (even to another qualified person) especially without the consent of his master, for by such alienation he would encroach upon the rights of his master. I might add that as regards Mahomedan religious offices also, the case of *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh* (9) has established that the sale of such a religious office is invalid. Macpherson, J., said in his judgment in the case of *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah* (10). "Such a sale would practically destroy the endowment, or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up: for the purchaser, whoever he might be—even if a Mahomedan or a Christian—would have the right of performing the worship of this Hindu idol." Then in *Raja Muttu Ramalinga Setupati* v. *Periana-yagam Pillai* (11), their Lordships of the Privy Council said that the sale of a trusteeship for the pecuniary advantage of the trustee, even though sanctioned by custom, will not be valid. Their Lordships say that they would be disposed to hold that "that circumstance alone," *i. e.*, the circumstance that the alienation was for the pecuniary advantage of the vendor, "would justify a decision that the custom was bad in law." Hence I am quite clear that the alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld even if a custom is set up sanctioning such an alienation. Some affidavits on the appellant's side in this case speak to alienations by way of mortgages and sales, in favour of even Vellalas and Chetties, of the *archaka* office and its emoluments and the appellants wish us to uphold the validity of even such mortgages and sales to disqualified persons on the ground of practice and custom and to uphold the rights of such disqualified alienees to have the duties performed through a *Brahmin* substitute. I am inclined to hold that such customs and practices are illegal.

Coming to the next set of authorities, it has been, no doubt, held that sex is no disqualification for a lady to hold the office of management of a religious trust whether Hindu or Mussalman. The case of *Srimant Rajah Yarlagadda Mallikarjuna* v. *Makerla Sridevamma* (12) was a case in which a widow succeeded to the trusteeship of a charitable endowment and her right to succeed was not questioned. In *Dhuncooverbai* v. *Advocate-General* (13), a female was held entitled to be the *Mohunt*

(6) 10 B. 395.
(7) 7 Ind. Cas. 901; 20 M. L. J. 654; 8 M. L. T. 325.
(8) 10 Ind. Cas. 548; 21 M. L. J. 580 at p. 582; 10 M. L. T. 14; 35 M. 631.
(9) 24 C. 83.
(10) 7 W. R. 266.
(11) 1 I. A. 209.
(12) 20 M. 162; 7 M. L. J. 289; 24 I. A. 78; 1 C. W. N. 497.
(13) 1 Bom. L. R. 743.

of a Bairagi *Mutt* but it is doubtful whether her right was not recognised in that case on the ground that the custom of that particular Bairagi community did not disqualify a female from holding that office. Managers of several temples have been *Sudras*. [See *Radha Mohun Mundul* v. *Judoomonee Dossee* (14)]. In fact, several non-*Brahmin* Tambirans are managers of many temples in Southern India. Hence so far as the question of the management of temples or mosques is concerned, sex is no disqualification. But as regards the office of temple *pujari* or *acharya purusha* or other priestly office in a temple or a mosque or among a community, there are cases which show that disqualification to inherit by reason of sex can exist. In *Seshammal* v. *Soondararajaiengar* (15), it was held following the opinion of the Sadder Court Pandits, that a woman was disqualified by reason of her sex from inheriting the office of *acharya purusha*. The Pandits clearly say that a lady being the next heir under the ordinary Hindu Law to the properties left by the last male, cannot by itself entitle her to inherit also the office of *acharya purusha* left by the said male owner (though lands were attached to that office as emoluments) as she was disqualified by reason of her sex from performing the duties of the office. The Pandits seem to have when pressed with the further questions, attempted to make a distinction between the *acharya purusha* office and the office of *archaka* or *purohita* and to have been inclined to hold that these other offices which, though religious offices, are not of as high a character as an *acharya purusha's* office, may be inherited by females, though females could not perform the duties of these offices and that such female heirs might employ male substitutes to do the duties of these lower offices while themselves enjoying the emoluments; but that opinion was clearly *obiter* and no reasons were given or authorities quoted by the Pandits. In *Janokee Debea* v. *Gopaul Acharjea* (16), the Calcutta High Court say that a widow who was a heiress of her husband as regards private properties, cannot by reason of that simple fact claim to be entitled also to succeed to her husband's right to hold the office in a temple. The learned Judges say: "The presumption in her favour from her husband having been in possession would not apply in this case in the same way and with the same force as if the question were—who was to succeed to her husband's private estate. There the ordinary rule of inheritance must prevail unless displaced by some special rule. Here the very question at issue is whether the rule of inheritance prevails at all." Of course, the duties of the office of *shebait* may merely involve the management of the trust and in that case, there is no disability in a female heir to succeed to the office but if it also involves the *archaka* duties, I think that sex is a disqualification according to the accepted law. In *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (17), the office in question involved the reading of the *fatiha* in a mosque, the person holding the office was called the *Majavar*. The learned Judges (Turner, C. J, and Kindersley, J.) say:—"It appears from the evidence that the office of *Mujavar* entails the discharge of duties of a spiritual character, such as reading the *fatiha*, offering prayers and incense, etc, which could not conveniently be performed by a woman. There is no satisfactory evidence that the office has ever been held by a woman, except in one instance, and that was at a different place, and in that case it is admitted there were in the family in which the office was hereditary no male members by whom its functions could be discharged." Then the learned Judges say that the decision of *Hussain Beebee* v. *Hussain Sherif* (18) notices the distinction which exists between a trusteeship for secular purposes, which can be held by a woman, and *an office entailing religious duties, for which a woman is not eligible*. Vrikan Naradiya Purana (it may be spurious Purana but it has been accepted as an authority) says that woman and *Sudras* are not competent to touch the images of Vishnu or Siva. In the Padma Purana, the disability of females is assumed in several passages.

(14) 23 W. R. 369.
(15) (1853) M. S. D. A. 261.
(16) 2 C. 365; 1 Ind. Jur. 737.
(17) 3 M. 95; 5 Ind. Jur. 190.
(18) 4 M. H. C. R. 23.

In Colebrook's Digest Vol. I at page 379 it is said:—

"On this point it is argued, that, as the rites cannot be performed by an ignorant or disabled person, the law directs that he shall be forsaken, intending that the rites should be performed by means of a substitute, but the ignorant person has property in the sacrificial fees and the like, as the owner of a slave has property in the wealth acquired by the slave and this construction should be settled on the strength of the admission of a property vesting in the heir. The text which ordains that, 'a person unable to act shall appoint another to act for him,' is the foundation for this construction: *but the property of an outcaste or other person disqualified for solemn rites, is absolutely lost, in the same manner with his right to the paternal gold, silver and the like.* This will be explained in the fifth book, on Inheritance. *Wives and others, disqualified by sex for the performance of holy rites, cannot appoint a substitute; as a defiled person cannot perform a solemn act ordained by the Vedas, therefore, wives have no property in the office of priest.*" No doubt, Mr. Ganapathy Aiyer says in his learned book at page CLVIII: "As usual with the discussion of Jagannatha, it is difficult to say what his final opinion is." But I am inclined to think (differing from the learned author, Mr. Ganapathy Aiyer) that the inclination of Jagannatha's opinion was that just as an outcaste cannot inherit a religious office by reason of his permanent disqualification, women also cannot. If I understand the appellant's learned Vakil's contention aright, he seemed to admit that it might be a question whether the trustee of the temple has not got a voice in accepting male substitute thrust by a female heir of the temple to perform the duties of the office and whether the trustee is bound to accept any qualified substitute. If personal disqualification is no hindrance to inheriting the office, why should not a convert to Christianity or Islam also inherit the religious office and provide a substitute? In the result, I hold that permanent personal disqualification to perform the duties of the office is also a disqualification to inherit the right to enjoy the emoluments attached to the office.

Coming to the last set of authorities, in *Monmohini Guha* v. *Banga Chandra Das* (19), it was held that a grant of Probate which establishes a right *in rem* cannot be made merely on the consent of parties and that an agreement or compromise which involves a right affecting not only the parties to the action but the public cannot be compromised so as to oblige the Court to pass a decree in terms thereof. The learned Judges say that "An agreement or compromise as regards this issue" if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of section 375 of the Code of Civil Procedure, when the Court has not an opportunity of judging for itself whether the Will is the Will of the deceased person and to what extent the rights of the parties will be affected, if the agreement be allowed to be made a rule of Court." The Court itself has certain duties in connection with a case in which a judgment *in rem* has to be pronounced, or in a case which involves the right of the public or the right of a religious and charitable office, or the right of a minor or other incapacitated person. Where an agreement or compromise attempts to affect such rights after they are brought before the Court for adjudication, it seems to me that it is not a lawful agreement or compromise. In *Mahomad Ibrahim Khan* v. *Ahmed Said Khan* (20), the learned Judges say:—"A party can refer a matter of a private individual right of a civil nature to arbitration, but he has no power to refer a matter *which is not purely of a private civil character*, and it is on this ground that a Bench of this Court in *Mahadeo Prasad* v. *Bindeshri Prasad* (21) held that the appointment of a guardian to a minor not being a matter of a private right as between parties, was not a question which could be settled by reference to arbitration." Then the learned Judges say: "the right to the office of a trustee to a public charity cannot also be settled by private arbitration." As I have shown above, the duties of the *archaka* office are more important than the rights of the office-holder; the rights of the deity to have the duties of the office performed are entitled to much more consideration than the so-called hereditary rights of any particular person to hold the office and it, therefore, seems to me that the dispute involving the

(19) 31 C. 357; 8 C. W. N. 197.

(20) 6 Ind. Cas. 219; 32 A. 503 at p. 513; 7 A. L. J. 761.

(21) 30 A. 137; 5 A. L. J. 101; A. W. N. (1903) 51; 3 M. L. T. 203.

right to such an office when it has once been brought before a Court for adjudication cannot be settled lawfully by a mere *razinama* between the parties. To summarise, I hold that the *razinama* in this case is not lawful (1) because it is really an alienation of a portion of a religious office, that is the right to receive the emoluments of the office during certain days in the year, (2) because the alienation is made in favour of persons who are permanently disqualified to hold the office and (3) because there can be no lawful compromise made of a dispute in respect of a religious office, the proper performance of the duties of which concerns not merely the parties to the compromise but principally affect the religious trust itself and the Hindu public for whose benefit the religious trust exists.

As held in *Jenkins* v. *Robertson* (22), the decree by consent between a plaintiff (who is allowed to represent the public) and the defendants, would not bind the public at large and it is only the result of a contested obligation which would bind the public. A judgment by consent will not bind the public even if the consent was not purchased and *a fortiori* if such consent was a purchased consent. In the present case the rights obtained by the plaintiffs under the disputed compromise were clearly purchased rights. In *Raja M. Bhaskara* v. *Narayanasamy Gurukkal* (23), the Court refused to allow the Raja of Ramnad who was a temple trustee to compromise a dispute with the Shanars which related to the alleged rights of the Shanars to enter the temple, because such a compromise affected the usages of the temple and the rights of the other sections of the Hindu public. [See also *Gyananda Asram* v. *Kristo Chandra Mukherji* (24).]

In the result, this Petition No. 924 of 1913 in which the plaintiffs (appellants) pray for the passing of a decree in accordance with the terms of the *razinama* must be dismissed and is dismissed. There will be no order as to costs as the 1st defendant, having agreed to the compromise, has succeeded in his objections not on the ground of any merits in himself but on the ground of public policy which requires the Court not to accept the compromise in the interests of the public and of the religious trust.

TYABJI, J.—I have had the benefit of reading the judgment prepared by my learned brother. I agree that the compromise cannot be upheld. As he has discussed the law in detail, it is unnecessary for me to do the same. But with regard to the main question whether a Hindu female can hold the religious office which is the subject of litigation,—I should like to indicate why I have come to the conclusion that the compromise cannot be upheld.

The founder of a religious charitable institution has wide powers of laying down the manner in which he requires the institution to be administered, and that power includes the laying down of the method of filling the offices necessary for administering the institution. So that if he desires that the office-bearers shall be selected in any particular mode, his desire is, as a rule, given effect to But his desires will not be given effect to if, for instance, they are opposed to public policy or if they are opposed to the fulfilment of the general object of the institution.

Where, therefore, the question is whether a particular person should succeed to a religious office, the first matter to which attention must be directed is, in what method did the founder of the institution desire that the succession to the office should devolve? Where the founder has put his desires in writing, in the form of a trust deed or *sanad* or some similar instrument, it only remains to interpret that instrument, and to see whether there is anything in law or in the nature and objects of the institution to prevent these desires being given effect to. But where, as frequently happens, there is no written instrument laying down the terms in accordance with which the institution is to be administered, the course of practice in the past may furnish indications of what the founder must have intended; and this may be supplemented by the general law and also by a consideration of the customs and usages prevailing in similar institutions in the same locality.

Where, therefore, the question arises whether a particular person is entitled to hold the office, and that person bases his claim on the hereditary devolution of the

(22) L. R. 1 H. L. Sc. 117.
(23) 12 M. L. J. 360.
(24) 8 C. W. N. 404.

office, it must, in the first instance, be determined whether, as a matter of fact, the founder desired that the office should devolve hereditarily. If it is found that he did so desire, then the question will be whether there is any reason why that desire should not be given effect to. If, on the other hand, it is doubtful whether he did so desire, a number of considerations must arise. In the particular case with which we are now dealing, the first question that is involved is whether the office was intended to devolve hereditarily and in such a manner that, if the person indicated by the hereditary principle is a female and if her sex necessarily disqualifies her from performing the functions of the office, still she must be deemed to hold the office, having the right to get the functions of the office performed by a deputy. There is no instrument showing what the intentions of the founder were, and we have, therefore, to discover whether he could have intended to lay them down as is claimed on behalf of the plaintiff. In considering whether such could have been the intention of the founder, regard must be had, to the point whether the hereditary system of selection is merely chosen as an easy mode of selecting the person who is to hold the office, or whether it is intended to provide that the property should belong to the first office-holder and his descendants. For this purpose an important consideration appears to be whether the emoluments of the office are commensurate with the duties to be performed by the person holding the office. Thus, if it is found that the functions of the office are such that they may be performed by any member of a large body of persons, and that no special abilities or moral qualities are necessary for enabling the person to perform the duties satisfactorily,—in such a case the expenses of getting the duties performed are frequently in the nature of fees paid to *Brahmins* or other members of the priestly class for conducting the ceremonies, and these fees are fixed within certain limits by custom. The fact that a higher fee may be demanded by one person for performing such ceremonies does not imply that he will perform them better than another: for *ex hypothesi* the functions are such as can be performed equally well by any one of the body of persons who are competent to perform them. Where, then, the functions of the office are of such a nature that the expenses for performing them consist of more or less fixed fees, and where it is found that the emoluments provided for the performance of these functions are far in excess of the necessary usual fees, and where in such a case the office is made to devolve hereditarily, these facts may furnish indications that the intention of the founder was that the property should remain in the family of the first office-holder but should be charged with the expenses of getting the duties of the office performed, with liberty to the members of the family to perform the duties themselves and thus to save the paying out of fees to a third person.

In such a case, therefore, I should be less inclined to hold that a person who would be entitled to the property by heredity should be deprived of that property because that person cannot himself or herself fulfil the functions; for I have started with the assumption that the functions are of such a nature that they can easily and satisfactorily be got to be performed by payment of comparatively small fixed fees. The institution in such a case does not suffer by the heir of the last office-holder, being the nominal office-holder and the duties being performed by another person.

The case, however, is entirely different where the functions of the office are such that they require peculiar qualifications, intellectual or moral, for performing them: as for instance if the functions consist of giving expositions of religious or moral duties. In such a case where a large income is set apart for the remuneration of the office-holder, it may well be inferred that the founder desired that the best available person should be selected to fill the office, and it is obvious that the higher the remuneration offered, the greater the chances of obtaining a competent person to discharge the duties. In such a case to hold that one person should nominally be the office-holder and should take the full emoluments provided by the founder for the office, and should, out of a portion of such emoluments, remunerate the person who is actually to perform the functions of the office, would be to get a person to perform the functions on

payment of much smaller emoluments than were intended by the founder, and in this way to prevent as competent a person being available for the performance of the functions as had been provided for by the founder.

For these reasons, though I am not prepared to lay down broadly that in every case, it is opposed to public policy to provide that a religious office should devolve hereditarily even on persons not themselves qualified to discharge the duties of the office, neither am I, by any means, of opinion that such a provision can always be given effect to. It seems to me that the question must be decided with reference to the particular facts of the case, including the nature of the functions to be performed by the office-holder according to the directions of the founder, the remuneration provided for the performance of those functions, and similar other matters.

Now on the facts of this case, it would seem (and my learned brother informs me to the same effect) that the particular office concerned is in its nature such as requires special qualifications for being properly filed. Its functions are not such as can be discharged by any individual; a fit and proper person must be selected for discharging them satisfactorily. The emoluments also are such that no surplus is left after providing a fair remuneration for the office-holder, and to lessen those emoluments would be to prevent a proper person being selected for holding the office, and for its functions being discharged in the manner that they ought to be discharged.

Under these circumstances, I agree that we cannot proceed on the basis that the office with which we are dealing can be permitted to be the subject of a compromise by which a female is to hold it in form, and to get its functions performed by a male proxy.

Petition dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 902 OF 1912.

February 12, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

KANAGAMMAL AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

PANCHAPAKESA ODAYAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 3, 5, s. 115—Application to sue in forma pauperis *—Rejection by Court.*

Leave to sue in *forma pauperis* under Order XXXIII, rule 5, ought not to be refused on insufficient grounds.

Rathnam Pillai v. *Pappa Pillai*, 13 M. L. J. 292, *Koka Ranganayaka Ammal* v. *Koka Venkatachellapati Nayudu*, 4 M. 323, referred to.

A plaint presented by two or more plaintiffs claiming different reliefs against the same defendant cannot be said to be framed improperly or bad for misjoinder of causes of action.

Nilmadhab Mitra v. *Jotindra Nath Mitra*, 18 Ind. Cas. 764; 17 C. W. N. 241, referred to.

Where claims, some of which are sustainable in law and others unsustainable in law, are joined together in one suit, it is open to the Court to direct the applicant to amend his plaint, so as to separate the sustainable from the unsustainable reliefs; and although a pauper application does not become a "plaint" within the meaning of Order VI, rule 1, until admitted under Order XXXIII, rule 8, the Court has, under section 141 of the Code of Civil Procedure, a general power to direct an amendment of this kind.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram, in Original Petition No. 359 of 1911.

Mr. *T. R. Ramachandra Aiyer*, with him Messrs. *K. Parthasaradhi Aiyangar* and *A. Sriranga Aiyanger*, for the Petitioners.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.—The plaintiffs are the petitioners. The first plaintiff is the mother of the minor 2nd plaintiff. Their application to the learned Subordinate Judge of Mayavaram to be allowed to sue in *forma pauperis* to obtain reliefs of future maintenance and recovery of arrears of maintenance was rejected by the learned Subordinate Judge. The total value of the reliefs claimed by them was Rs. 11,700. The first plaintiff gave the value of the properties belonging to her as Rs. 327 and the value of the properties belonging to the minor 2nd plaintiff as nil. The Rs. 327 worth of moveables was, of course, not sufficient to

pay the Court-fee stamps on the reliefs worth Rs. 11,700, the Court-fee required being Rs. 535. The lower Court did not go into the question whether the plaintiff's *pauperism* was established but it rejected the application on the ground that the requirements of rule 5, Order XXXIII, had not been complied with by the petitioners. That rule 5 says that the Court should reject an application for permission to sue as a *pauper* (*a*) where the application is not framed and presented in the manner prescribed by rules 2 and 3 (*b*) where the applicant is not a *pauper*, (*c*) where he has within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as a *pauper*, (*d*) where his allegations do not show a cause of action, (*e*) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter. It is difficult to gather from the learned Subordinate Judge's order what particular requirements of rule 5, Order XXXIII, had not been complied with by the petitioners. It is admitted that the questions (*b*), (*c*) and (*e*) arising under rule 5 were not considered or relied on by the Subordinate Judge, and that those clauses need not be considered in dealing with the petitioner's application. We have only to consider clauses (*a*) and (*d*).

As regards clause (*d*), unless the petitioner's allegations in their petition do not show "a cause of action" (that is, any cause of action), the Court cannot reject the application. The Subordinate Judge does not say in his order that the allegations do not show any cause of action. He only says that it is doubtful whether the 2nd plaintiff can be awarded maintenance if he was entitled to sue his putative father's undivided brother (1st defendant) for partition of the undivided family properties of his said father and of the 1st defendant.

It is the case of the defendants themselves that the 2nd plaintiff has no such right to sue for partition. If so, the 2nd plaintiff has undoubtedly a cause of action (if the allegations in the *pauper* application are true) to sue for maintenance. If again the 1st plaintiff is the permanent concubine of the 1st defendant's deceased brother, her claim for maintenance cannot be said to be groundless. As said in *Vijindra Tirtha Swami* v. *Sudhindra Tirtha Swami* (1), where there is a ground for reasonable doubt, leave should be granted and should not be refused. In the Full Bench case of *Rathnam Pillai* v. *Pappa Pillai* (2), it was held that evidence on the merits of the case of the *pauper* applicant cannot be gone into in the preliminary investigation of the question whether leave ought to be granted or not and *Koka Ranganayaka Ammal* v. *Koka Venkatachellapati Nayudu* (3) was followed. It may be that the plaintiffs when they claimed maintenance also on behalf of the two daughters of the 1st plaintiff, have added a claim which is not supported by any cause of action vesting in the plaintiffs but clause (*d*) of rule (5) does not justify the dismissal of an application simply because some of the several causes of action mentioned by the plaintiffs are not shown to vest in themselves and only the others vest in them. It is only where the plaintiffs' allegations do not show any cause of action as regards any of the reliefs that the application could be rejected under that rule.

We have thus left only to consider whether the application could be rejected under clause (*a*) of rule 5. That clause says that if the application is not framed and presented in the manner prescribed by rules 2 and 3, it shall be rejected. Rule 2 says that the application shall contain the particulars required in regard to plaints in suits and a schedule of any moveable or immoveable property possessed by the applicant with the estimated value thereof, and that it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. As regards the particulars requireds by plaint in suits we have to turn to Order VII, rule 1, and those particulars are contained in clauses *a* to *i* of Order VII, rule 1. I am unable to find any defect in the application either by omission of any of the particulars required by Order VII, rule 1, or by the omission of a schedule of property belonging to the

(1) 19 M. 197 at p. 198.
(2) 13 M. L. J. 292.
(3) 4 M. 323.

applicant or by the omission of the signature and verification of the applicant. Then as regards rule 3 of Order XXXIII, that rule requires the presentation of the application by the *pauper* herself or by an authorised agent and there is no defect alleged in regard to this particular either. The learned Subordinate Judge seems to think that because the 1st plaintiff's cause of action for her maintenance claim is different from the 2nd plaintiff's cause of action for his maintenance claim, therefore the application is not framed in the manner prescribed by Order XXXIII, rule 2. I am unable to agree with him. In the first place, Order VII, rule, 1 which relates to the particulars to be contained in the plaint and which is incorporated in Order XXXIII, rule 2 does not deal with the question of mistakes of law or fact or mistakes of non-joinder or misjoinder found in the plaint. It only deals with the question whether the particulars (*a*) to (*i*) mentioned in that order are found in the plaint. If they are so found, the application is framed in the manner prescribed by Order XXXIII, rule 2, and that is all what order XXXIII, rule 2, requires. In the 2nd place, I am unable to see that there is any misjoinder of causes of action so far as the claims of plaintiffs Nos. 1 and 2 to be awarded maintenance are concerned. Order I, rule 1, allows several plaintiffs to bring a single suit though the causes of action of the several plaintiffs are different, provided that the transaction out of which their separate claims arise is one and that any common question of law or fact exists in respect of the separate claim. In *Nilmadhab Mitra* v. *Jotindra Nath Mitra* (4) it was held that a husband and a wife and their son could all join in a single suit to recover the maintenance due to them separately, the words of Order I, rule 1, Civil Procedure Code being relied on for that conclusion.

Lastly it is urged that as the plaintiffs claim maintenance on account of the 1st plaintiff's daughters (2nd plaintiff's sisters) also, and as the plaintiffs have no cause of action vesting in themselves to sue for such maintenance, the *pauper* application which includes such an unsustainable claim must be rejected. As I said before, Order XXXIII, rule 5, clause (*a*) does not allow the rejection of the application on the ground that patently unsustainable claims have been joined in the application to sustainable claims. It is only if the application is not framed and presented in the manner prescribed by rules 2 and 3 that the application can be rejected. But it is further contended (*a*) that the Court has not got the power to direct the application to be amended by striking out that portion of the prayer which claims the unsustainable reliefs, (*b*) that if the Court has no power to order the application to be so amended, it would be unable to find out the separate value of the sustainable reliefs from the total value of Rs. 11,700 given in the application for both the sustainable and the unsustainable reliefs, and (*c*) that the Court would again be unable in consequence to find out whether the Rs. 327 which is the value of the plaintiff's properties could cover the Court fees due on the sustainable reliefs and hence whether the application to sue as *pauper* could be granted as regards even the sustainable reliefs. On these contentions, it is argued that the proper course was taken by the Court under these circumstances when it wholly rejected the application.

As regards the argument under the heading (*a*), I do not agree with the contention that the Court has not got the power to order the amendment of the application if it is improperly framed through misjoinder of causes of action and reliefs. No doubt, Order VI, rule 17, relates only to the power of the Court to allow parties to alter and amend *pleadings*; and the word "pleadings" means only plaints and written statements (see Order VI, rule 1); and an application to sue as a *pauper* becomes a *plaint* and, therefore, a *pleading* only after it is granted (see Order XXXIII, rule 8). But the power of a Court to direct a *pauper* applicant to amend his *pauper* application is one of the inherent powers of the Court, and it does not require any specific provision of the Civil Procedure Code to enable the Court to exercise this power. I am also of opinion that section 141, Civil Procedure Code, which makes "the procedure" provided in regard to suits applicable to other "proceedings" also, governs proceedings connected with *pauper* applications also and thus enables the Court to apply the provisions of Order VI, rule 17, to such proceedings.

(4) 18 Ind. Cas. 764; 17 C. W. N. 541.

In the result, I hold that the learned Subordinate Judge acted illegally and with material irregularity in rejecting the *pauper* application on the grounds set out by him. I set aside his order and remand the application for proper disposal with reference to the above remarks. I shall make no order as to costs in this Court. Costs in the lower Court will abide.

Order set aside.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 973 OF 1911.

January 29, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

NUR DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat JHANDO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884), s. 70 (1) (b)—Act I of 1912—Revision—Chief Court, powers of, under amending Act.

The power of entertaining a second appeal in a land suit below Rs. 1,000, under section 70 (1) (*b*) of the Punjab Courts Act, as it stood before its amendment by Act I of 1912, has been withdrawn from the Chief Court by the Amending Act of 1912.

Second appeal from the decree of the Divisional Judge, Lahore, dated the 5th June 1911, confirming that of the Subordinate Judge, Lahore, dated the 1st April 1910, decreeing plaintiff's claim.

Mr. *Ram Bhaj Datta*, for the Appellants.

Mr. *Dhan Raj Shah*, and Lala *Moti Lal*, for the Respondents.

JUDGMENT.—This is a further appeal in a land suit in which the two lower Courts have agreed. The value of the suit is under Rs. 1,000 and both parties before us are agreed that no further appeal lies under section 40 of the Punjab Courts Act as the law stood at the date, when this appeal was lodged. Mr. Ram Bhaj Datta asks us to exercise our powers under section 70 (1) (*b*) of the Act as the Act stood at the date of institution of appeal. But powers under that section have been taken away from us by Punjab Act I of 1912, and we cannot, therefore, listen to his application. The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 162 OF 1913.

February 12, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

SAMINATHA PATHAN—PLAINTIFF—PETITIONER

versus

RADHA KRISHNA PATHAN—DEFENDANT—RESPONDENT.

Promissory-note invalid for want of stamp—Antecedent oral agreement—Plaintiff, whether entitled to fall back on oral agreement.

The plaintiff and the defendant were partners. On the partnership accounts being taken some money was found due to the plaintiff from the defendant who paid a portion of the sum due and executed a pro-note for the balance. The pro-note was not properly stamped and, therefore, could not be sued upon. Under these circumstances the plaintiff based his suit for recovery of the balance on the original cause of action:

Held, (1) that the payment of a part of the money due after the settlement of accounts was evidence of an agreement to pay the balance;

(2) that, as the agreement to pay was prior to the execution of the pro-note, the plaintiff could sue on that agreement.

Kodali Mallaya v. *Turigopala Ramayya*, 10 Ind. Cas. 177; 10 M. L. T. 55; 21 M. L. J. 462, distinguished.

Muthu Sastrigal v. *Vishwanatha Pandra Sannadhi*, 21 Ind. Cas. 861; 14 M. L. T. 520; (1914) M. W. N. 58; 26 M. L. J. 19, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge of Tanjore, in Small Cause Suit No. 117 of 1912.

Mr. *G S. Ramachandra Aiyar*, for the Petitioner.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondent.

JUDGMENT.—The case has been fully argued before me and I do not think it necessary to reserve judgment.

The facts are these:—The plaintiff and the defendant are partners. In February 1909 the accounts were looked into between the parties and the plaintiff's case is that a sum of about Rs. 1,000 was found due to him from the defendant, and at that time a portion of the money found due was paid, and that a promissory-note was taken for the balance. The promissory-note, it is admitted, cannot be sued on, owing to its not being properly stamped, and, therefore, the plaintiff brings this suit upon the original cause of action.

The plaintiff states in his plaint that prior to the execution of the promissory-note, there was an oral agreement to pay the

sum of Rs. 150 and that, therefore, he is entitled to fall back upon that agreement as well as upon the original liability of the defendant to pay him the amount due under the partnership.

The contention of the defendant is that the promissory-note, the settlement of accounts and the oral agreement were all contemporaneous and form part of the same transaction and consequently if the promissory-note is invalid, the plaintiff is not entitled to fall back upon the agreement or on the liability under the accounts.

The Subordinate Judge in his judgment says: "The alleged oral agreement and the written contract (pro-note) were contemporaneous and constituted one transaction". I take it that the Subordinate Judge intended to find that there was an agreement prior to the execution of the promissory-note. It is no doubt true that in the evidence given by the plaintiff, there is no mention made of this alleged previous agreement although in the plaint there is a distinct averment that the promissory-note followed a previous agreement between the parties. I am prepared to hold that the previous settlement and the payment of a certain sum of money in pursuance of that settlement can be used for inferring an agreement to pay the balance of Rs. 150 and that the promissory-note was simply evidence of that agreement to pay. In that view of the facts of the case, there is no difficulty in applying the principles of law which have been enunciated in various cases.

The case of *Kodali Mallayya* v. *Tarigopala Ramayya* (1), to which my attention has been drawn by Mr. Muthukrishna Aiyar is altogether different from the present case. In that case it has been pointed out that where there is no pre-existing right and the document itself creates the obligation, a suit will not be maintainable if that document is found to be invalid. The observations of Sadasiva Aiyar, J., in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (2), are in point. The learned Judge says:—"I do not intend to say that if there is a contractual or other definite completed obligation, capable of proof, prior in date to the invalid promissory-note, the plaintiff 'cannot' sue on that prior independent obligation". I hold in this case that there was a prior independent obligation, an obligation resulting from the relationship of the parties and from the agreement which was entered into, prior to the execution of the promissory-note. No doubt this case is almost on the margin. But as I said before, the payment of a certain sum of money after the settlement of accounts is some evidence of an agreement to pay the balance pleaded in the plaint and I agree with the Subordinate Judge in thinking that there was this previous agreement. I hold, therefore, that the suit is maintainable upon the original cause of action, independent of the invalid promissory-note and that the plaintiff is entitled to a decree.

As I understand that there is no other question regarding the amounts due to the plaintiff, I reverse the decree of the Subordinate Judge, and give a decree to the plaintiff. As there is no evidence regarding any agreement to pay interest, the decree to the plaintiff will be only for the principal sum of Rs. 150 with interest at 6 per cent. from the date of the plaint. The plaintiff is entitled to proportionate costs throughout. There will be no costs to the defendant on the amount disallowed.

Decree reversed.

(1) 10 Ind. Cas. 177; 21 M. L. J. 462; 10 M. L. T. 55.

(2) 21 Ind. Cas. 864; 14 M. L. T. 520; (1914) M. W. N. 58; 26 M. L. J. 19.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 649 OF 1909.

October 20, 1913.

Present:—Mr. Justice Kensington and Mr. Justice Beadon.

MOHAMDA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LADHA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed after time—Sufficient cause—Gross carelessness of Pleader.

Where an appeal, which should have been filed in the Chief Court, was owing to the gross carelessness of a Pleader, filed in the Divisional Court and on being returned to be presented in the Chief Court was filed there after the expiry of the period of limitation:

MOHAMDA *v.* LADHA SINGH.

Held, that the provisions of section 5 of the Limitation Act did not apply to the case because under the circumstances of the case the appellant had no sufficient cause for not filing the appeal in the Chief Court within the prescribed period.

Sant Singh v. *Qaim*, 118 P. R. 1908; 197 P. W. R. 1908, followed.

Kura Mal v. *Ram Nath*, A. W. N. (1906) 67; 3 A. L. J. 218; 28 A. 414 and *Anjora Kunwar* v. *Babu*, 4 A. L. J. 515; A. W. N. (1907) 219; 29 A. 638, not followed.

Ghulam Shah v. *Mallik Muzaffar Khan*, 81 P. R. 1886; *Krishna* v. *Chathappan*, 13 M. 269, referred to.

Balaram Bhramarator Ray v. *Sham Sunder Narendra* 23 C. 526; *Dadabhai Jamsetji* v. *Maniksha Sorabji*, 21 B. 552; *Balwant Singh* v. *Gumani Ram*, 5 A. 591; A. W. N. (1883) 142; *Wazir Ali Khan* v. *Zainab*, A. W. N. (1903) 32; *Sardar Partab Singh* v. *Lala Karm Chand*, 184 P. R. 1889, *Musammat Gouhar* v. *Khan Muhammad*, 66 P. R. 1891, cited.

First appeal from the decree of the District Judge, Gujranwala, dated the 23rd July 1908, dismissing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Fazil-i-Hussain*, for the Appellants.

Mr. *Dharm Das Suri*, for the Respondents.

JUDGMENT.—The suit which is the subject of this appeal was dismissed by the District Judge on the 23rd July 1908. The value of the suit for purposes of jurisdiction is Rs. 7,564 11 0 and consequently the appeal lies to this Court and not to the Divisional Court.

The plaintiffs, instead of coming to Lahore in order to appeal, engaged a leading member of the local Bar at Sialkot who filed the appeal in the Divisional Court on 21st August 1908. The mistake was not detected by the Divisional Judge's office and the appeal came beofre the Divisional Judge for hearing on the 21st May 1909. On that date, the Divisional Judge, finding that he had no jurisdiction returned the appeal for presentation to this Court. The plaintiff then filed the appeal in this Court on the 25th May 1909, when the period of limitation for appeal had expired.

Section 5 of the Limitation Act is relied upon and the point for decision is whether the plaintiffs, under the circumstances noted above, had sufficient cause for not presenting the appeal within the prescribed period.

In *Kura Mal* v. *Ram Nath* (1) which was followed by a single Bench in *Anjora Kunwar* v. *Babu* (2) it was, no doubt, held that when a client *bona fide* accepts advice of Counsel as to the proper procedure to adopt in the course of litigation, and misled by that advice, fails to file an appeal within time, he is entitled to the benefit of section 5 of the Limitation Act. But in view of the decision of a Division Bench of this Court in *Sant Singh* v. *Qaim* (3), we with every respect venture to think that this ruling goes too far.

Other authorities cited on behalf of the appellants are *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra* (4), *Dadabhai Jamsetji* v. *Maneksha Sorabji* (5), *Balwant Singh* v. *Gumani Ram* (6), *Wazir Ali Khan* v. *Zainab* (7), *Sardar Partab Singh* v. *Lala Karm Chand* (8) and *Musammat Gouhar* v. *Khan Muhammad* (9) and no doubt there are cases in which in certain circumstances a *bona fide* mistake has been held to be sufficient cause for delay. But in *Ghulam Shah* v. *Mallik Muzaffar Khan* (10) the Full Bench did not go further than to rule that it cannot be laid down as a general proposition that ignorance of law can never be considered and Barkley, J. made it clear that it is inexpedient to lay down any general rule to control the discretion of the Court in dealing with each case with reference to its particular facts. According to *Krishna* v. *Chathappan* (11) which is referred to in the case relied on by appellants in the *Wazir Ali Khan* v. *Zainab* (7) the true rule is, whether under the special circumstances of each case, the appellant acted under an honest, though mistaken, belief formed with due care and attention.

The question now before us was very fully considered in *Sant Singh* v. *Qaim* (4), in which the facts were practically on all fours with the facts in the present case and it was held that the excuse for delay was insufficient.

In the present case, as in *Sant Singh* v. *Qaim* (3), there was no sort of doubt that the value for jurisdiction exceeded Rs. 5,000; the question as to the course of appeal was exceedingly simple and with ordinary care and diligence there could have been no mistake, no attempt has been made to explain how it was that the appeal came to be filed

(1) 28 A. 414; A. W. N. (1906) 67; 3 A. L. J. 218.
(2) 29 A. 638; 4 A. L. J. 515; A. W. N. (1907) 219.
(3) 118 P. R. 1908; 197 P. W. R. 1908.
(4) 23 C. 526.
(5) 21 B. 552.
(6) 5 A. 591; A. W. N. (1883) 142.
(7) A. W. N. (1903) 32.
(8) 184 P. R. 1889 (F. B.).
(9) 66 P. R. 1891.
(10) 81 P. R. 1886.
(11) 13 M. 269.

in the Divisional Court; and as the value of the suit was obvious on the face of the record and was in fact correctly entered on the memo of appeal, the mistake could only have been due to gross carelessness.

Under these circumstances, we are unable to hold that sufficient cause for delay has been made out, and the appeal being barred by limitation we dismiss it with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 427 OF 1912.
February 20, 1914.
Present:—Sir Henry Richards, KT, Chief Justice, and Justice Sir P. C. Banerjee, KT.
Musammat RAJWANTA KUAR—PLAINTIFF—APPELLANT
versus
SHAM NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 34, O. XXXIV, rr. 2, 4—Mortgage decree—Interest—Contractual rate—Discretion of Court in awarding less than the contracted rate.

The date referred to in Order XXXIV, rule 2, is the date fixed by the Court for the payment of the money by the defendant to the plaintiff. The clear meaning of the rule is that the Court must ascertain the amount due on the mortgage up to the date mentioned. The amount must be according to the contract between the parties unless the Court for some legal reason sees fit to interfere with the contract as to the rate of interest.

The only section of the Civil Procedure Code which gives any discretion in the matter of interest to the Court is section 34. This section applies to decrees for the payment of money, and does not, in any way, permit the Court to reduce the interest below the contracted rate when taking the accounts and making the decree as provided for by Order XXXIV.

First appeal from the decision of the District Judge of Azamgarh, dated the 4th of June 1912.

Mr. *Muhammad Ishaq*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage dated the 6th of July 1904. The principal money secured by the mortgage was the sum of Rs. 250. The present claim is for Rs. 1,068-13-8. The Court below granted a decree for sale and awarded the plaintiff interest at the rate of 6 per cent. per annum from the date of the institution of the suit to the date fixed for payment and awarded no interest after that date. The plaintiff has appealed on the question of the interest allowed. The other side does not appear. The rate of interest was high and if we thought that the Court below had any discretion in the matter, we doubt, that we would have interfered with its exercise of it. It is contended, however, on behalf of the appellant that the Court below had no discretion in the matter. Order XXXIV, rule 4, provides that in a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (*a*), (*b*) and (*c*) of rule 2. The material part of rule 2 is that the Court should pass a decree (*a*) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on the day next and thereinafter mentioned, and (*b*) declaring the amount so due at the date of such decree. The date referred to in the rule is the date which the Court fixes for the payment of the money by the defendant to the plaintiff. It seems to us that the clear meaning of the rule is that the Court must ascertain the amount due on the mortgage up to the date mentioned. That amount must be according to the contract between the parties (unless the Court for some legal reason sees fit to interfere with the contract as to the rate of interest). The only section of the Civil Procedure Code which gives any discretion in the matter of interest to the Court is section 34. This section applies to decrees for the payment of money and in our opinion does not in any way permit the Court to reduce the interest below the contracted rate when it is taking the accounts and making the decree as provided for by Order XXXIV. The result is that we allow the appeal to this extent that we vary the decree of the Court below by awarding interest at the contract rate from the time of the institution of the suit to the time fixed for payment of the mortgage money. We extend the time to six months from this date. We allow no interest after that time, the matter being entirely in the discretion of the Court. We make no order as to costs.

Appeal allowed.

TEJA SINGH *v.* SUNDAR SINGH.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 1188 OF 1911.
December 11, 1913.
Present:—Mr. Justice Shah Din and Mr. Justice Beadon.
TEJA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SUNDAR SINGH AND OTHERS—DEFENDANTS RESPONDENTS.

Appeal——Pre-emption suit relating to land—Value—Course of appeal.

In land suits, where the value of a claim for purposes of jurisdiction is calculated according to the revenue payable on the land claimed, the course of appeal is determined by such value and not by the amount of money decreed to be payable to the vendee by the pre-emptor.

Iftikhar Ali v. *Thakar Singh*, 15 Ind. Cas. 347; 83 P. R. 1912; 170 P. W. R. 1912, followed.

First appeal from the order of the Additional District Judge, Lahore, dated the 17th June 1911, decreeing plaintiffs' claim.

Mr. *Ganpat Rai*, for the Appellants.

Rai Bahadur Pandit *Shiv Narain*, for the Respondents.

JUDGMENT.—The learned Advocate for the respondents urges as a preliminary objection that a first appeal does not lie to this Court in this case, inasmuch as the value of the suit out of which the appeal has arisen is 30 times the land revenue of the land which is the subject-matter of the suit, and not the amount of the money which the appellants have been directed to pay into Court as price of the land [*Iftikhar Ali* v. *Thakar Singh* (1)]. The value of the suit is, therefore, only Rs. 1,718-2-6 and the appeal lies to the Divisional Court and not to this Court. Mr. Ganpat Rai for the appellants admits the correctness of the preliminary objection thus raised, and we accordingly return the appeal for presentation in the Divisional Court. Parties will bear their own costs in this Court.

Appeal returned.

(1) 15 Ind. Cas. 347; 83 P. R. 1912; 170 P. W. R. 1912.

CHANDRA NARAYAN SINGH *v.* ASUTOSH DE.

CALCUTTA HIGH COURT.
CIVIL RULE No. 442 OF 1913.
February 2, 1914.
Present:—Justice Sir Ashutosh Mookerjee, Kt., and Mr. Justice Beachcroft.
CHANDRA NARAYAN SINGH—PLAINTIFF—PETITIONER
versus
ASUTOSH DE AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Court Fees Act (VII of 1870), s. 7, cl. v, sub-cls. (a), (b), (c) and (d)—Court-fee—Suit for possession of five Ghatwali mehals—*Property in suit included in aggregate of fifty-two* mehals *for which Government revenue was payable—No apportionment in respect of property in suit—Court-fee according to market-value.*

In a suit for possession of five *Ghatwali mehals*, it was found that they were included in an aggregate of fifty-two *Ghatwali mehals* for which a certain sum of money was payable annually as *sadar jama* but that no apportionment of this sum was made between the several *mehals*:

Held, that the land in suit formed part of an estate paying revenue to Government, but did not constitute a definite share of such estate, nor was it separately assessed with revenue; that consequently sub-clause (*d*) of clause V of section 7 of the Court Fees Act was applicable to the case, and that a Court-fee according to the market-value of the land should be paid.

Rule against the order of the Sub-Judge of Deoghur, dated March 25th, 1913.

Babu *Naresh Chandra Sinha*, for the Petitioner.

Babus *Dwarka Nath Chakravarti* and *Khetra Mohan Sen*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to determine the principle on which court-fees are to be levied on the plaint in the suit instituted by the petitioner for recovery of possession of a *Ghatwali* estate known as Rohini. The plaintiff contends that the case falls within section 7, clause v, sub-clause (*a*) while the defendant argues that the case is governed by section 7, clause v, sub-clause (*c*), of the Court Fees Act, 1870. The Subordinate Judge has accepted the contention of the defendant as well-founded, and has called upon the plaintiff to pay Court-fees accordingly. As the question raised is of considerable importance and affects the Government ultimately, we have heard the learned Government Pleader in addition to the learned Vakils for the parties themselves. To determine the provision within which the case before us falls, it is necessary to examine carefully the terms of the sub-clauses of clause v of section 7 of the Court Fees Act.

CHANDRA NARAYAN SINGH *v.* ASUTOSH DE.

Clause v of section 7 provides that in suits for possession of land, the amount of fee payable on the plaint shall be computed according to the value of the subject matter. Sub-clause (*a*) lays down that where the subject-matter is land which forms an entire estate or a definite share of an estate, paying annual revenue to Government or which forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue, and such revenue is permanently settled, the value of the subject-matter shall be deemed to be ten times the revenue payable. Sub clause (*b*) treats of a case similar in all respects with that comprised in sub-clause (*a*), with this difference that the revenue payable in respect of the estate is not permanently settled. Sub-clause (*c*) lays down that where the land pays no such revenue or has been partially exempted from such payment or is charged with any fixed payment in lieu of such revenue and net profits have arisen from the land during the year next before the date of presentation of the plaint, the value of the subject-matter shall be deemed to be fifteen times such net profits; but where no such net profits have arisen therefrom, the value of the subject-matter shall be the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood. Sub-clause (*d*) provides that where the land forms part of an estate paying revenue to Government but is not a definite share of such estate and is not separately assessed as mentioned in sub-clause (*a*), the value of the subject-matter shall be deemed to be the market value of the land. To these sub-clauses is added an explanation that the word "estate" means any land subject to the payment of revenue, for which the proprietor or farmer or *raiyat* shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue. Before we determine which of these sub clauses governs the case before us, we may state that according to the plaintiff, the *Ghatwali* estate in suit pays a Government revenue of Rs. 3,148-12 8; and the plaintiff paid on the plaint, a Court-fee stamp of Rs. 995 on ten times the revenue payable, while he fixed the market value of the subject-matter at Rs. 3,50,000 for purposes of jurisdiction. The history of this *Ghatwali* estate has been explained to us but need not be set out in detail here for our present purposes, and will be found narrated in the judgment of this Court in the case of *Kustoora Koomares* v. *Monohur Deo* (1). There is no controversy that the land does not form an entire estate nor a definite share of an estate paying annual revenue to Government within the meaning of sub-clause (*a*). To enable us to determine whether the land forms part of such an estate and is recorded in the Collector's Register as separately assessed with such revenue, we called upon the parties to produce before us a certified copy of the register in so far as it is relevant to the matter under inquiry. We found that the property in suit which consists of five *Ghatwali mahals* is included in an aggregate of fifty-two *Ghatwali mahals* for which a sum of Rs. 16,183 is annually payable as *sadar jama*. No apportionment of this sum has been made with reference to the several tenures. It further appears from the register that a sum of Rs. 22,494 is collected by Government from the fifty-two *Ghatwali mahals*, out of which the Government retains a sum of Rs 16,183 on account of *sadar jama* and pays the balance to the *zamindar* within whose estate the *Ghatwali* land was originally comprised. The collections from the five *Ghatwali mahals* in suit amount to Rs. 3,148-12 8. It is consequently plain that this latter sum is in no sense revenue payable in respect of these five *Ghatwali mahals*; the whole of this sum is not payable as revenue to Government. As already explained, the larger sum, of which this amount is a component element, is collected by Government and is retained in part as revenue and made over in part to the proprietor of the estate from which the *Ghatwali* tenures have been carved out. We must hold accordingly that even if the disputed land is deemed part of a revenue paying estate, it is not recorded in the Collector's Register as separately assessed with revenue, within the meaning of sub-clause (*a*). It has been ingeniously argued, however, on behalf of the plaintiff, that he should not be called upon to pay a larger amount as Court-fee than what he would have had to pay if he had been the owner

(1) (1864) W. R. 39.

of all the fifty-two *Ghatwali mahals* and sued to recover possession thereof. This contention is manifestly fallacious for two reasons, namely, *first*, that the plaintiff cannot avail himself of sub clause (*a*) unless he brings his case strictly within its terms, and for that purpose the determining factor is the land in suit and not a larger property in which it may be included; and, *secondly*, that even if the plaintiff had sued for recovery of all the fifty-two *Ghatwali mahals*, the question would require careful examination, whether those *mahals* constitute an estate paying annual revenue to Government. The contention of the plaintiff consequently fails.

As regards sub-clause (*b*), it is plainly inapplicable for the reasons assigned for the exclusion of sub-clause (*a*). As regards sub-clause (*c*), it is clear that before the defendant can successfully rely upon it, he must establish that the land in suit pays no revenue permanently or temporarily settled thereon, or has been partially exempted from such payment or is charged with a fixed payment in lieu of such revenue. This the defendant has failed to establish. On the other hand, the Subordinate Judge has found on the authority of the cases of *Raja Lelanund Singh Bahadoor* v. *Government of Bengal* (2), *Munorunjun Singh* v. *Rajah Lelanund Singh* (3) on review, *Lelanand Singh* v. *Monorunjun Singh* (4). On appeal to Privy Council *Rajah Lilanund* v. *Munorunjun Singh* (5), *Leelanund Singh* v. *Monorunjun Singh* (6) that the *Ghatwali* land forms part of the estate of the *zemindar* of Birbhum; this position indeed is supported by the fact that a definite amount is collected through the agency of the Government and is divided between the Government and the *zemindar* of Birbhum. Consequently the contention of the defendant that sub clause (*c*) is applicable cannot be supported.

From what has been already stated, it is plain that sub clause (*d*) is applicable. The land in suit forms part of an estate paying revenue to Government, but does not constitute a definite share of such estate nor is it separately assessed with revenue. Consequently the value of the subject matter must be deemed to be the market value of the land. In paragraph 15 of the plaint, the market value is stated to be Rs. 3,50,000 and the fee payable is Rs. 2,665. As the plaintiff has paid Rs. 995 only, he must be called upon to pay the deficit, namely, Rs. 1,680 within a time to be fixed by the Court below.

The result is that the Rule is made absolute, the order of the Court below set aside, and the case remitted to it, so that the direction given in this judgment may be carried out. As the contentions of both the parties have failed, there will be no order for costs.

Rule made absolute ; Order set aside.

(2) 6 M. I. A. 101 at p. 123; 4 W. R. 77 (P. C.); 1 Sar. P. C. J. 505; 1 Suth. P. C. J. 248; 19 Eng. Rep. 38.

(3) 3 W. R. 84.

(4) 5 W. R. 101.

(5) 13 B. L. R. 124; L. R. I. A. Sup. Vol., 181.

(6) 3 C. 251.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 885 OF 1911.

November 24, 1913.

Present:—Mr. Justice Johnstone and Mr. Justice Beadon.

SUNDAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE KRISHNA MILLS COMPANY, LIMITED—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 39—Responsibility of contracting parties—Delivery of goods—Cash payment on delivery of railway receipt—Credit allowed to purchaser—Acquiescence—Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Appeal by some of unsuccessful plaintiffs—Common ground—Power of Appellate Court to set aside whole decree.

A suit brought by several persons was dismissed. Some of the plaintiffs appealed and prayed for reversal of the whole decree which proceeded on a ground common to all the plaintiffs. It was objected that as against the non-appealing plaintiffs, the decree had become final:

Held, that the Appellate Court was competent to set aside the whole decree in view of Order XLI, rule 4, of the Civil Procedure Code.

A contract for supply of goods contained a condition regarding cash payment on delivery of railway receipts but several deliveries were made without such payment and the amounts due from the plaintiffs in respect of these deliveries were entered in an account which was finally made up on 14th April 1909, when a balance of about Rs. 2,000 was found due from the plaintiffs to the defendants.

SUNDAR SINGH v. KRISHNA MILLS CO. LTD.

After the 14th April 1909 and up to 2nd May 1909, there were further deliveries in respect of which cash payments were made on delivery of the railway receipts and then arose a dispute about a consignment and further dealings between the parties stopped.

On the 14th April 1909, the plaintiffs made over to the defendants first halves of currency-notes to the value of Rs. 2,000 but withheld the second halves of those notes. The plaintiffs alleged that the defendants stopped further consignments for there was a rise in the prices, and the defendants complained that since the second halves of the notes were withheld, they were competent to stop further consignments as they were entitled to cash payments:

Held, (1) that under the provisions of section 39 of the Contract Act, the defendants were not justified in rescinding the contract on plaintiffs' refusal to deliver the second halves of these notes, as it was clear from the correspondence between the parties, that plaintiffs were ready and willing to take delivery of the last consignment on payment of the price of that consignment, and the defendants cancelled the contract, not because plaintiffs would not pay the price of the consignment, but because the plaintiffs refused to deliver the second halves of the currency-notes due on the previous account;

Cooverji Bhoja v. *Rajendra Nath Mukerjee*, 2 Ind. Cas. 851; 36 C. 617; *Rash Behary Shaha* v. *Nrittya Gopal Nundy*, 33 C. 477; 3 C. L. J. 249; *Sooltan Chund* v. *Schiller*, 4 C. 252; 3 C. L. R. 287 and *Simson* v. *Virayya*, 9 M. 359, referred to.

(2) that the account in respect of which the sum of Rs. 2,000 was due was not confined to dealings under the contract, but even if it was, the plaintiffs' failure to pay for the goods which had at first been delivered on credit was not a renunciation of the contract or such a refusal as excused performance of the contract on the part of the defendant.

First appeal from the decree of the Subordinate Judge, 1st Class, Amritsar, dated the 21st April 1911, dismissing plaintiffs' claim.

The Hon'ble Mr. *Shadi Lal*, R. B., and Mr. *M. L. Rallia Ram*, for the Appellants.

Lala *Lajpat Rai*, for the Respondents.

JUDGMENT.—This appeal relates to a suit in which the plaintiffs, members of a firm at Amritsar, claim damages from defendants, the Krishna Mills, Limited, at Beawar, District Ajmer, on account of an alleged breach of contract. The lower Court, finding that plaintiffs were guilty of the breach which put an end to the contract, has dismissed the suit and the appeal has been instituted by two of the four plaintiffs.

A preliminary objection was raised that the dismissal of the suit is final as against the two plaintiffs who have not joined in the appeal and that the claim in appeal must be confined to the shares of the two appellants in the sum alleged to be due from defendants on account of damages.

The lower Court has not gone into the question of the alleged amount of the damages but has dismissed the suit on the preliminary finding that plaintiffs are not entitled to claim damages, and if that preliminary finding is set aside, the case will have to be remanded. The claim in appeal is for the reversal of this decree which proceeds on a ground common to all the plaintiffs and in view of Order XLI, rule 4, Civil Procedure Code, the preliminary objection was overruled.

The parties entered into the contract in question on the 4th February 1909 and it is admitted that they agreed to the terms set forth in Exhibit P-I, printed at page 3 of the paper book, part I. This document consists of a letter, dated 4th February 1909, written by a member of the plaintiffs' firm to the defendant and confirmed by defendant's agent. The letter runs as follows:—

"On account and risk of my firm of the name of Messrs. Kishen Chand, Jawahar Singh of Amritsar, I agree to have bought from you in Beawar 621 bales of yarn as under:—

Five hundred and seventy-one bales at Rs. 3-1-3 per bundle of 10½*s*. for upper counts an anna per count to be added to this rate up to 17*s*.

Fifty bales of 20*s*. yarn at Rs. 3-11-0 per bundle, less discount at Rs. 1-6-0 per cent. of the value of yarn and brokerage at Rs 1-4-0 per bale.

2. We will send for the bales of counts according to our request, clearing the lot up to the 15th April 1909 at the latest.

3. You will have not to sell yarn to any merchant in Punjab up to 30th April 1909 and we on our part shall not buy any yarn from any other mills in Rajputana during that period.

4. This bargain is your mill's godown delivery. You will despatch the goods from your station to places in Punjab according to our requirements, of which the railway receipts we will receive from your clerk in Amritsar on payment of the amount and invoice of such railway receipts.

5. If on any cause your mills close spinning yarn wholly or partially, you will not be bound to abide by the delivery time

but shall be given furtherance of time at our option."

It appears that there had been other dealings between the parties and it is admitted that in spite of the condition regarding cash payment on delivery of Railway receipts, there were several deliveries of yarn under the contract now in question without such cash payment. The amounts due from the plaintiffs in respect of these deliveries were entered in an account which was finally made up on the 14th April 1909, when a sum of about Rs. 2,000 was the balance due on the account from plaintiffs to the defendant.

After the 14th April 1909 and up to 2nd May 1909 there were further deliveries of yarn in respect of which cash payments were made on delivery of the Railway receipts and then came a dispute about a consignment of 13 bales which resulted in the final rupture between the parties and the termination of the contract.

When the accounts between the parties were made up on the 14th April 1909 and a balance of Rs. 2,000—was found to be due from the plaintiffs to defendant, the plaintiffs made over the first halves of currency-notes to this amount to the defendant. But admittedly they withheld the second halves of those notes and consequently the payment was not completed.

Though the plaintiffs did not make cash payments at first as required by the contract, the defendant nevertheless delivered goods without such payment and as there were no less than five deliveries on cash payment after the accounts had been made up on 14th Aprial 1909, defendant clearly acquiesced in the continuance of the contract.

On behalf of defendant, it has been urged that, although the time for delivery could be extended, the plaintiffs were bound to complete their indents by the 15th April 1909, but it does not appear that this was the intention of the parties. No complaint that indents were not received in proper time appears to have been made by the defendant either in the correspondence between the parties or in the pleadings in the lower Court. On the contrary, according to the defendant, the sole reason why the last consignment of 13 bales was not delivered was, that plaintiffs refused to pay the price. The correspondence shows that defendant's spinning department was closed, this contingency was provided for in the contract and obviously the period of the contract was extended by mutual consent.

Passages in the correspondence between the parties have been pointed out by Counsel showing complaints by plaintiffs on the one hand that defendant was wilfully withholding consignments owing to a rise in prices, and complaints by the defendant, on the other hand, that plaintiffs were delaying payment on presentation of the railway receipts and were thus delaying to take delivery of goods. These complaints, however, appear to have been due to friction between the parties owing to the withholding by plaintiffs of the second halves of the currency-notes, and it is a significant fact, that though there is evidence showing the dates on which consignments were despatched and the dates on which the five consignments received after the 14th April 1909, were paid for and delivered, neither party has produced evidence to show the dates of the indents, the quantity indented for in each indent or the dates on which the final consignments arrived by train at their destination.

Whether or not there was a rise in prices is a question which would affect the assessment of damages and which would have to be gone into more fully when the assessment of damages becomes necessary. But without coming to a definite finding on this point, it may be noted that at present there does not seem to be sufficient indication that deliveries were delayed on account of the rise in prices. Deliveries were delayed owing to the closing of the defendant's spinning department, and, while acquiescing in this delay which was provided for in the contract, the plaintiffs naturally wanted to put pressure on defendant to delay as little as possible, probably this was the motive for the withholding of the second halves of the currency-notes which caused friction between the parties and led to the complaints which each addressed to the other.

Notwithstanding these complaints in the correspondence, it is clear that both parties

acquiesced in the continuance of the contract up to and including the delivery of the 2nd May 1909 and in order to determine which party is responsible for the breach of contract, it is necessary to ascertain as far as possible what took place after that date.

Before the delivery of the 2nd May 1909, the plaintiffs had written a letter dated 29th April 1909, intimating that the second halves of the currency-notes were being withheld because goods were not being supplied as required and that unless Railway receipts were sent, the defendant would be held liable to make good the plaintiffs' expected profits.

After the delivery of the 2nd May 1909 plaintiffs wrote on 7th May 1909, as follows: —

"As we have not received any railway receipt from you in spite of our requesting you constantly, therefore, we are convinced you are rather prepared to pay our profit at eight annas per bundle according to our letter No. 3590 dated the 29th April 1909. Kindly remit the amount being our profit on the remaining bales of our bargain. Otherwise we shall have to take steps against you legally in Court holding you responsible for costs and consequences arising through such proceedings. In case you will not reply to this notice, we shall have no more to give you any information of our doing against you. This is final."

Before receiving plaintiffs' letter dated 7th May 1909, defendant wrote on 10th May as follows: —

"According to the terms of your contract, you are bound to pay the amount of every invoice of which the Railway receipt is offered you by our agent at that place. In the beginning, out of business etiquette, our agent did not literally press the procedure on you and delivered you railway receipts before hand to receive the relative amount afterwards. But as through your irregularity in payments, we have experienced much loss and inconvenience besides, the company, under such circumstances, cannot any longer deliver goods on credit; we have over and over again asked you to pay our pending account in full and in future to pay the amount of invoice and receive the relative railway receipt as is the agreement between us, but you don't care the least for all our due requirements so much so that out of our dues against you, you sent us first halves of currency-notes of Rs. 2,000 about three weeks ago and have held back the second halves all this time in defiance of our incessant urgings in the matter. At present our agent has got railway receipts for 13 bales and 8 bales in our godown at that place, ready for delivery to you which he has asked you several times to receive, on payment in full of our dues against you which includes these second halves of Rs. 2,000 notes and the amount of these bales, but as you don't care at all about your liability, we serve you this notice wanting you to hand over the second halves of currency notes to our agent Lal Chand Ji, pay off our balance of account in full and to receive the 13 bales on payment of their value on receipt of this notice, failing which our agent has been directed to sell these bales in market, and through your breach of the terms of contract, we shall cancel the remaining part of your bargain and hence you will not be entitled at all for the goods of your bargain, please take notice." After receiving plaintiff's letter of 7th May 1909, defendant wrote on 13th May, as follows:—

"We are in receipt of yours of 7th instant in reply to which we refer you to ours of 10th idem, sent to you under registered cover, in which we have fully warned you against your quite objectionable conduct in this matter. As we told you in ours referred above, if you have not handed over the second halves of Rs. 2,000 currency-notes to our agent Lala Lal Chand Ji, first halves of which you had sent us in part payment of our dues against you so long ago, not paid him in full the balance of our account up to date and not received the railway receipt for 13 bales and 8 bales which have been offered you so often by our agent on full payment of our dues against you, including the value of these bales on receipt of the said notice, which at the latest must have been delivered to you to-day, your bargain is forthwith cancelled according to the terms of our notice, further, on hearing from our agent, that you have not fulfilled the terms of this notice, without further serving you any notice in this matter, we shall file a suit against you for recovery of our dues from you, the cost of which shall further fall on you, please take note."

A letter was also written on 13th May

1909, by the plaintiffs. It was a reply to defendants' letter of 10th May and ran as follows:

"Your favour of the 10th instant to hand, contents noted.

You have not replied to our letter No. 3590, dated 29th April, 1909, and No. 3899, dated 7th May 1909, but you have given us this notice so that you may not be held responsible by this way. But you cannot be set free by this way.

You shall have to pay in any case.

Neither you sent us any invoice nor Lal Chand Ji delivered us any invoice for 13 bales in spite of our requests.

Under the circumstances you had better to remit our profit mutually otherwise you shall be liable to pay same through Court.

If Lal Chand Ji delivers us within three days, whatever railway receipt he has, against payment we are still prepared to receive same."

With reference to defendants' letter of 13th May 1909, plaintffs wrote on 15th May merely referring defendants to their letter dated 13th May.

The consignment of 13 bales was sold by defendant in the Amritsar market and after this a Pleader, acting on behalf of the plaintiffs, wrote to defendants on 24th May 1909 as follows:—

"Under instructions from Messrs. Kishen Chand Jawahir Singh of this place I have to inform you that they are quite willing to give you the second halves of our currency-notes for Rs. 2,000, the first halves of which have already been given to you, provided you hand over to them the railway receipts of 13 bales of yarn that they have ordered of your company at Beawar. They will also pay you for these 13 bales at the time of receiving the railway receipts. Kindly let me know at what time within four days from this day it will be convenient for you to deliver the 13 bales and receive their price and the notes above mentioned. I may add that in default of your delivering the railway receipts of 13 bales within four days from to-day, my clients will sue your company for damages which they may incur by their not fulfilling their contract."

Defendant's agent on 25th May replied to the Pleader's letter as follows:—

"With reference to your registered notice dated 24th instant on behalf of Messrs. Kishan Chand, Jawahir Singh, I beg to bring to your notice that on receipt of the railway receipt against 13 bales in question, I asked the indentors to take this up against due payment and the money due to the mill before this, but they never complied with my request. I may add that the Krishna Mill was also in communication on the subject with them. You will instruct your clients, therefore, that they should refer the matter to the mills direct as regards half Government currency-notes of Rs. 2,000, which your clients still owe to the mills. Please warn them to remit same to them without any further loss of time otherwise they will have to bear the consequences."

After this, defendant on 1st June 1909, entered into negotiation for the supply of yarn to another firm in the Punjab and plaintiffs having delivered the second halves of the currency notes for Rs. 2,000 to defendant on 9th June 1909, instituted the present suit on the 10th June, 1909."

Notwithstanding defendant's allegations and oral evidence to the contrary, it is clear from this correspondence that plaintiffs were ready and willing to take delivery of the consignment of 13 bales on payment of the price of that consignment and that the defendant cancelled the contract, not because plaintiffs would not pay the price of the consignment but because the plaintiffs refused to deliver to defendant the second halves of the currency-notes for Rs. 2,000, due on the previous account. The question, therefore, is whether under the provisions of section 39 of the Contract Act, the defendant, on plaintiff's refusal to deliver the second halves of these notes, was justified in rescinding the contract.

Cooverjee Bhoja v. *Rajendra Nath Mukerjee* (1) the first authority cited on behalf of appellants related to the measure of damages in respect of a breach of contract consisting of a set of distinct contracts, and it does not help in determining the point now before us for decision.

Rash Behary Shaha v. *Nritya Gopal Nundy* (2) differs from the present case in

(1) 2 Ind. Cas. 831; 36 C. 617.
(2) 33 C. 477; 3 C. L. J. 249.

that there were distinct provisions to deliver specified quantities in certain specified months but in determining what amounts to a "refusal" in cases of this kind the Court was guided by the view expressed by Lord Coleridge in *Freeth* v. *Burr* (3) that where the question is "whether the one party is set free by the action or conduct of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."

In *Sooltan Chand* v. *Schiller* (4) the terms of the contract as to payment were cash on delivery—part delivery had been made by defendant and a certain sum had been paid by plaintiffs on account—plaintiffs then made a claim for excess refraction and defendants thereupon declined to deliver the remainder of the goods unless plaintiffs paid the full amount owing for the portion that had been delivered. The plaintiffs declined to accept these terms and defendants cancelled the contract. It was held that there was no such refusal on the part of plaintiffs to perform their part of the contract as to entitle defendants to rescind under section 39 of the Contract Act.

In *Simson* v. *Virayya* (5), it was held that failure by one party to pay for goods which had been delivered did not amount to a renunciation of the contract or to an absolute refusal of future performance.

The account in respect of which the sum of Rs. 2,000 was due was not confined to dealings under the contract but even if it had been confined to dealings under the contract, the authorities above referred to support the view that the failure by the plaintiffs to pay for the goods which had at first been delivered on credit was not a renunciation of the contract or such a refusal as excused performance of the contract on the part of defendant.

In our opinion it must be held that the defendant rescinded the contract without legal justification and the appeal must be allowed. At the same time we consider that the dispute and litigation is due to plaintiffs' unreasonable conduct in withholding the notes and that costs of the appeal should not be awarded.

We accept the appeal and setting aside the lower Court's decree dismissing the suit on the preliminary finding, we remand the case under Order XLI, rule 23, Civil Procedure Code, for decision on the merits after assessment of the damages, if any, suffered by the plaintiffs.

Except as regards Court-fees, which will be refunded, each party will pay its own costs of this appeal.

Appeal accepted; Case remanded.

(3) 9 C. P. 208, 43 L. J. C. P. 91; 29 L. T. 773; 22 W. R. 370.
(4) 4 C. 252; 3 C. L. R. 287.
(5) 9 M. 359.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 662 OF 1912.
February 6, 1914.
Present:—Mr. Justice Sadasiva Aiyar.
BILA SANYASI NAIDU—DEFENDANT—PETITIONER
versus
AGNIHOTRAM VENKATACHARYULU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-settlement Inams—*Madras Estates Land Act (I of 1908), s. 3*—Inam *granted prior to Permanent Settlement, whether "estate"—Suit by* Inamdar *for recovery of rent—Jurisdiction—Civil or Revenue Court.*

An *Inam* granted by a *zemindar*, prior to the Permanent Settlement, is not an "estate" as defined in the Estates Land Act, nor is such an *Inamdar*, a "landholder" within the meaning of this expression in that Act.

A suit by such an *Inamdar* to recover rent is, therefore, not cognizable by a Revenue Court.

Todikonda Buchi Virabhadrayya, Sonthi Venkanna, 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Vizagaptam, in Appeal Suit No. 174 of 1911, preferred against that of the District Munsif of Chodavaram, in Original Suit No. 505 of 1909.

Mr. *S. Srinivasa Aiyangar*, for the Petitioner.

The Hon'ble Mr. *B. N. Sarma*, for the Respondents.

JUDGMENT.—This is a petition under section 115 of the Civil Procedure Code to revise the decree of the District Judge of Vizagapatam in Appeal Suit No. 174 of 1911. The suit out of which that appeal arose was brought by some *inamdars* against their tenant to recover rent due for the first two instalments of the year' *Soumya*. The plaintiffs' suit was decreed on certain findings of fact and of law. There are nine grounds in the memorandum of civil revision petition presented to this Court. The phrase "the Court below acted illegally and with material irregularity" occurs in several of these grounds but I am satisfied that it only means that the Court committed some error of law or other in arriving at certain findings of facts or of law. Section 115, therefore, has no application and the contentions raised in these grounds must be rejected. The only contention which really relates to the question of jurisdiction is that raised in the sixth ground of the memorandum, namely "that a suit for rent of this land ought to have been preferred before the Revenue Court" though the reason why the jurisdiction of the ordinary Civil Courts is ousted is not expressly mentioned even in this ground.

It is argued that the *inam* falls under the definition of an "estate" within section 3 of the Estates Land Act, that, therefore, the plaintiffs are "land-holders" and that the suit for rent against a tenant holding under a land-holder ought to be brought in the Revenue Courts and not in the Civil Courts. It appears in this case that the *inam* had been granted by a former Maharajah before the issue of the Permanent Settlement *sannad* to the Maharaja of Vizayanagaram, and following *Tadikonda Buchi Virabhadrayya* v. *Sontr Venkanna* (1), I must hold that the *inam* is not an "estate" or part of an estate nor are the *inamdars* "land-holders" within the definitions of those terms contained in the Estates Land Act. The jurisdiction of the Civil Courts has, therefore, not been lost over a suit for rent by such an *inamdar*.

I dismiss the petition with costs.

Petition dismissed.

(1) 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1031 OF 1912.

January 26, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

SHAMBU RAM—PLAINTIFF—APPELLANT

versus

JAMITA—DEFENDANT—RESPONDENT.

Regulation (XVII of 1806), ss. 7 and 8—Foreclosure—Notice—Defect—Mis-description of mortgaged property.

Where, in a notice issued under section 7 of Regulation XVII of 1806, the property mortgaged instead of being described as one-half of a certain land, was described as the whole of it; the words used being *mabligh kata hojawegi* instead of *bai katai hojawegi*:

Held, that the first error was fatal to the validity of the notice.

Wazir Chand v. *Makhan*, 109 P. R. 1901; 16 P. L. R. 1902, Civil Revision No. 557 of 1910, followed.

Bhagirath v. *Nath Mal*, 105 P. R. 1907, referred to.

Obiter.—The second defect is also fatal to the validity of the notice.

Second appeal from the decree of the Divisional Judge, Hissar, dated the 22nd March 1912, reversing that of the Munsif 2nd Class, Hissar, dated the 29th January 1912, decreeing plaintiff's claim.

Lala *Moti Lal*, for the Appellants.

Bakhshi *Gokal Chand*, for the Respondent.

JUDGMENT.—The sole question in this appeal is whether the notice of foreclosure issued by the mortgagee was materially defective for the purpose of Regulation XVII of 1806. The Divisional Judge has decided this point against the mortgagee on the ground that there were two errors of a material kind in the notice, namely:

(1) that instead of the property mortgaged being described as one-half of 109 *bighas*, 15 *biswas*, it was described as the whole of 109 *bighas*, 15 *biswas*, and,

(2) that instead of the words "*bai katai hojawegi*", the words used were *mabligh kata hojawegi*.

The mortgagee has appealed to this Court and we have heard Mr. Moti Lal on his behalf, but in our opinion the first defect above referred to is fatal to the validity of the notice. *Wazir Chand* v. *Makhan* (1) though a converse case

(1) 109 P. R. 1901; 16 P. L. R. 1902.

is distinctly in point and there is nothing in *Bhagirath* v. *Nath Mal* (2) in any way opposed to that ruling. We cannot accept Mr. Moti Lal's contention that a mis-description of the kind referred to was not likely to have misled the mortgagor. On the contrary, we think that if the property mortgaged is described in detail, the mortgagor is very likely to be misled unless those details are correct. It is unnecessary for us, upon the view that we take of the first defect, to say anything with regard to the second beyond remarking that it has been held to be fatal in an unpublished judgment of the single Bench (Civil Revision No. 557 of 1910). No authority to the contrary has been cited to us and without expressing any definite opinion of our own, we are not satisfied by Mr. Moti Lal's arguments, that the decision in question is erroneous. We accordingly dismiss this appeal with costs.

Appeal dismissed.

(2) 105 P. R. 1907.

ALLAHABAD HIGH COURT.

MISCELLANEOUS APPEAL No. 520 OF 1913.

January 15, 1914.

Present:—Justice Sir George Knox, KT., Mr. Justice Tudball and Mr. Justice Piggott.

In re STAMP REFERENCE BY THE BOARD OF REVENUE.

Stamp Act (II of 1899), s. 2 (15), Sch. I, Art. 45 (3)—"Final order", meaning of.

The words "final order" in section 2, clause 15, and Article 45, clause (c) of Schedule I of the Stamp Act II of 1899, refer to the final order of the lowest Court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed.

Stamp reference made by the Board of Revenue per letter No. 1383/V. S. 630 of 1913, dated the 24th of July 1913.

The following was the reference made by the Board of Revenue:

The question for determination is the meaning of the words "final order" in section 2 (15) and Article 45 (c) of Schedule I of the Stamp Act (II of 1899). The Board think that they refer to the final order of the lowest Court of original jurisdiction empowered to give an order for effecting a partition, at the time it is passed, and not to the order of the highest Court of Appeal or to the order of the original Court when the time for appeal has elapsed and no appeal has been filed. This view has advantages from an administrative point of view as, if the "final order" to be stamped with the stamp required for an instrument of partition is that of the highest Court of Appeal, it will be necessary to keep the record out of the record-room for a long period without any stamping being done.

Difficulty will arise if (a) the Appellate Court quashes the partition or decreases the value of the plaintiff's share; (b) or increases the value of the plaintiff's share. In the one case, the plaintiff will apparently be entitled to a refund of the stamp duty he has paid or to a refund of the proportionate share of that duty, and in the other case the decree of the Appellate Court should apparently be written on a stamp representing the balance between the amount of stamp duty actually paid and that which might have been levied, had the original Court passed the decree issued by the Appellate Court.

Mr. *Wallach*, for the Crown.

JUDGMENT.—After hearing the learned Government Advocate, we agree with the Board of Revenue, which has made this reference, that the words "final order" in section 2, clause (15) and Article 45, clause (c) of Schedule 1, of the Stamp Act II of 1899 refer to the final order of the lowest Court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed. Let this be the answer to the reference made by the Board of Revenue.

Reference accepted.

MADRAS HIGH COURT.

SECOND APPEAL No. 935 OF 1911.

February 3, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

PALLA KANAKAMMA—PLAINTIFF—APPELLANT

versus

CHALLA RAMASAMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Reversionary heirs—Agreement between

SRINIVASA AYIANGAR v. TIRUMALAI CHETTY.

widow and reversionary heirs settling reversion on latter, whether legal.

A Hindu widow and the expectant reversionary heirs cannot legally enter into an agreement whereby the latter's expectant reversionary rights become converted into vested reversionary rights.

Second appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 280 of 1910, preferred against that of the District Munsif of Ellore, in Original Suit No. 516 of 1909.

Mr. *P. Narayanamurthi*, for the Appellant.

Mr. *P. Nagabushanam*, for the Respondents.

JUDGMENT.—The only question in this case is whether a Hindu widow and the expectant reversionary heirs could legally settle the reversion on the said expectant reversionary heirs so as to give them a vested reversionary right in the properties inherited by the widow, that is, so as to convert the expectant reversionary right into a vested reversionary right.

Persons who have got only a *spes successionis* in certain properties and a lady who has got no power of alienating or dealing with the reversion cannot, it seems to us, so deal in advance with the rights in the reversion as to affect the reversion when it actually falls in.

The agreement under Exhibit B between the said contingent reversioners to divide after the widow's death the properties in which they had only a *spes successionis* could not again legally give any vested right in half the property to either of the parties to the agreement. Whether, if the agreement was supported by consideration, a suit for specific performance of that agreement will lie at the instance of the legal representative of one of the two parties to the agreement against the other party, that is, whether the latter party could, when the reversion falls in to himself alone, be compelled to execute a registered conveyance of half the property to the said legal representative, that is a question on which it is unnecessary to express an opinion in this case as the plaintiff (appellant in this second appeal) brought his suit for partition on the basis that Exhibits A and B had already given him a vested right in half the lands, which right (according to the plaintiff in his plaint) had only to be enforced by this suit which was brought for partition and possession. The suit was not brought for the execution of a conveyance of half share in the properties by the 1st defendant to plaintiff, but it was only brought for partition and possession of the half share already alleged to have been conveyed. The point is also not taken in the second appeal memorandum, that the suit could be treated as one for specific performance. The second appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 338 OF 1913.

February 18, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

K. R. SRINIVASA AIYANGAR—PETITONER

versus

TIRUMALAI CHETTY AND OTHERS—RESPONDENTS.

Agent—Power-of-attorney—Outstandings, power to collect, whether includes decretal debts—Execution—Informal application—Step in aid of execution.

A power-of-attorney authorizing an agent to collect "outstandings," includes also a power to collect debts which have ripened into decrees, obtained even before the date of the power-of-attorney. An informal application, though infructuous, to carry on the proceedings in execution, may still operate to keep the decree alive.

Pachiappa Achari v. *Poojali Seenan*, 28 M. 557, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 12th December 1912 in Execution Application No 2329 of 1912 in S. C. S. No. 668 of 1908.

Mr. *S. V. Padmanabha Aiyangar*, for the Petitioner.

Mr. *V. Purushothama Aiyer*, for (Mr. *T. R. Venkatarama Sastri*), for the Respondents.

JUDGMENT.—Mr. Purushothama Aiyar argues that the right to take out execution mentioned in the power-of-attorney relates only to decrees obtained since 3rd July 1909 when the two ladies gave the power of attorney to their agent. The preamble says that the two ladies are unable to appear in Court and to conduct the proceeding; this is followed up by the statement, that for the purpose of recovering outstandings due to the estate, the agent is given

power to file suits and to recover the outstandings due to the estate. I take it that the word 'outstandings' refers not only to debts which have not ripened into decrees but also to decrees obtained against persons owing money to the estate; the clause relating to execution stands by itself; I am, therefore, of opinion that this power of attorney did giveauthority to the agent to present an application for execution of the decree already passed. That being my view, the previous application presented on the 4th August 1911 was an application in accordance with law. It is hardly necessary to refer to the authorities which hold that non-compliance with certain formalities, although they may disable the petitioner from successfully carrying on execution through the agency of such a petition, would none the less make the application presented by him an application in accordance with law. It is only necessary to refer to *Puchiappa Achari* v. *Poojali Seenan* (1) where this pointhas been expressly referred to. I hold, therefore, that the Subordinate Judge was wrong in holding that the application was barred by limitation. I reverse his order and direct him to restore this application to his file and to dispose of it according to law. The costs will abide the result.

Order reversed.

(1) 28 M. 557.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 118 OF 1913.

January 3, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

DEOKI RAI—PLAINTIFF—APPELLANT

versus

Musammat PARBATI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—Succession—Daughter's son—Daughter succeeding to her father's holding while Rent Act of 1881 was in force.

B., a tenant of a holding under a permanent lease, died while the Rent Act of 1881 was in force, and was succeeded by his daughter *S* who died, after the Tenancy Act of 1901 came into operation, leaving a son *D*:

Held, that *D* was entitled to succeed to the holding.

Second appeal from the decision of the Subordinate Judge of Ghazipur dated 22nd November, 1912.

Mr. *M. L. Agarwala* (with him Mr. *Haribans Sahai*) for the Appellant.

Dr. *Satish Chandra Banerji*, for the Respondent.

JUDGMENT—This appeal arises out of a suit brought by the plaintiff to recover possession of certain property. The property was held under a perpetual lease, dated the 1st of August 1886, under which the lessees were entitled to hold the property so long as they paid the rent reserved by the lease. The property in question became vested in one Bechu Rai. Bechu Rai had a daughter called Sajni and the plaintiff is the son of Sajni. Bechu Rai died whilst the Rent Act of 1881 was still in force. Sajni died after the Tenancy Act of 1901 had come into operation. The Court of first instance held that the plaintiff was entitled to recover possession. The lower Appellate Court reversed this decision holding that as Sajni died after the Act of 1901 was passed, the succession must be regulated according to the provisions of section 22 of that Act, and that the plaintiff being the daughter's son of Bechu could not succeed as he did not share with him in the cultivation of the holding. We think that the decision of the Court of first instance was correct and ought to be restored. If Sajni is to be regarded as the full tenant of the holding, then Deoki, as her male lineal descendant, is entitled to succeed. If we cannot regard Sajni as the full tenant, then we must go back to the death of Bechu to see how the property would devolve. If the property is of such a nature as to be regulated by section 9 of the Act of 1881, then the plaintiff is entitled to succeed because the property devolved as if it were land. Again if the property is not governed by section 9 of the Act of 1881, then it is a class of property for which no special provision has been made by any Act of the Legislature and we must fall back on the Hindu Law to see how the succession would run. As the daughter's son of Bechu, the plaintiff according to the Hindu Law would be entitled. It, therefore, appears that from whatever point of view we look at the case, the plaintiff's title is made out. The respondent raised the question of limitation but inasmuch as Sajni died within twelve years

of the institution of the suit, the claim is clearly within time. We, accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 161 OF 1911.
April 10, 1913.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Roy.
Maharaja Adhiraj Sir BEJOY CHAND MOHATAP BAHADUR OF BURDWAN—PLAINTIFF—APPELLANT
versus
SHASHI BHUSHAN BOSE—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 169, cl. (c)—Civil Procedure Code (Act V of 1908), s. 65—Title of auction-purchaser in execution of rent decree—Date of sale—Liability of purchaser, for rent after sale—Whether judgment-debtor liable for same.

A plaintiff caused a tenure to be sold in execution of a decree for rent due thereon. After the sale, he applied under section 169, clause (*c*), of the Bengal Tenancy Act, to obtain from the surplus sale proceeds the rent which accrued due from the date of institution of the suit to the date of confirmation of the sale. The amount of surplus was not sufficient to meet that amount, and the plaintiff, therefore, brought a suit to recover the same from the judgment-debtor:

Held, that, in view of section 65 of the Civil Procedure Code of 1908, which lays down that the title of the auction-purchaser dates from the date of the sale, the purchaser and not the judgment-debtor was liable for the rent of the period from the date of the sale to its confirmation, and that the suit was rightly dismissed.

Appeal from the decree of the Officiating Third Sub-Judge of Hooghly, dated September 27th, 1910, affirming that of the Third Munsif of Arambagh, dated March 30th, 1910.

FACTS:—The facts will appear from the following judgment of the lower Appellate Court:—

The plaintiff in this case caused a tenure to be sold in execution of a decree for rent due thereon. After the sale, he applied under section 169 of the Bengal Tenancy Act to obtain from the surplus sale-proceeds the rent which accrued due from the date of institution of the suit to the date of confirmation of the sale. The amount of surplus, however, was not sufficient to meet this whole amount of rent for that period, and fell short by Rs. 191-2 6. The plaintiff now sues to recover this sum.

The only point for determination in this appeal is whether the defendant, who is the out going tenure-holder, is liable for the rent of the period between the date of the sale and the confirmation of the sale. He urges that the purchaser and not he is liable for the rent of that period. Section 65 of the Civil Procedure Code now lays down that the title of the purchaser will date from the date of the sale. This section also applies to all proceedings under the Tenancy Act. Although section 169, Bengal Tenancy Act, gives the landlord a right to obtain from the surplus the rent for the subsequent period, it does not say that the outgoing tenant will be personally liable for the same. When the landlord sues to make the outgoing tenant personally liable, as in this case, section 65 of the Civil Procedure Code will be a bar to that suit. The landlord can only make the purchaser liable for the rent but not the defendant. I think the lower Court is right in his finding. The respondent does not appear, service of notice upon him is proved.

Ordered, that this appeal be dismissed and the judgment of the Court below affirmed.

Babu *Shoroshi Charan Mitra*, for the Appellant.

JUDGMENT.—In our opinion, the decree of the lower Appellate Court must be confirmed. The point turns upon the effect of section 169, clause (*c*), of the Bengal Tenancy Act, in view of the alteration in the law occasioned by section 65 of the new Civil Procedure Code as to the date of the vesting of property sold in execution. The scope of clause (*c*) is limited to the rent that may have fallen due to the decree-holder in respect of the tenure or holding, between the dates mentioned. It must have fallen due from some person and that person must, I think, be the judgment-debtor. But as a consequence of the alteration occasioned by section 65, the judgment-debtor is not liable for rent beyond the time when

property is sold and the liability of the proceeds under clause (*c*) must be similarly limited, so as to correspond with this. This view does not involve any inconsistency in the law or any conflict with the express words of clause (*c*). All that it involves is that it is no longer necessary to carry matters up to the more extended margin of time permitted by that clause.

For these reasons, the decree must be confirmed. There will be no order as to costs as there is no appearance on the part of the respondent.

Appeal dismissed.

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 89 OF 1913.
February 21, 1914.
Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.
Musammat GHURE—DEFENDANT—APPELLANT
versus
Musammat SITAL KUAR—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901)—Sir land—Perpetual lease—Purchase of Sir in execution—Suit for possession by purchaser against lessee, whether maintainable.

During the pendency of a mortgage suit, the mortgagor made a perpetual lease of his *sir* in favour of one *A*. The mortgagee obtained a decree for sale of the *sir* and in execution thereof purchased the same. The mortgagee brought a suit for ejectment against *A*:

Held, that as the mortgagee could not maintain a suit for possession against the mortgagor under the Tenancy Act, he could not obtain a decree for possession against *A*, the lessee.

Letters Patent Appeal against the decision of Justice Sir George Knox, KT., in Second Appeal No. 945 of 1912, dated 21st of April 1913

Mr. *Haribans Sahai*, for the Appellant.

Mr. *S. C. Choudhri*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for ejectment from two plots of *sir* land. It appears that the owner of the property made a mortgage. A decree for sale of the mortgaged property was made in the first instance granting a decree for sale of one of the two plots, and after some further litigation, a decree for sale of the proprietary rights in the two plots. Whilst this litigation was pending, the representative of the mortgagor made a perpetual lease in favour of the defendant. The plaintiff who purchased under a sale held in execution of the decree, brings the present suit for physical possession of the two plots, alleging that the perpetual lease was fraudulent and collusive. It is quite clear as a general rule that a plaintiff in a suit for ejectment claiming physical possession must show a right to possession against all the world. It, therefore, becomes of importance to see whether, if the perpetual lease had never been made, the plaintiff would have been entitled to a decree for physical possession against the mortgagor. The Tenancy Act provides that when a proprietor's proprietary right is sold, he *ipso facto* becomes an ex-proprietary tenant of his *sir*. This is a right which neither the Court nor the proprietor himself can take away or give up. Consequently it is clear that the plaintiff would not have been entitled to a decree for possession against the mortgagor. This being so, it is clear that he cannot have a decree for possession against the present appellant. He is, no doubt, assuming the lease to be fraudulent, entitled to the rent which the ex-proprietary tenant ought to pay for the two plots. In our opinion, the decree of the lower Appellate Court was, under the circumstances, a proper decree and we accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court. We think, under the circumstances (particularly as both parties contested the propriety of the decree of the lower Appellate Court) that each party should bear his own costs in this Court.

Appeal allowed.

MADRAS HIGH COURT.
CITY CIVIL COURT APPEAL No. 30 OF 1912.
February 17, 1913.
Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Oldfield.
NATESA GRAMANI—DEFENDANT—APPELLANT
versus
TANGAVELU GRAMANI—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (1) (b), (d)

NATESA GRAMANI *v.* TANGAVELU GRAMANI.

—*Lease of palmyra trees for enjoyment of toddy fruits, etc.* — *Registration* — *Immoveable property*— *Moveable property.*

Where a document stated that the lessee "had taken for lease for two years...for enjoyment for toddy, palmyra fruit, etc., the palmyra trees" in a certain garden, that he had paid the amount of the lease for two years (*i. e.*, Rs. 140) and that he would not cut the leaves of any of the trees on which he climbed except those whose leaves had to be cut.

Held, that the document in question was neither a lease of immoveable property nor did it create an interest in immoveable property:

Held, also that a lease for drawing toddy does not create an interest in "immoveable property" within the meaning of section 17 (*b*) of the Registration Act, and does not require registration.

Sukry Kurdeppa v. *Goondakull Nagireddi*, 6 M. H. C. R. 71; *Seeni Chettiar* v. *Santhanathan Chettiar*, 20 M. 58; 6 M.L. J. 281; *Janoo Mundur* v. *Hucha Mundur*, 12 W. R. 366, distinguished.

Marshall v. *Green*, L. R. 1 C. P. D. 35; 45 L. J. C. P. 153; 33 L. T. 404; 24 W. R. 175, cited.

Appeal against the decree and judgment of the Court of the City Civil Judge, Madras, in Original Suit No. 561 of 1910, dated the 26th July 1912.

FACTS.—Suit for damages for obstruction of enjoyment. The plaintiff was lessee of certain palmyra trees for drawing toddy for a period of five years from the owner of certain garden. While the lease period had not expired, the defendant obtained on lease the same garden from a purchaser from the real owner and immediately ousted the plaintiff from possession. The latter now sues for damages for obstruction of enjoyment. Objection was taken that the lease creates an "interest in immoveable property and as such requires registration." The contention was rejected and the City Civil Judge gave a decree for plaintiff for Rs. 540. The present appeal is against that decree in which objection was taken to the admissibility of lease-deed on the ground of want of registration,

Mr. *T. Ethiraja Mudaliar*, for Mr. *Balamukunda Aiyer*, for the Appellant.

Mr. *O.K. Mahadeva Aiyer*, for the Respondent.

JUDGMENT

WHITE, C. J.—The only point taken in appeal was that Exhibit A was a document which under the law should be registered but had not been registered and that consequently it was inadmissible in evidence. No objection was taken to the admissibility of the document in the Court of first instance. The document states that the lessee had "taken for lease for two years..... ..... for enjoyment for toddy, palmyra, fruit, etc, the palmyra trees." in a certain garden, that he had paid the amount of the lease for two years (*i. e.* Rs. 140) and that he would not cut the leaves of any of the trees on which he climbed except those whose leaves had to be cut. The question is, 'Is the instrument a lease of immoveable property within the meaning of section 17 (1) (*d*) of the Indian Registration Act, or an assignment of an interest of the value of Rs. 100 or upwards in immoveable property within the meaning of section 17 (1) (*b*) of the Act'? For the purposes of this case, I am prepared to assume that the instrument is a lease, or, if it is not, that it is an assignment of an interest of the value of Rs. 140. The Act defines "moveable property" as including "standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immoveable property."

On behalf of the appellant, Mr. Ethiraja Mudaliar has relied upon two decisions as bearing directly upon the point we have to decide. They are *Sukry Kurdeppa* v. *Goondakull Nagireddi* (1) and *Seeni Chettiar* v. *Santhanathan Chettiar* (2). The case of *Sukry Kurdappa* v. *Goondakull Nagireddi* (1) which was not decided until 1871 turned on the meaning of section 13 of the Registration Act of 1864. That Act contained no definition of moveable and immoveable property. The Act of 1866 introduced the definitions of moveable and immoveable property. The Act of 1871, introduced into the definition of moveable property the words "juice in trees." This amendment of the definition would seem to be in consequence of a decision of the Calcutta High Court in the case of *Janoo Mundur* v. *Hucha Mundur* (3) where the Court held, though with some doubt, that section 50 of the Act of 1866 had no application to a lease of a right to take the juice of date trees. In view of the definition to which I have referred, I do not think the present case is governed

(1) 6 M. H. C. R. 71.
(2) 20 M. 58; 6 M. L. J. 281 (F. B.).
(3) 12 W. R. 366.

by the decision of this Court in *Sukry Kurderpa* v. *Goondakull Nagireddi* (1).

In *Seeni Chettiar* v. *Santhanathan Chettiar* (2) the interest assigned was a right to cut and enjoy for four years the trees etc. and the grass, korai, gum, karuvela nut etc., which grew in a certain tank for a certain period. Under the instrument the party was entitled to cut and carry away the whole of the vegetable produce growing in the tank in question. The effect of the definition to which I have referred was not considered in that case because no question of the right to take the "juice in trees" arose. In that case the Court was of opinion that the instrument created an interest in immoveable property. Mr. Justice Subramania Aiyer in his judgment on page 66 observed that "The fact that the comparatively long period of a little more than four years was granted to the defendant for cutting and removing the trees is, to my mind, strongly in favour" of the view expressed in the case of *Marshall* v. *Green* (4) that "it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land."

Shephard, J. pointed out that under the instrument then in question, it was not merely the trees and grass then growing and ready to be cut that the defendant was to acquire. He was further to be at liberty and take all the trees which might grow on the ground within the period named.

The instrument in question in the present case only gives the right to take toddy and fruit for two years. No doubt any license under which a person is entitled to take toddy in a sense creates an interest in land since without land there would be no tree, and without tree there would be no toddy. It may be that in this case there is an implied contract or covenant that the lessor should not cut down the trees in derogation of his own grant. But having regard to the definition to which I have referred, it seems to me, the right view is that the instrument in question is not a lease of immoveable property, and that the interest conveyed by the document is not for the purposes of the Registration Act, an interest in immoveable property.

Accordingly I would dismiss this appeal with costs.

OLDFIELD, J.—The first of the two cases, on which the defendant has relied, *Sukry Kurdeppa* v. *Goondakull Nagireddi* (1) can be dismissed shortly, because at its date "moveable property" was not defined for the purpose of registration as it now is.

The second, *Seeni Chettiar* v. *Santhanathan Chettiar* (2) was decided after the amendment of the definition in 1871, though without explicit reference to it; and it was held that an instrument authorising the enjoyment and removal of trees, grass and other produce in a tank bed for a period of four years for a consideration of Rs. 3,400 required registration. Now, although a right to the juice of trees was not conveyed by that instrument, its terms indicating that no juice bearing trees were in question, yet it resembled Exhibit A in the present case to the extent that the trees being referred to in the judgment as timber, it dealt with moveable property as it is at present defined. That, however, was not held to be decisive as to the necessity for registration. The ground, on which registration was required, was in the words of Subramania Aiyer, J., that "parties entering into such a contract may expressly or impliedly agree that the transferee shall enjoy, for a long or short period, some distinct benefit to arise out of the land, on which the timber grows. In a case like that, the contract would undoubtedly be not one in respect of mere moveables but would operate as a transfer of an interest in immoveable property." And in deciding whether the contract then in question fell under the latter description, the learned Judge expressly attached importance to its duration, four years, and presumably also to the nature of the property, timber, grass and under growth which would be augmented by spontaneous growth. No doubt in the present case, in which plaintiff's right was to draw palmyra juice, cut such leaves as his doing so involved, and take the fruits of the trees, his right to do so for two seasons entailed that he should benefit, to adopt an expression from *Marshall* v. *Green* (4) by "the nutriment afforded by the land." This benefit, however, is not, in my opinion,

(4) 1 C. P. D. 35; 45 L. J. C. P. 153; 33 L. T. 404; 24 W. R. 175.

such an interest in land as section 17 (1) (*b*) of the Registration Act contemplates. For it involves only a stipulation that the trees are to remain available during the currency of the contract for the use specified in it, not any limitation on the transferor's enjoyment of the land as such. In *Seeni Chettiar* v. *Santhanathan Chettiar* (2), there was such a limitation. Although as observed in the judgment already referred to, there was no such transfer of possession as would constitute a lease, the contract was still subject to the implied proviso that the transferor's "action did not injuriously affect the special rights conferred upon the first defendant with respect to the trees etc.," and the enjoyment of those rights would evidently have been irreconcilable with the retention of substantial enjoyment by the transferor. Here it has not been explained and it does not appear how any ordinary use of the land could affect the nutriment it afforded to the trees, their juice or their fruit. It is, therefore, possible to give unrestricted effect to the reference to the juice of trees in the definition of moveable property in section 2 of the Act and to hold that Exhibit A transferred no interest in immoveable property.

Concurring with the learned Chief Justice, I would dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 227 OF 1911.

March 26, 1913.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Beachcroft.

CHANDRA NATH TEWARI AND ON HIS DEATH PARSON KOER—JUDGMENT-DEBTOR—APPELLANT

versus

Maharaja PROTAP UDAI NATH SAHE DEO—DECREE-HOLDER—RESPONDENT.

Chota Nagpur Tenancy Act (V of 1901 B. C.), ss. 208, sub-s. (1), 211 sub-s. (1)—Rent decree—Sale of tenure—Successful claim to share of tenure—Sale of share of tenure whether contemplated by s. 208 (1)—Execution of decree as one for money.

Section 208, sub-section (1), of the Chota Nagpur Tenancy Act of 1908 contemplates the sale of an entire tenure, and not of any share thereof.

Where a decree-holder originally sought to bring to sale the entire tenure in accordance with sub-section (1) of section 208, but found tha the could not do so as a quarter share of the tenure had been exempted from sale on the application of the registered holder thereof who had been left out of the sale:

Held, that the decree-holder could not execute the decree as a decree for rent under section 208 in respect of the three-fourths share of the tenure but that it was open to him to treat the decree as a decree for money against the judgment-debtor and to execute it in the ordinary Civil Court.

Madan Mohan Nath Sahi v. *Protap Udai Nath* 15 Ind. Cas. 842; 40 C. 623; 16 C. W. N. 1024, distinguished.

Appeal from the order of the Judicial Commissioner of Chota Nagpur, dated March 20th 1911, affirming that of the Deputy Collector of Ranchi, dated December 16th 1910.

Babus *Ram Chandra Majumdar*, *Biraj Mohan Majumdar* and *Najendra Nath Ghose*, for the Appellant.

Babu *Jogesh Chandra Dey*, for the Respondent.

JUDGMENT.—This appeal is directed against an order for execution of a decree for rent, obtained by the respondent on the 13th July 1907 under the Chota Nagpur Landlord and Tenant Procedure Act of 1879. On the 14th April 1910, the decree-holder applied for execution of the decree. On the 11th July following, two persons, not parties to the decree, preferred claims under section 211 of the Chota Nagpur Tenancy Act of 1908, which had come into force after the date of the decree and before the date of the application for execution. On the 16th September 1910, the claim was allowed in respect of one of those claimants who established his interest to the extent of a fourth share in the defaulting tenure. It was found in substance that the decree for rent had been obtained against persons who did not represent the entire tenure and that the holder of a fourth share had been left out of the suit, although his name had been registered in the books of the landlord. As soon as the claim was allowed, the decree-holder prayed that the decree might be executed against the remaining three-fourths share of the tenure. The owners of this three-fourths share thereupon objected that the sale could not take place under

section 203 of the Chota Nagpur Tenancy Act of 1903, and, that, in any view, they could be held liable only in respect of a proportionate share of the rent due. This objection has been overruled by the Courts below and sale directed of a three-fourths share of the tenure. In our opinion, this order cannot be supported.

Section 208, sub-section (1), of the Chota Nagpur Tenancy Act of 1908, provides that when a decree passed by a Deputy Commissioner is for arrears of rent due in respect of a tenure, the decree-holder may apply for the sale of such tenure and the tenure may thereupon be brought to sale in execution of the decree according to the provisions for the sale of under-tenures under the Bengal Rent Recovery Act of 1865, all the provisions whereof, except sections 12, 13, 14 and 15, shall, as far as may be, apply to such sale. It cannot be seriously contended that this sub-section contemplates the sale of a share of a tenure. In fact, the provisions of the Bengal Rent Recovery Act of 1865 clearly contemplate the sale of an entire tenure. It has been argued however on behalf of the decree-holder respondent upon the authority of the decision in *Madan Mohan Nath Sahi Deo* v. *Pratap Udai Nath Sahi Deo*(1), that it is competent to the Court to execute a decree for rent against a share of a tenure. In our opinion, the case mentioned is clearly distinguishable and is of no assistance to the respondent. In that case, the Commissioner had prohibited the sale of a portion of a tenure under clause (*a*) of the proviso to sub-section (1) of section 208. Under these circumstances, it was held that the remainder of the tenure, the sale whereof had not been prohibited by the Commissioner, might be sold under section 208, read with the provisions of the Bengal Rent Recovery Act of 1895, as if it were a tenure by itself, and that the purchaser at such sale would acquire the same status as the purchaser of an entire tenure. That case obviously bears no analogy to the one before us. Here the decree-holder originally sought to bring to sale the entire tenure in accordance with sub-section (1) of section 208. He now finds himself unable to sell the entire tenure, because an order adverse to him has been made in favour of a claimant under sub-section (1) of section 211. It is, therefore, impossible for us to hold that an application for sale of the remainder of the tenure stands on the same footing as an application for sale of a part of a tenure, the remainder whereof has been exempted from sale by an order of the Commissioner under clause (4) of the proviso to sub section (1) of section 203. This view is confirmed by an examination of the provisions of sub section (1) of section 211. That sub-section provides that if, before the day fixed for the sale of a tenure in pursuance of section 208, a third party appears before the Deputy Commissioner and alleges that he and not the person against whom the decree has been obtained was in lawful possession of or had some interest in the tenure, when the decree was obtained, the Deputy Commissioner shall examine such party according to the law for the time being in force relating to the examination of witnesses; and if he sees sufficient reason for so doing, and if such party deposits in Court, or gives security for, the amount of the decree, the Deputy Commissioner shall stay the sale and shall, after taking evidence, adjudicate upon the claim, provided that no transfer of a tenure shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner. It is worthy of note that this sub-section, though based upon section 125 of the Chota Nagpur Landlord and Tenant Procedure Act of 1879 which substantially reproduced the terms of section 103 of the Bengal Rent Recovery Act of 1859, differs from the corresponding provisions of the earlier statutes in one important respect. Under the Statutes of 1859 and 1897, a claim could be preferred only by a person who asserted that he was the owner of the entire tenure sought to be brought to sale. Under section 211 of the Statute of 1908 the claimant could allege that he was in lawful possession of or had some interest in the tenure, when the decree was obtained. Consequently it is open to a person who has some interest only in the tenure successfully to assert his claim under section 211. But although a claim by such a person is admissible under the section, yet he has to

(1) 15 Ind. Cas. 842; 16 C. W. N. 1024; 40 C. 623.

furnish security for the entire amount of the decree, and, if his claim is established, what is stayed is the sale, that is, the entire sale, and not merely the sale in respect of the interest asserted by him. The inference may legitimately be drawn that the Legislature intended that if the claim has been allowed in respect of some interest in the tenure under sub-section (1) of section 211, the decree should not be executed as a decree for rent under section 203. This view is, in accordance with the well-established principle, that a decree obtained against some only of the registered tenants cannot be executed as a decree for rent. [*Ananda Kumar Naskar* v. *Hari Dass Haldar* (2) and *Girish Chandra Guho* v. *Khagendro Nath Chattopadhyaya* (3).] It follows, therefore, that the decree-holder is not entitled to execute the decree against a three-fourth share of the tenure under the provisions of the Chota Nagpur Tenancy Act of 1908. It is open to him, however, to treat the decree as a decree for money against the judgment-debtor and to execute it in the ordinary Civil Court. The contention of the judgment-debtors that they cannot be held liable for the entire rent cannot be entertained at this stage. The defence might have been available to them if it had been urged in the course of the suit for recovery of arrears of rent; they cannot now be permitted to get behind the decree; nor is it open to them to invite the Court to break up the decree. Consequently the decree must be executed, as it stands, against the judgment-debtors, if an appropriate application is presented to a Civil Court competent to execute such a decree.

The result is that this appeal is allowed, and the order of Court below discharged. The application for execution will be forthwith returned to the respondent decree-holder with an endorsement by the Deputy Registrar that it has been so returned for presentation to the proper Court. When it is so presented, whether any question of limitation will arise or not, must depend upon the applicability of the terms of section 14 of the Indian Limitation Act. That, however, will be a question for the execution Court to determine, if the objection of limitation is urged there. The appellants are entitled to their costs throughout these proceedings. We assess the hearing-fee in this Court at two gold *mohurs*.

Appeal allowed.

(2) 27 C. 545; 4 C. W. N. 608.
(3) 9 Ind. Cas. 1001; 13 C. L. J. 613; 16 C. W. N. 64.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER NO. 246 OF 1913.
February 26, 1914.
Present:—Mr. Justice Ryves and Mr. Justice Piggott.
NATHU MAL—DEFENDANT—APPELLANT
versus
KISHORI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, rr. 5, 6—Attachment before judgment—Conditions to be fulfilled—Conditional attachment before judgment, when determines.

An order of attchment before judgment can only be made after a defendant fails to show cause to the contrary or to furnish the security required. The conditional attachment permissible under Order XXXVIII, rule 5, has effect only until the defendant, to whom notice has been issued, either furnishes the required security or appears to show cause.

First appeal from the order of the District Judge of Meerut, dated the 29th November, 1913.

Mr. *M. L. Agarwala* (with him Mr. *Ross Alston*), for the Appellant.

Mr. *Hamilton* (with him Dr. *S. N. Sen*), for the Respondents.

JUDGMENT.—This is an appeal against an order which was in substance an order for the attachment of certain property before judgment. The suit has since terminated in a decree against Nathumal, the present appellant; that decree is under appeal and a stay order has been applied for, which application is pending before this Court. It was practically admitted in argument before us that under these circumstances, it was not now a matter of much importance to any one whether this appeal succeeds or not. We think, however, that the order passed was irregular. If the learned District Judge considered himself to be acting under Order XXXVIII, rule 5, he should have begun by issuing the necessary

notice to the defendant, Nathumal, and the conditional attachment permissible under that rule is one to take effect only until the defendant to whom notice has been issued either furnishes the required security or appears to show cause. The order under appeal seems to have been really passed under rule 6 of Order XXXVIII; but the conditions necessary for the application of the rule were not fulfilled, as the attachment was made before Nathumal had been ordered to furnish security. The order passed was, therefore, irregular and objectionable. We formally allow this appeal with costs, and set aside the order complained.

Appeal allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 739 OF 1912.
January 14, 1914.
Present:—Mr. Justice Teunon.
Mohunt AJEB BHARTHI—PLAINTIFF—APPELLANT
versus
RAM NARAIN SINGH—DEFENDANT—RESPONDENT.

Interest—Arrears of rent—Absence of contract to contrary—General law as to interest—Bengal Tenancy Act (VIII of 1885*), ss.* 67, 68—Mokarari *lease.*

In the absence of any express or implied contract to the contrary, a landlord is entitled to the benefit of the general law with regard to the payment of interest on arrears of rent; that is to say, he is entitled to the benefit of sections 67 and 68 of the Bengal Tenancy Act.

Section 67 is applicable to *mokarari* leases when there is no contract to the contrary.

Matangini Debi v. *Mokrura Debi*, 29 C. 674; 5 C. W. N. 438, referred to.

Appeal from the decree of the District Judge of Gaya, dated January 23rd 1912, modifying that of the Second Munsif of that place dated August 23rd 1911.

Babu *Baldeo Narain Singh*, for the Appellant.

Moulvi *Khursed Husain* and Babu *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for rent. The suit was for the arrears of rent for the year 1318 and was based on a permanent *mokarari* lease granted on 25th November 1881. The first Court decreed the full amount of the rent claimed with damages at Rs. 15 per cent; but, on appeal, while upholding the decree for rent, the learned District Judge disallowed the claim for damages.

On the pleadings and on the findings arrived at, it is clear that the tenant had no reasonable cause for withholding the rent for the year 1318; and the contention of the landlord appellant before me is that, under the provisions of sections 67 and 68 of the Bengal Tenancy Act, the learned District Judge ought to have granted a decree for either interest or damages. The contention of the tenant respondent, on the other hand, is, *first*, that the intention of the parties as embodied in the lease of 25th November 1881 was that, on arrears of rent, no interest should be payable; and, *secondly*, that sections 67 and 68 of the Bengal Tenancy Act do not apply in the case of permanent *mokarari* leases.

The lease of the 25th November 1881 has been placed before me. It provides that the tenant shall pay to the landlord a sum of Rs. 500 by way of rent in certain instalments, and contains a promise on the part of the tenant defendant that he will not make default in any such payment. It is silent as to the consequences of such default, that is to say, nothing is said with regard to the payment of interest. In the absence of any express or implied contract to the contrary, I am of opinion that the landlord is clearly entitled to the benefit of the general law with regard to the payment of interest on arrears of rent, that is to say, he is entitled to the benefit of sections 67 and 68 of the Bengal Tenancy Act.

The contention that section 67 has no application to the case of permanent *mokarari* leases is based on the decision of a Full Bench of this Court in the case of *Matangini Debi* v. *Mokrura Debi* (1) but that case merely lays down that a covenant in a permanent *mokarari* lease regarding the payment of interest on arrears will override the provisions of section 67 of the Bengal Tenancy Act. It does not lay down and is no authority for the proposition that section 67 has no application to *mokarari* leases.

There is then a cross-objection by the respondent with regard to a sum of Rs. 60 which it appears he deposited in the

(1) 29 C. 674; 5 C. W. N. 438.

Collectorate towards the payment of Government revenue for the January *kist* of 1911. It is contended on behalf of the respondent that, as he was interested in protecting the estate of the plaintiff from sale, credit should have been given to him for that sum. But the findings of both the Courts below are that when the deposit was made, there were no arrears of Government revenue, the plaintiff having already paid the proper and sufficient amount. On this finding it appears to me that the defendant respondent cannot claim in this suit the sum of Rs. 60 which has been unnecessarily deposited by him. The cross-objection, therefore, fails.

The result is that the decree of the District Judge is set aside and that of the Court of first instance restored. The appellant is entitled to his costs of this Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1157 OF 1911.

February 16, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

HUKAM CHAND—PLAINTIFF—APPELLANT

versus

Musammat JINDO BAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884) *before amendment of* 1912), *s.* 40—*Unclassed suit—Same question involved in two decrees—Each decree less than Rs.* 2,500 *—Both decrees combined exceeding Rs.* 2,500—*Further appeal, whether lies.*

Where in two decrees in unclassed suits for Rs. 2,243-10-0 and Rs. 600 respectively, the same question of inheritance was involved and it was, therefore, contended that each decree directly involved a question respecting property valued at Rs. 2,243-10-0 *plus* Rs. 600, *i.e.*, over Rs. 2,500:

Held, overruling the contention, that whatever each suit may directly involve, each decree directly involves only a question respecting the property dealt with in it and that, therefore, no further appeal was competent under section 40 of the Punjab Courts Act, as it stood before amendment by the Act of 1912.

Second appeal from the decree of the Additional Divisional Judge of the Multan Division, at Ferozepore, dated the 1st June 1911, affirming that of the District Judge, Multan, dated the 31st August 1910, dismissing the claim.

Lala *Lajpat Rai*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—In this case and in the connected Case No. 1158 of 1911, Mr. Lajpat Rai began by asking us to adjourn them in order that they might be tried along with an appeal in a similar custom case between persons of the same tribe of the same town of Multan, which appeal has been, it is said, admitted but not yet set down for hearing on a specific date. This suggestion was objected to by Mr. Sheo Narain, and we have upheld the objection. There is much to be said against Mr. Lajpat Rai's request on its merits, and nothing whatever to be said in favour of it, in view of our opinion that the appeals are in any case not competent.

The suits are unclassed suits, and both the Courts below have come to concurrent findings. Therefore, according to section 40, Punjab Courts Act, as it stood before amendment by the Act of 1912, in order to justify a "further appeal", Mr. Lajpat Rai has to show that each suit bears a value of over Rs. 2,500 or that the decree in each case directly involves some claim to, or question respecting, property of that value. In No. 1157 the value of the suit is Rs. 2,243-10 and in No. 1158 it is Rs. 600, in neither case is the value of the suit sufficient. Then Mr. Lajpat Rai is compelled to admit that neither decree directly involves a claim to property over Rs. 2,500 in value; but he argues that, inasmuch as the same question of inheritance governs both cases, each decree directly involves a question respecting property valued at Rs. 2,243-10 *plus* Rs. 600, *i.e*, over Rs. 2,500. We are unable to accede to this proposition. In our opinion, whatever each suit may directly involve, each decree directly involves only a question respecting the property dealt with in it. Therefore, no appeal lies to this Court in either case.

Mr. Lajpat Rai then asks us to treat these petitions as revisions under section 70 (1) (*b*), Courts Act; but we find ourselves unable to do so. A similar question came before a Division Bench of this Court in *Nur Din* v. *Musammat Jhando* (1) decided on 29th January 1911, in which it was held that powers under section 70 (1) (*b*), had been taken away from this Court by Punjab Act I of 1912, even where the decree sought to be impugned was

(1) 23 Ind. Cas. 85; 44 P. L. R. 1914.

passed before that Act came into force. No doubt if on 9th November 1911, the learned Judge, who provisionally admitted these appeals as regular appeals, had refused to admit them as such and had taken them as special appeals under section 70 (1) (*b*) and admitted them, they could be heard as such now; but this is not what was done. He admitted them as regular appeals "subject to just exceptions as to appeal lying," and with regard to appellant's suggestion that, if not competent as regular appeals, the Court should admit them under section 70 (1) (*b*), the Judge merely noted "Bench will decide as to 70 (1) (*b*)." This was in no sense an admission under section 70 (1) (*b*), and our powers to admit under that section are gone. As Mr. Sheo Narain points out, the appellants would have been well advised to have come up with revisions under section 70 (1) (*b*) and have asked alternatively that the Court should consider whether they were not entitled to regular appeals.

The appeals fail and are dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 183 OF 1913.

December 18, 1913.

Present:—Mr. Justice Wallis.

MESSRS. MOHANLAL KUNIALAL—PLAINTIFF

versus

KESARIMULL CHORDIYA AND ANOTHER—DEFENDANTS.

Stamp Act (II of 1899), s. 13—Statutory Rules, r. 7—Promissory-note written on impressed stamp paper of insufficient value—Blank impressed sheet added to make up the deficiency—Pro-note, whether duly stamped.

Where the terms of a promissory-note were written on an impressed stamp sheet of Rs. 1-8 and another blank impressed sheet of Rs. 0-12-0 was attached to make up the deficiency in the value of the stamp required for the pro-note:

Held, that under section 13 of the Stamp Act and rule 7 of the Statutory Rules, made in pursuance thereof, the promissory-note was not duly stamped and, therefore, was inadmissible in evidence.

Mr. *P. Duraiswami Iyengar*, for the Plaintiff.

Messrs. *W. Barton*, *C. P. Ramasami Iyer* and *N. Viswanatha Iyer*, for the Defendants.

JUDGMENT.—This is a suit on an instrument on paper impressed with a stamp. The stamp is marked *hundi* but the instrument is really a promissory-note written on a stamp paper of Rs. 1-8 0. There has been pasted on to this paper another similarly impressed paper bearing a stamp of 12 annas. When this promissory-note was tendered in evidence, Mr. Barton took the objection under section 35 of the Stamp Act that it was not admissible because it was not duly stamped. Under that section, a promissory-note if not duly stamped is absolutely inadmissible. Now section 13 of the Stamp Act provides "Every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument." And section 75 of the Act provides that "The Governor-General in Council may make rules to carry out generally the purposes of this Act." And section 76 provides that "All rules published as required by this section shall, upon such publication, have *effect as if enacted by this Act.*" Now admittedly also the "Rules," that is, rule 7-*a* Chapter II of the impressed sheets is as follows:—"7-*a*. When two or more impressed sheets are used to make up the amount of duty chargeable in respect of any instrument, a portion of such instrument shall be written on each sheet so used."

Now it appears to me that in this case two impressed sheets have been used to make up the amount of duty chargeable in respect of this promissory-note, but that the whole of the instrument has been written on only one of the sheets. The object of the rule appears to be in furtherance of the provisions of section 13 that the stamp paper should not be used or applied for any other instrument; and the present document illustrates the necessity of the rule because in its present state no part of the instrument having been written on one of the two impressed sheets, it would be possible for anybody with a little water to separate this sheet from the sheet on which the promissory note is written and use it for a new promissory-note. I cannot see how an instrument which offends against section 13 and the statutory rule made to give effect to section

13 and which is to be regarded as part of the Act can be said to be 'duly stamped.' It is said that this is not an uncommon practice. If so, the sooner it is stopped or the law is altered, the better. But those are not considerations which can legitimately be allowed to operate upon my judgment. I am constrained to uphold the objection and to dismiss the suit. No costs.

Suit dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 6 OF 1913.

February 23, 1914.

Present:—Sir H. S. Hartnoll, KT., Offg. Chief Judge, and Mr. Justice Twomey.

MAHOMED SALAY NAIKWARA—APPELLANT

versus

MULLA GOOLAM MAHOMED AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92 (1) (b) —Suit under section 92 compromised and trustee discharged from liability to account—Compromise decree attacked as fraudulent and collusive—Declaration sought that discharge of trustee from liability to account is void—Advocate General's consent, whether necessary for such declaratory suit—Ejusdem generis, *principle of—"Further or other relief," meaning of.*

A suit, under the provisions of section 92, Civil Procedure Code, praying for the removal of trustees, appointment of new trustees, accounts and inquiries, etc., was compromised, the old trustees were discharged from their trusteeship, and new trustees were appointed in their stead. The beneficiaries under the trust being dissatisfied with the compromise decree attacked it in a regular suit on the ground of fraud and collusion and asked that so much of the decree as related to the discharge of the old trustees from their liability to render accounts of the trust moneys was void and of no effect:

Held, that, although the direct object of the suit of beneficiaries is to declare a portion of the challenged compromise decree void and of no effect, yet, as the grounds on which such a declaration is asked allege a breach of trust and involve the taking of accounts and inquiries before a decision can be given on the prayer for relief, the relief asked for should be held to come within clause (*b*), sub-section (1) of section 92, Civil Procedure Code, and, therefore, the suit not maintainable without obtaining the consent of the Advocate-General.

Sir Dinshaw M. Petit v. *Sir Jamsetji Jijibhai*, 2 Ind. Cas. 701; 11 Bom. L. R. 85; 33 B. 509; 5 M. L. T. 301, referred to.

Mr. *Doctor*, for the Appellant.

Mr. *Chari*, for Respondents Nos. 1 and 2.

Mr. *Vertannes*, for Respondent No. 3.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The point for decision in this appeal is whether the consent in writing of the Government Advocate was necessary for the institution of the suit out of which this appeal arises. In Civil Regular No. 417 of 1909, the fourth and seventh respondents brought a suit against appellant and Mynuddin Naikwara, that clearly came within the provisions of section 92 of the Code of Civil Procedure. One Mariam Bi Bi *alias* Ma Htay by her Will gave one-third part of her property after payment of her debts and funeral expenses to charitable purposes. It was alleged that appellant, who had been the agent and attorney of the deceased Mariam Bi Bi, had been in possession of her property, had obtained Probate of the Will and had continued to remain in possession of the property. It was asserted that he had appropriated certain immoveable properties belonging to the estate for the said charitable trust and had been managing the trust properties and realizing the rents and profits thereof and had not divided the same. Mynuddin Naikwara was made a defendant, as appellant alleged that he had appointed him to be a co-trustee, though the plaintiffs were not aware whether he had taken any part in the management of the said trust. It was asked that the defendants be called on to render an account, and that appellant should be removed from the office of trustee, other trustees being appointed and the trust estate being vested in them and that a scheme be framed for the management of the trust. This suit was compromised. The defendants were discharged from their trusteeship and the fourth, fifth and eighth respondents were appointed trustees in their stead. The first two respondents then instituted the present suit. They charge that the terms contained in the petition of compromise are collusive and fraudulent, inasmuch as the said compromise was made not for the benefit of the trust but for the purpose of concealing from the vigilance of the Court breaches of trust and fraud, committed by the appellant and Mynuddin Naikwara as trustees and that, therefore, the decree passed on the petition is *ipso facto* void against the plaintiffs who were beneficiaries under the said trust. Particulars of the alleged frauds were set out. They, therefore, asked that so much of the decree as related to the discharge of the appellant and Mynuddin Naikwara

from their liability to render accounts for all the moneys received by them since the trust properties came into their hands as trustees thereof, is void and of no effect. The learned Judge on the original side disallowed the objection that the suit was not maintainable on the ground that the leave of the Government Advocate had not been obtained under section 92 of the Code. He found that the relief asked for did not come within any of the reliefs specified in section 92. He accordingly ordered that the matter be referred to the Second Deputy Registrar to investigate the accounts and report whether there was any justification for the charge of fraud being made.

The present section 92 of the Code has considerable differences as compared with the corresponding section 539 of the repealed Code (Act XIV of 1882 as amended) There were five reliefs in the old Code and then came the words "or granting such further or other relief as the nature of the case may require" The new section has eight reliefs, the last one "granting such further or other relief as the nature of the case may require" being made clearly a distinct form of relief as it is given a letter of the alphabet of its own. It is urged that "further or other relief" means relief *ejusdem generis* as the preceding reliefs. The word "other" is of wide import. As I have said, this form of relief has now been made clearly quite a separate form of relief. The principle underlying the section is that private persons shall not have unrestricted license to bring suits against trustees of trusts created for public purposes of a charitable and religious nature, but they must obtain the sanction of a Crown Officer first. The duty is obviously imposed on such an officer of seeing that a *prima facie* cause exists for bringing such a suit before he gives his consent. The present suit in any case involves the taking of an account and inquiries into the accounts. This is the fourth form of relief set out in the section. In discussing the meaning of the words "further or other relief" Beaman, J., said in the case of *Sir Dinshaw M. Petit* v. *Sir Jamsetji Jijibhai* (1). "It will, of course, be at once observed that that section, (*i. e.*, section 539 of the repealed Code) after an introduction containing very general words—as, *e. g.*, 'whenever the direction of the Court is deemed necessary for the administration of any such trust'—goes on to say that the plaintiffs may obtain a decree for five specified objects, after which come the words 'or granting such further or other relief'. And it is, I understand, the opinion of my learned brother that the relief we are now concerned with does not fall within any of those five objects and cannot be included under the following words. Those, it is said, must be read as *ejusdem generis*. * * * * * * * * I am not myself—and never have been—much in love with the *ejusdem generis* rule. It is too vague. If it means anything more than a tautologous re-affirmation of what has gone before, it must mean so very much more. What is relief of the like kind? Certainly not of a kind so like as to be practically identical. That would make the words mere surplusage. I should be disposed to think, they meant such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in a suit of this kind. As, for example, removing fraudulent trustees, restraining a breach of the trust, and so forth."

In the present case, the direct object of the suit is to declare a portion of a decree void and of no effect, but the grounds on which such a declaration is asked allege a breach of trust and they involve the taking of accounts and inquiries before a decision can be given on the prayer for relief. I am of opinion that the relief asked for should be held to come within the eighth ground of relief set out in section 92. I would, therefore, allow the appeal, set aside the order of the learned Judge on the original side and dismiss the suit. It will be open to the first and second respondents to obtain the leave of the Government Advocate, and if they obtain it, to file a fresh suit.

In view of the petition of the 1st ard 2nd respondents of the 18th November 1912 and the order of the learned Judge on the original side passed on the 26th November 1912, each party will bear its own costs on appeal.

TWOMEY, J.—I concur.

Appeal allowed.

(1) 2 Ind. Cas. 701; 11 Bom. L. R. 85 at pp. 137, 138; 5 M. L. T. 301; 33 B. 509.

CHINNAN *v.* KONDAM NAIDU.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1716 TO 1756 OF 1912.

October 24, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

CHINNAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KONDAM NAIDU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Chingleput District—Mirasi tenure—Melvaram—Thunduvaram—Kudivaram—Kudivaram right, meaning of—Ullkudi Payakar—Swatantrums—Inamdar—Mirasidar also ancient Inamdar—Presumption—Ekabogam Mirasidar—Shrotriam Inam, granted to Mirasidar in 1802, whether "estate"—Madras Estates Land Act (I of 1908), s. 3, cl. 2 (d)—Suit to compel acceptance of patta—Revenue or Civil Court -Jurisdiction.

In the case of Mirasi proprietors, the produce of the land is divided into three shares, (1) Melvaram, the royal share, (2) Thunduvaram, the landlord's and (3) Kudivaram, the occupant's share.

The word "Kudivaram" may be used in two senses, (1) the right of occupancy, (2) the share of the produce which the cultivator, whoever he may be, gets. In section 3, clause (2) (*d*) of the Madras Estates Land Act, it is used in the former sense.

A person cannot be held to own the Kudivaram right in its true and complete sense, unless he has got the power of alienation of his right of occupancy, and unless he does not acknowledge himself to be merely the tenant of a person really owning the Kudivaram right.

A Payakar whom a Mirasidar introduces for cultivation purposes, if he permanently settles in the village and if he and his descendants enjoy the same lands as tenants for about 100 years, becomes by custom and by Hindu Law, Ullkudi Payakar with permanent rights of occupancy, or in other words, acquires what may be called in one sense Kudivaram right in the lands in his holding.

Swatantrums include Thunduvaram and mean a certain portion of the gross produce raised by the Ullkudi tenants, which is due to the original Mirasidar.

As regards Inamdars, the presumption is that at the time of the Inam grant, the Inamdar was not the owner of the Kudivaram right.

Venkatachala Goundan v. *Rangaratnam Aiyar*, 20 Ind. Cas. 374; 24 M. L. J. 571; 13 M. L. T. 450; (1913) M. W. N. 434 and *Indety Chinna Nagadu* v. *Potu Konchi Venkatasubbayya*, 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376- dissented from.

Marapu Tharalu v. *Telukulu Neelankanta Behara*, 30 M. 502; 2 M. L. T. 470, followed.

But as regards a Mirasidar, to whom an Inam was granted long ago, it cannot be said that there is a presumption against his having also owned the Kudivaram right at the time of the ancient grant, regard being had to the history of the Mirasi tenure in the Chingleput District.

A Mirasidar who is the owner of a Kudivaram right in the lands in the village is called Ekabogam Mirasidar.

Where a Shrotriam Inam was granted to a Mirasidar in 1802 and it was contended that the Shrotriam Inam came under the definition of 'estate' in the Madras Estates Land Act:

Held, overruling the contention, that the Shrotriamdar being also a Mirasidar in whom presumptively the Kudivaram right rested, the Shrotriam Inam was not an estate within the meaning of section 3, clause 2 (*d*), of the Madras Estates Land Act, and that, therefore, the suit to compel acceptance of *patta* could not be brought in an ordinary Civil Court.

Second appeals against the decision of the District Court of Chingleput, reversing that of the Sub-Collector of Chingleput.

Mr. *T. R. Ramachandra Aiyar*, for the Appellants.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—These second appeals have arisen out of suits brought against the same two defendants. The plaintiffs in these suits are the tenants in a Shrotriam village, called Talamber in the Chingleput Taluq. The plaintiffs' case in each suit is that the Shrotriam Inam comes under the definition of 'estate' in the Madras Estates Land Act, and the plaintiff is the occupancy tenant of the lands entered in the A schedule to the plaint, and that the plaintiff is entitled to demand from the defendants a Pattah containing the terms stated in the "model" Pattah, forming the B schedule to each plaint. The defence of the two defendants, who are Shrotriamdars, is that the plaintiffs have no occupancy rights, that the defendants own both the Melvaram and the Kudivaram rights in the lands in the plaint village, that the village is not an 'estate' under the Madras Estates Land Act, that the provisions of that Act do not apply to the suit lands, and that the plaintiffs are not, therefore, entitled to demand Pattahs from the defendants. As regards also the terms to be entered in the Pattahs, there was dispute between the plaintiffs and the defendants. The Sub-Collector of Chingleput decided the suits substantially in the plaintiffs' favour, though in respect of the rents to be paid by the plaintiffs, he decided in favour of the defendants' contention, namely, that the plaintiffs were bound to pay Waram or share of produce (forty per cent. of the produce) as rent and not money rents as contended by the plaintiffs. On appeal, the learned

District Judge held that the defendants were not only Shrotriamdars but also Mirasidars of the village, that while they owned the Melvaram of the village as Shrotriamdars, they owned the Kudivaram as Mirasidars, that the plaintiffs had no occupancy right, that the village was not an *estate* under section 3, clause (*d*) 2 of the Estates Land Act, because the persons to whom the land revenue was granted as Shrotriam Inam by the Government did own the Kudivaram thereof as Mirasidars, and that hence the Madras Estates Land Act did not apply to the lands in the village, and no suit could be brought under that Act by the tenants to enforce the grant of pattahs. On these findings, he reversed the Sub-Collectors' decisions and dismissed the plaintiffs' suits with costs. The plaintiffs have, therefore, brought these second appeals, contending that the village is an "estate" under the Madras Estates Land Act and that the plaintiffs have occupancy rights. I think the decision of these cases depends on the answer to the question whether, when the Government granted the Melvaram as Shrotriam Inam to the predecessors-in title of the defendants, the grantees owned the Kudivaram in the village lands or whether there existed at that time tenants with occupancy rights, who owned the Kudivaram in the lands in dispute.

These second appeals have been fully and ably argued by the learned Vakils on both sides, and we have been taken through not only the documentary evidence adduced by both parties, but even through much of the oral evidence. The Melvaram of the village seems to have been first granted as Poliagar service Inam by a former Government, probably the Nawab of Arcot, in the seventeenth century, to a person whose family was known as Pothi Reddi family. The evidence further seems to show that Pothi Reddi Nayakan, who became the Poliagar, was known as the Ekabogam Mirasidar of the village, and hence must have owned at one time the Kudivaram right in all the village lands.

Now the Mirasi system in the Chingleput District began, according to the traditional authorities, by the act of a Chola king named Kulothunga, whose illegitimate son Adanda conquered the country round Canchipuram. The date of this conquest is variously given as between the eighth and twelfth centuries. The grantees of lands under the Chola king in Mirasi right were all Vellalas. It was intended that they should bring the lands in the villages, which were mostly of poor quality, under cultivation through their own exertions or through the exertions of Payakaris, who were to be settled by the Mirasidars, known in the Hindu period as Kaniakshikar. The Mirasidar was not expected himself to cultivate the entire area of the cultivable lands in the village. The Payakaris, whom he introduced for cultivation purposes, if they permanently settled in the village and if they and their descendants enjoyed the same lands as tenants for about 100 years, became by custom and by Hindu Law, Ullkudi Payakaris with permanent rights of occupancy, that is, they acquired what may be called in one sense the Kudivaram right in the lands in their holding. Though they thus acquired permanent occupancy rights, the original Mirasidar, who had obtained the Kudivaram from the Government, was entitled to demand from the Ullkudi Kudivaramdar some Swatantrams including what was called Thunduvaram, the amount of which Swatantrams was a certain proportion of the gross produce raised by the Ullkudi tenant. These Swatantrams might be looked upon as a fraction of the fruits of the Kudivaram right, which fraction can never be lost by the Mirasidar. Forty per cent. being the Melvaram share, and sixty per cent. the Kudivaram share, the Ullkudi Kudivaramdar did not take the whole sixty per cent. for himself, but gave out of it a percentage as Swatantrams to the Mirasidar, even after he, the Ullkudi, had obtained the permanent occupancy right in the lands. The above is the conclusion which I have arrived at, after anxious consideration of the arguments on both sides and after perusal of the passages in Huddlestone's papers on Mirasi rights and Crole's Chingleput District Manual and other authorities. (See Huddlestone' Mirasi papers, pages 176, 214, 372, 379 to 384, 395 and 435; Chingleput District Manual, pages 110, 138, 212, 213, 300 to 302, 393, 394 and 395).

Though the Ullkudi Payakari tenant seems to have obtained a sort of permanent right of occupancy by continual residence in the village and by cultivation of the same lands for three generations, it appears very doubtful whether he could be held to have acquired in former times what is now known as the

Kudivaram rights in the lands in his occupation. At page 214 of Mr. Huddlestone's Mirasi papers it is said "the Ullkudi, on the contrary, holds his lands in a subordinate species of Mirasi and possesses in them no *absolute* but indefinite property; for, though he cannot transfer them by sale, gift, mortgage or otherwise, yet he cannot be removed from them and they descend like the Kaniyakshi Mirasi of the village to his posterity; he pays the Sirkar revenue, the Thunduvaram—often no more than a pepper corn—and all dues rendered by the Mirasidars and Puracudis, but he receives nore. The Ullkudi Payakaris have, in many places, by gradual encroachment, succeeded in placing themselves in possession of the whole *varapat* of the village and not infrequently in usurping the Mirasi right; there is a remarkable instance within the limits of Madras of complete usurpation, in which the Gramini Payakaris of the village of Tondiyarpet, after the continued contention of half a century, have established themselves in possession of whole Mirasi, though under a decision of the Supreme Court, their right has been negatived and "they are liable to ejectment, on further process." The question of Mirasi right is a very contested matter. I shall just quote a few passages from Crole's Chingleput District Manual, page 214. "The question of Mirasi right is without doubt one of considerable difficulty. No proof of this is more conclusive than diametrically opposite opinions regarding it which have been ventilated and upheld by officers of vast ability from the very commencement of our administration. The Madras Government has itself at various times passed orders containing *dicta* utterly irreconcilable, one with the other, while the Board of Revenue, although on the whole more consistently supporting the claims of Mirasidars (Kaniyatchikars), has, in hardly any single instance, been at one with the Government in the many discussions on this question, which have now attained such bulk as to supply Mirasi right with a literature of its own, equalled in point of ability and learning by that of few of the many other great and intricate subjects which have from time to time engaged the attention of Indian Administrators." In going over the bulky reports, proceedings, minutes of consultation, and "orders thereon," not to mention the despatches of the East India Company, nothing strikes the reader more strongly than the change which has come over the nature of the right itself ever since the District was first handed over to the Company. During that period, many portions of the right, at one time inherent in it, have disappeared owing to the changes produced by flux of time and the altered conditions of the country, while others have been expressly abrogated by Government itself; yet this seems generally to have been overlooked and additional perplexity has been thus imported into the discussions of a subject already sufficiently intricate and obscure.

The literature on this subject was recently added to by the pronouncement of my learned brother, Sir C. Sankaran Nair, J., in Second Appeal No. 210 of 1911. I also contributed my humble quota in that case by a separate judgment. By our judgments, we have referred the question to a Full Bench and I, therefore, do not intend to say anything in this case as to the present right of Mirasidars in Ryotwari villages.

What, however, we have to consider in this case is, whether in 1802, the Ekabogam Mirasidar of the plaint village in the Chingleput Taluk owned the Kudivaram right or whether there were Ullkudi Payakaris then, who could be deemed to have acquired the full Kudivaram rights of that time. I must frankly confess that I was at first rather inclined to hold that the Wullur Sukawasi tenants mentioned in the Varachattam of 1772, Exhibit LV, might have acquired full Kudivaram rights in 1772 itself, and that in any event, they might be presumed to have acquired full Kudivaram right at the time of the Shrotriam grant in 1802. However, after I had recorded a portion of this judgment, I had the great advantage of a perusal of the judgment prepared in this case by my learned brother, and I began to feel doubts about the soundness of my view. It seems to me now that a person cannot be held to own the Kudivaram right in its true and complete sense, unless he has also got the power of alienation of his right of occupancy, and unless he does not acknowledge himself to be merely the tenant of a person really owning the Kudivaram right. The documentary evidence in this case seems to show that, even for several years after 1802, the occupancy tenants of the

lands in this village did not claim rights of alienation of their occupancy tenure, and that they acknowledged the Shrotriamdar as Ekabogam Mirasidar, that is, that he was the owner of the Kudivaram right in the lands in the village. That even the sub-tenant of a Kudivaram owner might acquire a permanent occupancy right in his sub-tenure, has been held by Benson and Sundara Aiyar, JJ., in *Venkatachala Goundan* v. *Rangaratnam Aiyar* (1). If it were necessary to decide the question in this case as to whether the plaintiffs have now obtained permanent rights of occupancy in their lands, I would, speaking for myself, feel great difficulty in concurring with the learned District Judge (see paragraph 6 of his judgment) that the plaintiffs have no occupancy rights, having regard to the considered observations of *Venkatachala Goundan* v. *Rangaratnam Aiyar* (1). But the only question on which it is necessary to express a finding in this case is, as I said before, whether in 1802 the grantee of the Shrotriam Inam had lost the Mirasi rights by the Ullkudi tenants having set up in themselves and enjoyed the Kudivaram permanent occupancy rights, in the full sense, for the required period. As regards Inamdars, I think or rather, I hope, that in this Court it has been now settled that the presumption is that at the time of the Inam grant, the Inamdar was not the owner of the Kudivaram right, notwithstanding the observations in *Indety Chinna Nagadu* v. *Potu Konchi Venkatasubbayya* (2) and *Marapu Tharalu* v. *Telukula Neelakantha Behara* (3) from which I have expressed dissent in my judgment in the recent cases, *Adusumulli Suryanarayana* v. *Acchutta Potanna* (4). But as regards a Mirasidar to whom an Inam was granted long ago, it cannot be said that there is a presumption against his having also owned the Kudivaram right at the time of such an ancient grant, having regard to the history of the Mirasi tenure in the Chingleput District. Whether a Mirasidar in the modern period, that is after 1878, has the Kudivaram right in the waste lands in his village, not included in his patta or in the communal sites, is another question. But whether he should be presumed to have lost his Kudivaram right in cultivable lands in 1802 is quite a different question. After anxious consideration, I am glad to find myself able to concur in the opinion of my learned brother, that the finding of fact by the learned District Judge, limited to the following statement, namely, that the Ekabogam Mirasidar of the plaint village had not lost his original Kudivaram rights in the village cultivable lands at the time of the grant to him in 1802 of the Shrotriam Inam, should not be disturbed by us in second appeal.

On that finding, the Inam does not fall under the definition of an 'Estate' under section 3, clause 2 (*d*), of the Madras Estates Land Act, and the plaintiffs had no right to bring suits to enforce the grant of pattahs. The right to enforce the grant of pattahs being the right created by a particular statute (section 55 of the Estates Land Act) to be enforced in a particular class of Courts, the Civil Courts have no jurisdiction to entertain such suits The second appeals, therefore, should be dismissed with costs; but as I said before, it should not be taken by the defendants that these cases have decided the question of the alleged permanent occupancy rights of plaintiffs in their respective holdings.

SPENCER, J.—The plaintiff brought this suit in the Court of the Sub-Collector of Chingleput under section 55 of the Madras Estates Land Act to compel his landlord to grant him a pattah admitting his right of occupancy in the land cultivated by him. The Sub-Collector found that the plaintiff was entitled to such a pattah and gave him a decree accordingly. In appeal, the District Judge decided that the plaintiff had not proved that the occupancy right lay with him. The judgment goes further and finds that the land concerned in this suit is not part of an estate as defined in section 3 of Act I of 1908 and, therefore, that the suit was not maintainable in a Revenue Court.

The village of Talambur in the Chingleput District appears to be held by the defendants on Shrotriam tenure. Exhibit II is the original *purwanah* or grant, dated 1802. From this it appears, that the village was

(1) 20 Ind. Cas. 374; 24 M. L. J. 571; 13 M. L. T. 450; (1913) M. W. N. 434.

(2) 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376.

(3) 30 M. 502; 2 M. L. T. 470.

(4) 22 Ind. Cas. 339; 15 M. L. T. 268; 26 M. L. J. 99.

previously held on Mokhasa tenure on condition of rendering Police services. When the Mokhasa was converted into Shrotriam in 1802, the services were dispensed with and a money rent was substituted. Afterwards in 1862, the Shrotriam was enfranchised and the title-deed, which is Exhibit IX, was granted to the holders.

As the respondents have taken the objection in their written statement, that this village is not an estate within the meaning of the Act, and as the District Judge has found this point in their favour, it becomes necessary for us to decide, in the first place, whether at the time of the original grant, the defendants' ancestors were, in the eye of Government, persons already owning the Kudivaram. Mr. Govindaraghava Aiyar for the respondents has strenuously maintained that in the Chingleput District, Mirasi rights carried with them the right of occupation.

In *Papala Narayanasami Naidu* v. *Secretary of State for India* (*Pensalani Kanniappa Naidu*) (5) the meaning of 'Shrotriam tenure' is considered and the definition of Shrotriam in Wilson's Glossary is quoted to show "that a Shrotriam grant gives no right over the lands and the grantee cannot interfere with the occupants as long as they pay the established rents." Properly speaking, Shrotriam consists of lands or a village held at favourable rate, the land or the revenue being assigned to a Brahmin, or to servants of the Government as a reward for past services. In *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadari Appa Rao Bahadur* (6) the meaning of the word Mokhasa is discussed. The definition given in Wilson's Glossary is quoted to show that it is derived from an Arabic word signifying 'to have as one's own' and that it means "a village or land assigned to an individual, either rent-free or at a low quit rent, on condition of service."

The grant of the Shrotriam being a grant by Government of a portion of their Melvaram rights to persons already in occupation of the land, a presumption appears to arise that the persons in occupation were, previously to the grant, owners of Kudivaram right. If they were not Kudivaramdars previously, it is difficult to understand on what right they were occupying the village. In this connection, Exhibit IV is a very important document as it purports to be a Varachattam or settling of rent for the year 1772, thirty years before the Shrotriam grant was made under Exhibit II, and shortly after the British Administration began, which dates from 1760 according to the District Manual, page 229. From Exhibit IV, it appears that two persons, Pothi Reddy and Venkatakristnama Naicken, who are described as Kaniyakshi, were cultivating Kambattam or home farm-land and that the other land in the same village was being cultivated by ryots who are described as Ullur Sukavasis. It also appears that out of the total yield of 100 Kalams of grain, the Government took 34 kalams 5 marakals and 4 measures as their Melvaram after making all deductions. An important feature of this document is, that Kambattam lands and lands cultivated by Sukavasis are put on the same footing. In Wilson's Glossary, at page 492, 'Sukavasi Kudiyan' is defined as one "who lives by the produce of the rented lands", Kaniyakshi is the proprietor, from Kani, the Tamil for land, and 'adsi'-'andei', owner, lord. Kaniyakshi became afterwards known as Mirasidar (see pages 211 and 216 of the Chingleput District Manual). Mirasidars had a right to receive Thunduwaram or short assessment on all produce raised on lands in the occupation of non-Mirasidars (page 220). Thunduvaram is defined at page 265 as the fixed percentage of the Kudivaram which by agreement or custom was due to the Mirasidars on all lands cultivated by Payakaris. At page 223, the opinion of Mr. Place that the Mirasidar had an undoubted hereditary property in the soil, which he derived originally from the sovereign, is quoted. In the papers on Mirasi right compiled by Government in 1862, Kaniyakshi is described at page 372 as "free hereditary property in the land." Mirasi is the name by which it came to be known, a word of Arabic derivation introduced by the Mahomedans soon after their conquest of the Deccan, and denoting hereditary property in general. Mirasi is defined by Mr. Ellis at page 176 as a general term used to designate a variety of rights, all more or less connected with the proprietary possession or usufruct of the soil or of its pro-

(5) 14 Ind. Cas. 261, (1912) M. W. N. 496, 24 M. L. J. 36 at p. 89.

(6) 29 M. 52 at p. 55; 16 M. L. J. 1; 1 M. L. T. 3; 3 C. L. J. 1; 3 A. L. J. 55; 8 Bom. L. R. 1; 10 C. W. N. 161; 33 I. A. 46.

duce and by Sankarayya in similar terms at page 218. Thunduvaram is defined at page 380 as that which remains to the Mirasidars of the rent paid by the Payakaris after the liquidation of the land tax. If the Mirasidars failed to cultivate for a year, the Mirasi right was not forfeited to the Sirkar, but the Government could select a tenant and confirm him in possession by issuing a cowle (pages 221 and 384). It thus appears that the Mirasidar was the person who got lands cultivated and let tenants into possession for the purposes of cultivation. At page 434, in Sir Thomas Munro's minute, the right of a Mirasidar to cultivate the land is recognised. It is also noted that if he fails to pay the public assessment, his land is liable to sale, but the Mirasidars possessed the privilege for some years more or less of recovering his land from tenant let in by the Government on his consenting to pay the rent. The history of Mirasi tenure after the British occupation appears in pages 300 to 303 of the Chingleput District Manual. Their privileges were continually encroached upon, but it appears that these encroachments did not commence before the 19th century. In 1802 when this Shrotriam grant was made, there is thus every reason to presume that the Mirasi right in the defendant was unimpaired. Mr. Baden Powell in his book on the Indian Village Community observes at page 365 that there cannot be the smallest doubt that, if the Mirasi village claims were anything at all, they were claims which originally, at any rate, constituted the holders jointly, according to their shares, the proprietors of the villages exactly as such co-sharers were in other parts of India.

At page 369 he states : "The produce, if there is no Mirasi class, is simply divided into the Melvaram, the state share, and the Kudivaram or occupant's share, that is to say, after the fees (Meras) of the village servants, watchmen, etc., etc., have been satisfied out of the grain heaps. When there is a body of Mirasi proprietors, then there are *three* instead of *two* to share. Melvaram, as before, is the Royal share; Thunduvaram is the landlord's (Mirasidar's) share, and Kudivaram, the cultivating occupant's, as before. This division of the Varam into three portions is well recognised in the judgment of Collins, C. J., and Muthuswami Aiyar, J., in *Chidambara Pillai* v. *Thiruvengadathiengar* (7), but the proprietor's share is there called Miraswaram instead of Thunduwaram. This Thunduwaram or Mirasi waram being paid by the Payakaris to the Kaniyakshdar or Mirasidar out of the Kudivaram raised upon lands leased out for waram, and the Mirasidar taking the whole of the Kudivaram for his Panni lands cultivated by his own labour and the labour of farm-servants who were paid wages in grain, it is plain that the Mirasidar of such a whole village cannot be described as a person not owning the Kudivaram in 1802. For the purpose of considering who was the owner of the Kudivaram in a village of the class of the four villages granted as Shrotriam under Exhibit II, it is necessary to treat the village as a whole, for the portions of estates or of villages which under section (3) (2) (*b*) and (*c*) are not portions of villages falling under (*d*) class. In Exhibit V, an ancient cadjan without date, Pothi Reddi and Venkatakrishnama Naicken, appear as Gramathars or villagers, which appears to have been an equivalent to Mirasidars. It is significant that in the chittas (Exhibit XI series) a deduction is made for Thunduvaram not only in the Kambatham lands of the Shrotriamdars in pattahs Nos. 1 and 2 but also in the fifth pattah, which contains lands cultivated by one of the other *ryots* of the villages. It is right to receive this Thunduvaram that distinguishes the Mirasi *ryots* from the other Payakari *ryots* of the village. It is a symbol of this Kudikani right. It appears to represent an acknowledgment of the cultivator that the Mirasidar has the power of disposal of the lands in the village. Later, in Exhibits A, VI and XVI the village is described as Ekabogam Miras, which means an original Miras not divided into several pangus or shares. Unlike the case of some Shrotriams, it is clear that here the original grantees were not Brahmins and that they were cultivating as many village lands as they could by their own labour and the labour of their farm-servants, and giving out the rest to Payakaris as under-tenants. Exhibit IV mentions the quantity of grain that goes to the Padiyal. It also mentions that a certain quantity is given to the *ryot*. The word Kudivaram may be used in two senses

(7) 7 M. L. J. 1.

(1) the rights of occupancy, (2) the share of produce which the cultivator, whoever he may be, actually gets. Here it is used in the latter sense. In section 3 clause (2) (*d*) of the Act, it is used in the former sense. There is nothing to show that this Kudi or *ryot* had the right of Kudivaram or Kudikani of the village. In fact, the respondents have not attempted to show how the tenants came into possession of their lands. It is possible and even probable that they have since acquired occupancy rights; but in 1802, I consider that the probabilities were that the Mirasidar had the Kudivaram right. The pattahs show that the Mirasidars were cultivating part of the village as Kambattam and the rest through Sukavasis. The fact that the Sukavasis were termed Ullur Sukavasis mean that they were residents in the villages as distinguished from Parakudis brought from other villages. (See page 212, Chingleput District Manual). In *Chidambara Pillai* v. *Thiruvengadathaiengar* (7), the Mirasidar was recognised as having a title to the Mirasi waram as distinguished from Melvaram or Government share of the produce, and it is observed by Muthuswami Aiyar, J., "Ordinarily the Mirasidar or proprietor in Taraf village has the right of cultivation also and he is, therefore, at liberty to arrange for it from time to time, either by granting leases or letting it to Parakudis for waram, or under what is usually called Pannai system, by means of labourers who are paid wages in grain." This must be regarded as an authority on the customary rights of the Mirasidar class even in a non-taraf village, when the Mirasidar has come to hold the whole village by virtue of a grant, in addition to his original Miras. In *Venkatachala Gounandan* v. *Ranganatnam Aiyar* (1) which follows the decision of *Veerana Ambalam* and *Peria Karuppan Ambalam* v. *Annasawmi Iyer* (8) and also in *Krishnasami Pillai* v. *Varadaraja Ayyanger* (9) occupancy right was found to exist in the tenants under certain Mirasidars in *ryotwari* villages. But these were cases of land-holders suing in a Civil Court to eject their tenants on the ground that they had now no occupany rights. The burden of proving that the plaintiffs had a right to evict lay heavily on them. The observations made by the learned Judges who tried those appeals are applicable to the particular facts that appeared in the findings and evidence in those cases. In the particular circumstances of the present case, I find nothing to negative the presumption that the Kudivaram right existed at the commencement of the nineteenth century in Kaniyakshidars or Mirasidars, who held the Mokhasa, subsequently converted into a Shrotriam village. I am, therefore, of opinion that the District Judge was right in dismissing the suit on this ground. The Sub-Collector did not pronounce an opinion on this point.

Suits to compel acceptance of pattah could not be brought in an ordinary Civil Court. Therefore, the plaints could not be returned for presentation in the proper Court and they were rightly dismissed. The present appeal must be dismissed with costs.

In this view of the case, I find it unnecessary to express an opinion whether the plaintiff or his predecessors acquired occupancy rights subsequent to the original grant of the Shrotriam which was the subject of much able argument. I consider it advisable to express no opinion on this point, as it may be the subject of further litigation in a Civil Court at some time or other.

Second Appeals Nos. 1717 to 1756 will follow this judgment.

Appeals dismissed.

(8) 12 Ind. Cas. 1; 21 M. L. J. 845; 10 M. L. T. 185; (1911) 2 M. W. N. 162.

(9) 5 M. 345.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1636 OF 1910.

March 9, 1914.

Present:—Justice Sir Herbert Carnduff, Kt., and Mr. Justice Richardson.

APTAR ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BROJENDRA KISHORE ROY CHOWDHURY—PLAINTIFF—RESPONDENT.

Assam Land and Revenue Regulation (Act 1 of 1886), s. 70—Sale—Adverse possession, whether incumbrance.

Adverse possession is an incumbrance in connection with a sale under section 70 of the Assam Land and Revenue Regulation, 1886.

Mahomed Nasim v. *Kasi Nath Ghosh*, 26 C. 194 at p. 198; 3 C. W. N. 108, relied upon.

Karmi Khan v. *Brojo Nath Das*, 22 C. 244 at p. 251, referred to.

APTAR ALI v. BROJENDRA KISHORE ROY.

Appeal from the decree of the Officiating Additional District Judge of Sylhet, dated January 12th, 1910, reversing that of the Sub-Judge of Sylhet, dated May 30th, 1903.

Mr. *Pugh* and Babu *Broo Lal Chakravarti*, for the Appellants.

Babus *Dwarka Nath Chakravarti* and *Ramani Mohan Chatterji*, for the Respondent.

JUDGMENT.

CARNDUFF, J.—In the suit out of which this appeal arises, the plaintiff sought to recover possession of certain land as lying within *Mauza* Damber, and consequently appertaining to an estate, purchased by him at a sale for arrears of revenue under section 70 of the Assam Land and Revenue Regulation, 1886. In the Court of first instance, the contesting defendants did not dispute the plaintiff's title to *Mauza* Damber, but pleaded that some of the land claimed lay outside that *mauza* and in their *Mauza* Pitaboi. The plea succeeded, and the suit was partially decreed.

On appeal, the lower Appellate Court upheld the decision of the first Court, and a second appeal was preferred by the plaintiff. The main point then urged apparently was, that the Courts below had not attached due weight to the *thak* map, on which the plaintiff had relied, inasmuch as it was a map, the correctness of which had been affirmed after objection taken, and to which, therefore, as was held by the Judicial Committee in *Rani Hemanta Kumari Debi* v. *Moharaja Jagadindra Nath Roy* (1) conclusive effect should have been attributed. Stephen and Holmwood, JJ., considered that the case should be re-considered from this point of view, and they remanded it to the lower Appellate Court, with the direction that that Court should find whether the map concerned was of the character indicated, and, if so, whether either party had acquired rights, not shown on the map, by adverse possession or otherwise.

The appeal comes before this Court again with the result of the learned District Judge's re-consideration of it. He has found that there was a boundary dispute between the two *mauzas* at the time when the *thak* map was prepared, that it was decided in favour of the proprietors of *Mauza* Damber by the highest authority in the district, and that, therefore, the map was of the same character as that dealt with in the case cited above. The correctness of this finding has been attacked by the learned Counsel who has appeared for the appellant; but, without expressing a final opinion on the question whether the order which was passed on the dispute in this case, was an order comparable with the "judicial order", which their Lordships of the Privy Council had before them in *Rani Hemanta Kumari Debi's* case (1), I think that the conclusion of the District Judge may be supported as a conclusion of fact with which we cannot interfere. There was a dispute between the parties at the time, the dispute was decided between them and the decision was not contested. Whether that decision was a judicial decision and in that sense conclusive, or whether it had not, in strictness, that character, the circumstances that there was a dispute and a decision upon it, must be of great, if not overwhelming, weight in determining what was the true boundary between the two *mauzas*.

The Judge has, however, further held that no question of adverse possession arises, because adverse possession is not an incumbrance on the right of a recorded proprietor, and also because the plaintiff, although he was admittedly the owner of some shares in certain specified villages in the *mahal* sold for arrears, was not a defaulting proprietor of it, and, therefore, purchased free from encumbrances. I cannot affirm these views. Adverse possession has in a number of cases, see *Karmi Khan* v. *Broio Nath Das* (2)—been held to be an incumbrance, and it was so regarded in connection with a sale under section 70 of the Regulation with which we are here concerned. See *Mahomed Nasim* v. *Kasi Nath Ghose* (3). And I am myself unable to understand how it is possible to take the plaintiff out of the scope of the third proviso to section 71 of the Regulation, which declares that nothing in the section (which frees the property purchased from an incumbrance) shall apply when the purchaser is a recorded or unrecorded proprietor of the estate.

I think, therefore, that there must be another remand for a finding, on the evidence

(1) 10 C. W. N. 690; 3 A. L. J. 363; 8 Bom. L. R. 400; 16 M. L. J. 272; 1 M. L. T. 135.

(2) 22 C. 244 at p. 251.

(3) 26 C. 194 at p. 198; 3 C. W. N. 108.

already on the record, on the third and seventeenth issues, as originally framed. The case should be remitted to us with the finding of the lower Appellate Court as speedily as possible.

RICHARDSON, J.—I agree.

Case remanded.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No 531 OF 1912
September 22, 1913.
Present:—Mr. Justice Beaman and Mr. Justice Macleod.
LAXMAN GANESH RAJENDRA—PLAINTIFF—APPELLANT
versus
MATHURABAI NARAYAN GOVIND—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 101—One mortgagee holding two mortgages over same property—Property sold in decree based on first mortgage—Sale subject to second mortgage—Property purchased by mortgagee himself—Second mortgage, whether extinguished.

Where a mortgagee, holding two different mortgages over the same property, sues on foot of the first mortgage, and on obtaining a decree, purchases the property himself "subject to his second mortgage", his second mortgage is extinguishd and he becomes an absolute owner of the property.

Second appeal from the decision of the District Judge of Nasik, in Appeal No. 180 of 1911, confirming that passed by the first class Subordinate Judge at Nasik, in Civil Suit No. 479 of 1910.

Mr. *Gadgil*, (with him *K. H. Kelkar*), for the Appellant.

Mr. *D. R. Patwardhan*, for the Respondent.

JUDGMENT.—The property in suit was first mortgaged by its owner to Govind and his two brothers in the year 1886. In 1894 the land was again mortgaged to Govind for Rs. 2,500. In the meantime it would appear that Govind's two brothers must have died, because in 1895 Govind brought a suit upon the mortgage of 1886 and obtained a decree. The mortgage amount claimed was Rs. 2,000. Govind obtained permission to bid at the sale of the property, and also applied to the Court that that sale should be made subject to his own second mortgage of 1894. It appears that this application was at first rejected, but the sale certificate shows that the property was sold subject to Govind's second mortgage of Rs. 2,500, and was purchased by Govind himself for Rs. 1,791. Govind is the grandfather of the present minor plaintiff. Govind appears to have had two sons, Ganesh, the father of the plaintiff, and Narayan, whose widow is the defendant in this suit. Ganesh predeceased Govind. The defendant's husband survived Govind by a short time, both dying in the year 1904. Therefore, the family appears to have consisted, before the death of Govind, of Govind, his son Narayan, and his grandson, the plaintiff. On the death of Govind, the family consisted of Narayan and the plaintiff, and on the death of Narayan, the ordinary result would have been that all the joint family property would have come into the sole and exclusive ownership of the minor plaintiff. But in 1905 it appears that a partition was sanctioned by the District Court of Nasik between the minor plaintiff and his aunt, the defendant, the latter taking in the proportion of 6/16ths. Speaking for myself, I must record my surprise that any arrangement of that sort should have been come to and sanctioned by the District Court, since on the facts, which have been stated on appeal, it appears to me perfectly clear that the minor was entitled to the whole of the joint family property, whatever it may have been, and the defendant merely to maintenance.

Reverting to what happened in 1895, when Govind redeemed the first mortgage of 1886, it would appear that as a result of that sale and his purchase, the property, which was the subject-matter of that mortgage and his own subsequent mortgage of 1894, became his exclusive property, or that of the joint family of which he was a member.

It has been contended on behalf of the plaintiff that, having regard to the terms of the sale certificate, we are bound to hold that Govind kept alive the charge represented by his second mortgage of Rs. 2,500 upon this property in his own interest within the language and intention of section 101 of the Transfer of Property Act.

Now, when the partition of 1905 was effected, a very curious procedure was adopted as apparently the officer entrusted with

making lots, put up all the documents, which had the appearance of being valuable securities, in sixteen packets, of which the defendant drew six and the plaintiff ten. Very unfortunately, I think, one of those lots contained the sale-certificate of 1895, and the other mortgage-deed of 1894. The former was drawn by the defendant, who has ever since been in actual possession of the property. The latter was drawn by the minor plaintiff, who now seeks to enforce it against the defendant, as though the relations subsisting between them were the ordinary relations of mortgagor and mortgagee.

In our opinion, it is clear that after what has occurred in 1895, Govind could have had no right to sue himself in a double capacity as mortgagee under the mortgage of 1894, and mortgagor under the sale-certificate of 1895. We think that as he could have had no cause of action against himself, it is impossible that those who claim under him as heirs should have any cause of action against each other upon the same materials. For these reasons, we are of opinion, that the decision of the lower Appellate Court is right and ought to be confirmed with all costs.

Decree confirmed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 164 OF 1911.

March 16, 1914.

Present:— Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice D. Chatterjee.

GORA CHAND CHATTERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

KESHAB CHUNDER KHOWAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mesne profits—Co-sharers—Recovery of possession—Ouster.

Mesne profits may be awarded to a co-sharer suing another co-sharer for recovery of possession of his (plaintiff's) share in a certain joint property, if there has been an ouster. The mere excess of enjoyment does not in itself amount to an ouster. In the absence of ouster, mesne profits cannot be given.

Appeal, under section 15 of the Letters Patent, from the following judgment of Mr. Justice Carnduff, dated August 14, 1911, in Second Appeal No. 1758 of 1909:—

JUDGMENT.—This appeal arises out of a suit for the recovery of possession of seven tanks. There were various defendants including the present appellant who claimed title to a one eleventh share in the tanks. The suit was resisted by all the defendants.

In the Court of first instance, the plaintiff obtained a decree in full. On appeal, the claim of the present appellant to the 1/11th share claimed by him was upheld. The appeal was accordingly allowed as regards his share, mesne profits were directed in respect of only 10/11ths of the tanks and proportionate costs were allowed.

The appellant is, however, still dissatisfied and he appeals again to this Court against so much of the decree of the learned District Judge as renders him liable for mesne profits along with the other defendants. On his behalf it has been contended that he ought to be absolved from such liability.

It appears that in the first Court it was found that the first defendant, who is the present appellant, was liable for the dispossession generally. "It has also been satisfactorily proved" the Munsif writes "that the other *metah* defendants, by order of defendant No. 1 forcibly caught fish in *dighi* and shire tanks, which are in the heart of the village and which are the biggest tanks." "I find" he concludes "on the evidence that there was forcible looting of the fishes by the order of defendant No. 1 in *Baisakh* 1313."

An application was made to the learned District Judge for an amendment of his decree on the ground, that it was not in conformity with the judgment, in that the latter established the first defendant's title to 1/11th share, whereas he was made liable by the former for mesne profits in respect of the dispossession of the remaining 10/11ths. The application was disallowed on the ground that there was no inconsistency between the two. The learned District Judge was then asked to review his judgment on the same ground, and it is quite clear from his order on that application, that not only did the Judge not intend to disturb the findings of the Court of first instance as to the present appellant's responsibility for the dispossession generally but also that no attempt was made in the appeal before him to disturb it.

HARI GOVIND KULKARNI v. NARSINGHRAO.

In these circumstances, I think that this appeal must be dismissed with costs.

From the above judgment the defendants appealed.

Babu *Susil Madhab Mullick* for Babu *Provash Chandra Mitter*, for the Appellants.

Babu *Jyoti Prosad Sarbadhikary*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is an appeal that arises out of a suit brought by the plaintiffs, who are co-sharers in certain tanks, against the defendants, one of whom has been held to be a co-sharer of the plaintiffs. The plaintiffs have established their right to be co-sharers to the extent of 10/11ths. The defendant No. 1, appellant before us, has established his right to be a co-sharer to the extent of the remaining 1/11th, joint possession has been awarded by the lower Appellate Court in favour of the plaintiffs. This decree modified the decree of the Munsif, who granted the plaintiffs possession of the 16th annas of the tank, and also, as a consequence, mesne profits. While the lower Appellate Court varied the decree in the manner I have indicated, it adhered to the award of mesne profits as against the co-sharer. It is from this part of the decree that the defendant No. 1 appealed to the High Court and appealed without success, for the learned Judge before whom it came thought that it was right to decree mesne profits. The present appeal is under the Letters Patent from this judgment of a single Judge.

In my opinion the appellant is entitled to succeed. It is true that mesne profits may be awarded against a co-sharer, if there has been an ouster. The mere excess of enjoyment does not in itself amount to ouster, and there is nothing in any of the judgments which affirm the ouster of the plaintiffs by their co-sharers. In the absence of such a finding, mesne profits cannot be given. It may be that the plaintiffs have purchased that which placed them in some difficulty. But it is not for us to advise the plaintiffs as to what they should do, though I cannot think that they are without remedy. It may be that a suit for partition or for regulation of rights would lie, but that is a matter which the plaintiffs must consider, if not satisfied with the result of this litigation.

The result is that the judgment of Mr. Justice Carnduff must be reversed, and the decree of the lower Appellate Court varied so far as it awards mesne profits against the present appellant.

The appellant is entitled to his costs of the appeal before Mr. Justice Carnduff and before this Bench.

D. CHATTERJEE, J.—I agree.

Appeal accepted.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 105 OF 1913.

September 29, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

HARI GOVIND KULKARNI—PLAINTIFF—APPELLANT

versus

NARSINGRAO NOUHERRAO—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 7—Execution—Whether executing Court can question jurisdiction of Court passing decree—Bombay Court of Wards Act (Bom. Act I of 1905), s. 32, whether applicable to pending suits.

Under Order XXI, rule 7, of the Code of Civil Procedure, a Court executing a decree has no power to question the jurisdiction of the Court which passed the decree.

Section 32 of the Bombay Court of Wards Act was not intended to apply to pending suits.

First appeal from the decision of the District Judge of Belgaum in Darkhast No. 5 of 1912.

Mr. *S. R. Bakhle*, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Belgaum dismissing an application for execution of a decree, which had been passed by the Joint Subordinate Judge at Belgaum in Suit No. 246 of 1906. The decree was against defendant No. 1 personally and against the joint estate of defendants Nos. 1 and 2. It has not been made clear to us why the application for execution was not made to, or entertained by, the Court which passed the decree. But we will assume that the application was rightly made to the District Court. The learned District Judge dismissed the application on the ground that the decree was a nullity and incapable of

execution. There are cases which were decided under the Code of 1882 in which the opinion was expressed that it is open for an executing Court to consider whether the decree sent to it for execution was passed by a Court having jurisdiction to pass it. The dictum to that effect in the Bombay Reports is to be found in *Haji Musa Haji Ahmed* v. *Purmanund Nursey* (1), and it was accepted in *Imdad Ali* v *Jagan Lal* (2). The *ratio* of the dictum in *Haji Musa Haji Ahmed* v. *Purmanund Nursey* (1) was that the Code recognizes in section 225 the right of the executing Court to inquire into the jurisdiction of the Court which passed the decree. That section, however, has been altered in the Code of 1908, for the words "or of the jurisdiction of the Court which passed it," have been omitted in Order XXI, rule 7, and we think that the inference is clear that the executing Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution. We are, therefore, of opinion that the learned District Judge acted *ultra vires* in deciding that the decree which he was called upon to execute was a nullity. We further disagree with him in the reasons which he assigned for holding that the decree was a nullity. The facts upon which he based his conclusion were, that on the 13th May 1907, a few days before the decree, a notification was issued under section 13 of the Court of Wards Act I of 1905, to the effect that the Court of Wards would assume superintendence of the estate of the defendants with effect from the 15th May 1905. The Joint Subordinate Judge was informed of the notification, and was asked by the defendants to make the Court of Wards a party. He, however, declined to do so, saying that the section had no retrospective effect. Presumably by "the section", he meant section 32 of the Code of Wards Act of 1905. We agree with the learned Subordinate Judge in thinking that that section was not intended to apply to pending suits. In terms it refers to suits "brought by, or against," a Government ward. The suit before the Joint Subordinate Judge was not such a suit. Section 32 must be read with section 31, which provides that before such a suit is brought, notice shall be delivered to, or left at the office of, the Court of Wards. This is impossible in the case of a suit pending at the time of the assumption of superintendence of the estate by the Court of Wards. Moreover, the phraseology of section 32 relating to suits makes no such distinction as that of section 17, which relates to execution of decrees, and provides that no proceeding in execution of any decree against the Government ward or his property shall be *instituted* or *continued* until the decree-holder files a certificate from the Court of Wards that the decree-claim has been duly submitted. That apparently is the only provision which the Legislature has thought necessary to make for the protection of the estate of a Government ward, where a decree has been passed in a suit instituted before the assumption of superintendence by the Court of Wards. For the above reasons, we set aside the order of the District Judge dismissing the Darkhast with costs. The respondents must pay the costs, if any, of the hearing in the lower Court and the costs of this appeal.

Order set aside.

(1) 15 B. 216 at p. 219.
(2) 17 A. 478; A. W. N. (1895) 169.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 155 OF 1912.

February 4, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

VELLAICHAMI SERVAI—DEFENDANT—APPELLANT

versus

MAMUNDI SERVAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Stridhanam—Widow of Agambadia caste—Succession—Parents succeed in preference to husband's kindred.

According to custom, the *stridhanam* property of a widow of the *Agambadia* caste, who leaves no issue, goes to her parents and not to her husband's kindred.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 142 of 1911, preferred against that of the Court of the Principal District Munsif of Madura, in Original Suit No. 646 of 1909.

VELLAICHAMI SERVAI *v.* MAMUNDI SERVAI.

Mr. *S. Srinivasa Aiyangar* (with him Mr. *V. Purushothama Aiyar*), for the Appellants.

Mr. *T. Rangochariar*, (with him Mr. *K. V. Krishnaswamy Aiyar*). for the Respondents.

This Second appeal coming on for hearing on the 16th of January 1913, the Court (Benson and Sundara Aiyar, JJ.) delivered the following

JUDGMENT.—The third issue framed in the suit was "Are the husband's relations disentitled to the property of a woman according to the custom among the *Agambadia* caste." The form of the issue threw on the defendants the onus of proving that the husband's relations are not entitled to inherit according to the usage of the community to which the parties belong. In the circumstances of the case, it would have been better to word the issue so as not to throw the onus distinctly on one side. The customs of the *Agambadia* community are not in all respects identical with those prevailing among other castes. Re-marriage of widows seems to be common among them. It is not clear whether re-marriage is regarded as putting an end to all ties of kindred created by the first marriage between the woman and her first husband's relation. The payment of *parisam* is, according to the finding of the lower Courts, a usual incident in all marriages—apparently the lower Courts also consider that *parisam* was originally at least regarded as 'bride-price' paid to the parents of the bride. They have also assumed that when 'bride-price' was paid, the *stridhanam* property of a married woman went to parents, in the absence of issue, in preference to her husband or his *sapindas*. No finding has been recorded on the question whether the community has adopted any different rule of succession in later time We consider it desirable to modify the third issue thus: "What is the rule of succession applicable to the *stridhanam* property of a woman in the absence of any issue in the community to which the parties belong?, If there are different rules of succession depending on differences in the form of marriage, what are they? Is there any special rule applicable to the property of a re-married woman?" We request the lower Appellate Court to submit findings on the above questions. Both parties may adduce fresh evidence. The Court may, if it considers it desirable to do so, examine competent persons as Court witnesses to enable it to arrive at satisfactory findings on the questions at issue. The finding will be submitted within three months from the date of the receipt of this order. Seven days will be allowed for objections. The further hearing of the case is adjourned till the receipt of the findings.

In compliance with the order contained in the above judgment, the District Judge of Madura submitted the following

FINDINGS.—The following are the issues on which I am required to submit finding:—

I. What is the rule of succession applicable to the *stridhanam* property of a woman in the absence of any issue in the community to which the parties belong. If there are different rules of succession depending on differences in the form of marriage, what are they?

II. Is there any special rule applicable to the property of a re-married woman?

(2) Further evidence has been adduced. The plaintiff examined nine additional witnesses and the 2nd defendant twelve. At the commencement of the inquiry, I expressed willingness to examine as Court witnesses any competent persons accepted by both sides. No agreement was come to, although some names were suggested by the 2nd defendant, and consequently no Court witnesses were examined.

(3) The parties are agreed that there is but one rule of succession which is not subject to modification on account of any differences in the form of marriage. This furnishes the answer to the second part of the first issue.

(4) They are also agreed in holding that there are no special rules applicable to the property of a re-married woman. The second issue is, therefore, answered in the negative.

(5) Passages in the evidence indicate, that the rites and ceremonies followed at marriages amongst *Agambadiars* vary to some extent according to the social position of the parties. In this the community is, no doubt, following the world-wide practice of imitating those who are regarded as holding a socially superior position. Imitation in this country is rendered easier by the fact that the customs imitated are for the most part immutable, while elsewhere there is fre-

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quently a tendency to discard a custom because others have taken to adopting it. It by no means follows, however, that a community intends to adopt along with the form all the legal consequences which attach to it amongst those who have followed it for generations. It is common ground that, in the caste now in question, re-marriage of widows is permitted and dissolution of marriage is freely allowed. The only condition imposed in case of divorce appears to be the payment of a sum of money varying in amount according to the circumstances of the case.

(6) The plaintiff contends that the property of a woman passes on her death without issue to the last of her husbands or to his kindred to the exclusion of previous husbands and their families, and this quite irrespective of the fact that it may have been acquired during the subsistence of some prior marriage. The 2nd defendant, on the other hand, alleges that the property goes to the parents of the woman or their family. Some of the plaintiff's witnesses base the husband's rights on the fact that he must perform the obsequies of the owner. It is conceded by most of the defendants' witnesses also that these rites should be carried out by the husband, though as one of them puts it, the husband's family sometimes declines to do so, if no property is to come to them saying "Why should we shave our heads for nothing." The defendants' evidence is, however, that the performance of the ceremonies does not in itself confer any rights in the property. The explanation given is that the only property that a husband's family can expect to get is what belonged to him and is in the hands of his widow and that the instances of refusal arise only in the case of a widow who holds no property of her husband. In this connection, it may be noted that most of the evidence as to custom now produced relates specially to the particular facts of the present case, *i. e.*, to the succession to an issueless widow and not to the rule applicable where the husband survives the wife. The defendants' witnesses, however, state generally that this makes no difference.

(7) No explanation appears in the evidence as to the origin of the practice of paying "*parisam.*" It seems probable that it is a survival from a time when an actual "bride-price" was paid as is surmised by the District Munsif. If this be the correct explanation, then marriages in the *Agambadia* caste must originally at any rate have been celebrated in the *Asura* form. Presumably the rule of succession to a woman's property was that incidental to marriage in an "unapproved form." It has not been suggested in the evidence for the plaintiff, that there has been a change in the rules of succession in later times and I do not think that such a change can be inferred from the fact that the husband no longer gives "as much wealth as he can afford" for the purchase of bride but makes merely a nominal payment which cannot be regarded as price at all.

(8) It seems to me that the rule contended for by the defendants is more in consonance with the admitted marriage customs of the caste than that which the plaintiff relies upon. The former rule is easily applied and leads to no complications. With the latter, the case is the reverse. According to the defendants' rule, the rights of any particular husband and his kin are dependent on whether the owner of the property choses to exercise her right of contracting another marriage or not.

(9) Coming to the oral evidence, I prefer that of the defendants' witnesses. Several of them are persons who from their position in the caste are well able to speak about its usages. Others give evidence from personal experience of the application of the rule, *e. g.*, D. Ws. Nos. 12 and 16 are men who have been adversely affected by it. Almost all give instances illustrative of how the rule works from cases with which they are personally acquainted. Nothing has been elicited to show that they are particularly interested in supporting the defendants' version. Some inconsistencies have been pointed out in their evidence, but I do not think that these relate to any differences in principle but merely to the application of the rule in hypothetical cases. To give opinions on such matters might well puzzle persons more competent than these witnesses. On the other hand, the plaintiff's witnesses are not persons who hold any special position in the caste. Several of the instances cited by them in support of their statements

are not apposite, *e.g.*, P. W. No. 16 refers to property which admittedly belonged to the family of the husband of the woman whom he mentions. *Vide* also P. W. No. 17. Several of the witnesses have not made it clear whether they are referring to property of a deceased husband in the hands of a widow about which there is no dispute or to cases of the kind to which this inquiry relates. From the judgment of the High Court, it appears that the burden of proof is not to be cast distinctly on either side. Taking the evidence as a whole, I think, that adduced for the defendants is entitled to the greater weight. I would, therefore, answer the first question by saying that the *stridhanam* property of a woman goes to her parents' family in the absence of issue. The material available is not sufficient for a determination of how the succession is worked out in detail. The witnesses say generally that the parents succeed, but, as far as the instances given go, there appears to be no preference of females over males and the property has usually been taken by the father or his male descendants,

(10) Some questions have been put to witnesses regarding the sub-divisions of the caste and as to differences in custom prevailing in these divisions. It has not, however, been argued that the plaintiff relies upon membership of any particular division in support of his case and it is, therefore, unnecessary to refer to the matter further.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by the Court for trial, this Court delivered the following

JUDGMENT.—The question is whether, according to custom, the *stridhanam* property of a widow of the *Agambadia* caste, who left no issue, goes to the parents of the widow or their family or to her husband's kindred. The District Judge has found that according to custom, the parents are entitled to the property. Objection is taken to this finding. In this caste re-marriage is allowed by custom. Divorce also is freely allowed, the only condition is payment of certain money. It is not shown that the parties have any *gotra* and that the wife on marriage adopts the husband's *gotra*. On marriage the husband pays *parisam*, a small sum of money to the parents. This is very probably a survival from the time actual "bride-price" was paid. These facts support the conclusion drawn by the District Judge from the oral evidence in favour of the father's right of succession. Instances have been proved in which this rule has been followed by the caste. We think for these reasons that the District Judge is right. We, therefore, reverse the decree of the District Judge and restore that of the District Munsif with costs in this and the lower Appellate Court.

Decree reversed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1277 OF 1910.

May 14, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

ALLAH DITTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GAUHRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Widow—Widow's rights in absence of collaterals—Patti, *owners of—Right to contest widow's alienation*—Onus *of proof*—Wajib-ul-arz—*Instances.*

A widow's estate is a limited one but it is only limited for the benefit of reversioners. Where there are none, she is to all intents and purposes an absolute owner.

Wazira v. *Mangal*, 10 Ind. Cas. 294; 2 P. R. 1911 Rev.; 3 P. W. R. 1911 Rev.; 188 P. L. R. 1911, cited.

Where the proprietors of a *patti*, who were not a compact body, but belonged to miscellaneous tribes, sued for possession of a land willed away by a widow in favour of her brother's son, on the ground that the widow had no power to alienate except for necessity, and that, in the absence of collaterals, they were entitled to succeed:

Held, that the onus lay on the plaintiffs.

Harnam Singh v. *Partab Singh*, 102 P. R. 1906; 129 P. L. R. 1906; *Dasounda Singh* v. *Mangal*, 5 Ind. Cas. 817; 26 P. W. R. 1910; 166 P. L. R. 1910; 18 P. R. 1910, *Nihala* v. *Rahmatullah*, 137 P. R. 1908, followed.

ALLAH DITTA v. GAUHRA.

The entry in the *wajib-ul-arz*, that a widow is not allowed to make a gift to any of her paternal relations, was inserted in the interests of the collaterals but has no effect where there are none, who might challenge the alienation made by the widow. In the absence of any instance, the entry in the *riwaj-i-am* is not sufficient proof of a custom entitling the proprietors of the *patti* to succeed.

Second appeal from the decree of the Divisional Judge of the Jullundur Division, dated 29th August 1910, reversing that of the Subordinate Judge, 2nd class, Jullundur, dated 22nd December 1909, decreeing plaintiffs' suit.

Mr. Pestonji Dadabhai, for the Appellants.

Rai Sahib Pandit *Devi Chand*, for the Respondents.

JUDGMENT.—Suba, the last male proprietor of the land in suit, died, leaving a widow, *Musammat* Hukman. After her death, Gauhra, her brother's son, obtained possession of the land and claims to hold under a Will executed in his favour by *Musammat* Hukman. Plaintiffs, the proprietors of the *patti*, sued for possession on the ground that *Musammat* Hukman had no power to alienate the land except for necessity, and that in the absence of collaterals, they were entitled to succeed. The first Court decreed their claim.

The lower Appellate Court relying upon *Harnam Singh* v. *Partab Singh* (1) and *Dasounda Singh* v. *Mangal* (2) dismissed plaintiffs' suit. They have filed a further appeal in this Court.

The first question for decision is upon which party, the onus lay?

We have no hesitation in holding that it lay upon the plaintiffs. The rulings cited by the Divisional Judge are in point, and so is *Nihala* v. *Rahmatullah* (3). In the 1908 and 1910 cases, the dispute was between the proprietors of the *patti* and a blood relation of the deceased proprietor. In *Harnam Singh* v. *Partab Singh* (1) the principal defendant claimed to be related to the deceased proprietor, but the claim of the plaintiffs, proprietors of the *patti*, was dismissed solely on the ground that they had not discharged the onus which lay on them.

In the present case, as in the 1906 one, the proprietors are not a compact body, but are of miscellaneous tribes. The Counsel for appellants relies upon the village *wajib-ul-arz* and the *riwaj-i-am* of the Jullundur Tahsil. According to the former, a widow is not allowed to make a gift to any of her paternal relations. This provision was, of course, inserted in the interests of the collaterals and has no effect where there are none, and where there is consequently no one competent to challenge an alienation by a widow. As regards the *riwaj-i-am*, we agree with the view taken of it by the lower Appellate Court. We do not think, it can have been intended to apply to the case of a village or *patti* where the proprietors are of different tribes. In the absence of any instance, we certainly are not prepared to hold that the entry in question is sufficient proof of a custom entitling the proprietors of the *patti* to succeed to Suba's land.

Mr. Pestonji urges that the widow's estate is always a limited one. Quite so, but it is only limited for the benefit of reversioners. Where there are none, she is to all intents and purposes an absolute owner. Counsel referred us also to *Wazira* v. *Mangal* (4), but we cannot find anything there which assists his contention. The fifth proposition laid down therein by the Hon'ble the Financial Commissioner is against him. To sum up, we hold that the onus was upon the plaintiffs and they have not discharged it. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 102 P. R. 1906; 129 P. L. R. 1906.

(2) 5 Ind. Cas. 817; 18 P. R. 1910; 26 P. W. R. 1910; 166 P. L. R. 1910.

(3) 137 P. R. 1908.

(4) 10 Ind. Cas. 294; 2 P. R. 1911 Rev.; 3 P. W. R. 1911 Rev.; 188 P. L. R. 1911.

DWARKA DOSS *v.* DANAKOTI AMMAL.

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION No. 42 OF 1913.

October 6, 1913.

Present:—Mr. Justice Wallis.

M. G. DWARKA DOSS GOVARDANA DOSS—PLAINTIFF

versus

O. C. DANAKOTI AMMAL AND OTHERS—DEFENDANTS.

Transfer of Property Act (IV of 1882), s. 54—Transfer of mortgage-debt, whether sale—Registration Act (III of 1877), s. 17—Equitable mortgage—Registration.

A transfer of a mortgage by the deposit of title-deeds does not require registration under either the Transfer of Property Act or the Registration Act.

Ganpat Pandurang v. *Adharji Dadabhai*, 3 B. 312, distinguished.

Kedarnath Dutt v. *Sham Lall Khettry*, 11 B. L. R. 405; 20 W. R. 150, referred to.

A transfer of a mortgage is a transfer of the mortgage-debt with its attendant securities and not a sale of the immoveable property, therefore no registration is required by the Transfer of Property Act of such a transfer.

Subramaniam v. *Perumal Reddi*, 18 M. 454, followed.

Tarvadi Bholanath v. *Bai Kashi*, 26 B. 305, 4 Bom. L. R. 18, referred to.

Ramasami Pattar v. *Chinnan Asari*, 24 M. 449, distinguished.

Mr. *C. P. Ramaswamy Iyer*, for the Plaintiff.

Mr. *V. Masilamani Pillay*, for the Defendants.

JUDGMENT.—In this case the defendants executed a promissory-note in favour of Rajah Venugopala Bahadur and effected an equitable mortgage at the same time by deposit of title-deeds. Rajah Venugopala Bahadur subsequently endorsed the promissory-note to the present plaintiff and at the same time handed over to him the title-deeds which had been deposited with him.

The case was posted on the undefended board, but at the hearing, it was objected for the defendants, that the plaintiff was not entitled to any relief in respect of the mortgage for want of registration. The objection came to this, that the registration was requisite both under section 54 of the Transfer of Property Act and under the Registration Act. With regard to the first, great reliance is placed upon an observation of Sir V. Bhashyam Iyengar in *Ramasami Pattar* v. *Chinnan Asari* (1) in which he expressed his dissent from the decision of *Subramaniam* v. *Perumal Reddi* (2). I might content myself with saying that that decision is binding upon me, more especially as the remarks of Sir V. Bhashyam Iyengar were purely *obiter*. The question before him was whether a mortgagee in a suit for redemption could set up in answer an agreement with the mortgagor giving him a right of pre-emption. The ground upon which Sir V. Bhashyam Iyengar was disposed to think that the transfer of a mortgage required registration under section 54 of the Transfer of Property Act, was that he considered that it came within the words of intangible thing in section 54 of the Transfer of Property Act and that, therefore, a transfer of mortgage for consideration amounted to a sale, whereas the learned Judges, who decided *Subramaniam* v. *Perumal Reddi* (2), were of opinion that it did not. Admitting, however, that the language of section 54 taken by itself may be wide enough to cover such a transaction, I am not satisfied that it, therefore, follows that the learned Judges who decided *Subramaniam* v. *Perumal Reddi* (2) were wrong in the result at which they arrived. Apart from the definition, a transfer of a mortgage is a transfer of the mortgage-debt with its attendant securities rather than a sale of immoveable property, and what we have to see is whether taking the provisions of the Transfer of Property Act as a whole, it is right to hold such a transaction comes within the definition of such a sale in section 54. Admitting that a mortgagee has an interest in immoveable property, still it is, undoubtedly, accessory to, and attendant upon, the mortgage-debt. With the extinction of the mortgage-debt, the interest ceases, and with the transfer of the mortgage-debt, the beneficial interest, at any rate, of the original mortgagee also ceases.

Now, the Transfer of Property Act has provided for the transfer of a mortgage debt, that is to say, that it may be transferred in the same way as any other actionable claim, and it has further provided by section 8 that "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee

(1) 24 M. 449 at 463.

(2) 18 M. 454; 5 M. L. J. 92.

all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents include..... .....where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer." If it be held that in the case of all mortgages of immoveable property, a registered transfer is necessary to pass the mortgage interest to the transferee, that seems to me to be inconsistent with the terms of this section. Mortgages of immoveable property are by far the largest and most important class of securities and it scarcely seems to me that if the Legislature contemplated that such securities should only pass from the mortgagee to the transferee by means of a registered instrument, they would scarcely have inserted this provision in such general terms. If a registered instrument is really required, it is not true to say that when the property is a debt, the securities therefor pass to the transferee. The conclusion to which I am disposed to come to is that the special provisions relating to the transfer of mortgage-debts and the transfer of securities for such debts are applicable rather than the perfectly general provisions of section 54. *Generalia specialibus non derogant.* General provisions do not derogate from special provisions and it certainly seems to me the most satisfactory course to hold that registration is not required under the Transfer of Property Act to pass a mortgage security on immoveable property from the transferor to the transferee. If that be not so, it is difficult to see what is to become of the mortgage security when the debt is lawfully transferred. Is it to become extinguished? As pointed out in *Tarvadi Bholanath* v. *Bai Kashi* (3) by Sir Lawrence Jenkins, that is not any one's care. The only other alternative would be to hold that the transferor-mortgagee is a trustee for the transferee, and that seems to me to be inconsistent with, and opposed to, the provisions of section 8 of the Transfer of Property Act. For these reasons both on the authority of *Subramanian Chetty* v. *Perumal Reddi* (2), which is binding upon me and also on principle, I am of opinion that registration is not required under the Transfer of Property Act for a transfer of the mortgage by the mortgagee.

The next objection is that the registration is necessary under the terms of the Registration Act. In this case we are dealing with a mortgage by deposit of title-deeds. It is not necessary for me to consider the question whether the transfer of an ordinary mortgage created by a registered instrument requires to be registered under the terms of the Registration Act. I think it is quite clear that a transfer of a mortgage by deposit of title-deeds does not require registration. Reliance was placed upon the decision of *Ganpat Pandurang* v. *Adarji Dadabhai* (4). That case is distinguishable from this because there there was a document of transfer set out in Westropp, C. J.'s judgment, which provided for the transfer not only of debts but of securities held with them. It was held that that document required registration, and was consequently inadmissible, and that the terms of the contract having been reduced to writing, no other evidence could be looked to. At the same time in the Court below, Sir Charles Sargent expressly held that an equitable mortgage by deposit of title-deeds was transferable without registration; and in this contention he referred to a case, *Kedarnath Dutt* v. *Shamlall Khettry* (5), which is a very strong case though it is not a case of transfer. There as held by the Appellate Court, there was a promissory-note which recited a deposit of title-deeds, so that it might be said it was an agreement which required registration under the Registration Act, but the Appellate Court held that this was a mere recital and that it did not require registration. The case here is very much stronger because in this case there is no agreement reduced to writing at all about the transfer: there is merely an endorsement on a promissory-note and handing over of the title-deeds. The present case, therefore, seems to me much stronger than the one in *Kedarnath Dutt* v. *Shamlall Khettry* (5). I, therefore, hold that this objection also fails.

In the result there will be the usual mort-

(3) 26 B. 305; 4 Bom. L. R. 18.

(4) 3 B. 312.

(5) 11 B. L. R. 405; 20 W. R. 150.

gage decree for the plaintiff for Rs. 19,991 with further interest on the principal amount at contract rate for 6 months and costs. Sale in default. Personal decree for the balance.

Suit decreed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 605 OF 1912.

July 30, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

HARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHRIDHAR—DEFENDANT—RESPONDENT.

Usufructuary mortgage—Terms—Mortgagor resuming possession upon abandonment by mortgagee—Personal covenant, to pay, becomes operative—Interest.

Where in a usufructuary mortgage the net profits, after payment of the land revenue, were agreed to be taken as equivalent to the annual interest:

Held, (1) that the mortgagees were bound by the terms of the contract to pay the land revenue, whether there was profit or loss; (2) that an inquiry whether the land remained fallow through their negligence or not was precluded by the very terms of the contract; (3) that whether the mortgagees are to bear the enhancement of revenue made at a periodical resettlement is a question of fact dependent upon the intention of the parties to the contract; (4) that upon the mortgagees' abandonment of the possession and the mortgagors' taking back the same, the personal covenant to pay the debt and interest became operative and the mortgagees are entitled to interest from such date.

Juggeewun Das v. *Ram Das Brijbhookandass*, 2 M. I. A. 487 at p, 500, 6 W. R., (P. C.) 10, 1 Suth. P. C. J. 109, 1 Sar. P. C. J. 222, 18 Eng. Rep. 386, followed.

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 3rd August 1912, modifying that of the Subordinate Judge, Nagpur, dated the 29th January 1912.

Mr. *A. C. Roy*, for the Appellants.

Messrs. *M. R. Dixit* and *Nilkanthrao Udhoji*, for the Respondent.

JUDGMENT.—The plaintiffs sue on a mortgage, dated the 18th June 1886, executed by the father and uncle of the defendant. They obtained a decree for sale for the full amount claimed in the first Court. On appeal by the defendant, the decretal amount has been reduced to Rs. 70 1-6. The plaintiffs have now filed a second appeal. Many of the points in controversy between the parties have been now set at rest by the findings of fact arrived at by the lower Appellate Court and this second appeal turns mainly on the construction of the mortgage-deed.

The parties are agreed that the latter part of the mortgage-deed has been more accurately translated in the judgment of the learned Divisional Judge than in the official translation made in this Court. I shall, therefore, adopt the former translation where it differs from the latter.

The mortgage-deed begins by reciting that the mortgagors have borrowed five hundred rupees. It then runs as follows: "We will pay interest on this at Rs. 1 per cent. per mensem. We will pay the whole amount with interest in seven years, by paying Rs. 100 at the end of *Vaisakh* of the next year and Rs. 100 at the end of *Vaisakh* of each succeeding year. We have now paid you one month's interest and *balta* of the said amount. . . . . You will take interest of the whole amount each year from Rs. 100 and credit the balance towards principal. . . . If we fail to make the re-payments each year as laid down above, we will pay interest on defaulted instalments at Rs. 2 per cent. per mensem from this date till satisfaction of the amount. In lieu of this amount we have mortgaged to you our *malik makbuza* field . . . . and put the same in your possession. The income of the field, after deducting the revenue, you are to credit against the interest every year. If on account of heavenly mishap or Government action there be any loss to the property while in your possession, we will, without any objection, punctually pay the instalments as mentioned above. If the amount remains unpaid after seven years you will manage the fields as above till satisfaction of the amount in accordance with the terms."

Both parties have in their written pleadings agreed that the clause relating to income means that there was to be no accounting between the mortgagors and mortgagees and that the net profits are to be taken as equivalent to the annual interest.

The mortgagees entered into possession on the execution of the document and arranged for the cultivation of the land till 1305 *Fasli*. They then allowed it to remain fallow till 1309. The mortgagors were compelled to pay Rs. 258-13 0 revenue

for the years in which the land was uncultivated. In 1310 the mortgagors apparently with the tacit consent of the mortgagees resumed possession and they have been in possession ever since.

The lower Court has debited the mortgagees with the amount of land revenue paid by the mortgagors and has disallowed interest.

The first point for determination is whether the appellants were rightly debited with the land revenue for the four years. In my opinion, they having entered into possession, were bound by the terms of the document to pay the land revenue, whether there was a profit or loss. They stipulated for not being liable to keep accounts of the usufruct. If the usufruct exceeded the interest, they were at liberty to appropriate it without any reduction of the principal. Equally they were bound to credit themselves with the interest and to pay the revenue, if there was a loss. This is not a case where it is necessary to inquire if the land remained fallow through their negligence or not. The very terms of the contract preclude all such inquiry. This ground of appeal fails.

The next point urged is that they should not be debited with the enhanced revenue which was imposed in 1893. They made no claim for the two or three years that they themselves paid the enhanced revenue after the new Settlement came into force but they object to their liability for the years in which the defendant's predecessors paid it. I think in this case it may well be assumed that the parties contemplated the usual enhancements which take place at periodical re-settlement of the land revenue. The plaintiffs might have sued for the mortgage-money in 1893 but having elected to continue in possession for a few years, they cannot now complain of the enhancement of the revenue. Cases have been cited before me by both sides, but as the question depends on the intention of the parties, it is unnecessary to refer to them.

The last point argued is that the appellants should have been given interest at one per cent. per mensem as provided for in the deed, for the period that they derived no income from the land. There can be no doubt that the appellants have been rightly disallowed the interest for the four years, the land remained in their possession uncultivated. Under the terms of their document, such a claim is untenable.

I will now proceed to discuss whether the appellants are entitled to interest from the date the defendant's father and uncle resumed possession. The reason for disallowing interest for this period is given by the learned Divisional Judge in the following sentence: "Having voluntarily and wrongfully relinquished possession of the property which they were holding in lieu of interest, I cannot see how the mortgagees can possibly be entitled to any interest whatever after the end of 1309." This would be a complete answer to the appellants' claim if the mortgage was pure usufructuary one, or if the mortgagors themselves had not resumed possession.

There was no discussion, apparently, in the lower Appellate Court, as to the nature of the mortgage. In the plaintiffs' written statement, dated the 1st December 1910, (paragraph 4), it was pleaded that "the mortgage-bond in suit is a simple mortgage usufructuary. The bond contains a personal covenant to pay interest at one per cent. per mensem and to pay off the principal and interest by yearly instalments." The defendant did not deny this. It is difficult to see on what ground the plaintiffs have been given by both the lower Courts a decree for sale, unless the mortgage is in part a simple mortgage.

Is the mortgage, then, as argued for the respondent, a simple mortgage so far as regards the principal and a purely usufructuary one as regards the interest? The test appears to me to be this—if the plaintiffs had never taken possession, could they have got a decree for sale for the entire mortgage-money including interest and penalty provided for in the deed? The learned Counsel for the respondent did not seriously contend that the plaintiffs could not have done this. The personal covenant clearly extends to payment of the interest and the penal rate of interest. At the date of the document, the first month's interest was paid in cash. In the face of this, it seems to me difficult to hold that the sole mode, provided for by the document, for the recovery of the interest, was possession of the land and its usufruct. I am,

therefore, of opinion, that if the plaintiffs had never taken possession of the land, they would have been able to secure a sale decree for the entire mortgage-money. I note that this contention of the respondent finds no support in the judgment of the learned Divisional Judge.

I have held that the plaintiffs had two alternative remedies for the recovery of their money. But having elected to take possession, they were not at liberty to abandon it arbitrarily and for this reason, they have been rightly debited with the land revenue and have been disallowed interest for the years 1306—1309. But I have now to consider what is the effect of the mortgagors' taking back possession in 1310. In my opinion this amounts to an acquiescence in the mortgagees' abandonment of the possession of the land and the personal covenant to pay at once became operative though not so expressly provided for in the document.

In the case of *Juggeewun Das Keeka Shah* v. *Ramdas Brijbookundas* (1), their Lordships of the Privy Council, speaking of the acquiescence of a mortgagee in the mortgagor's possession of land to which the former was entitled, observe as follows: "Now the question will be, in what way the mortgagee's rights are affected by this conduct, and that will depend first upon the construction of the instrument itself. If this is a binding contract, binding between him and the mortgagors, binding him to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his *Mehta* was in possession. But their Lordships are of opinion, that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate; and if an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the mortgage."

If then the mortgage were a pure usufructuary mortgage, it would have been binding on the appellants to recover their money out of the usufruct. The appellants having another remedy may fall back on it, the moment the mortgagors took back possession. I can see no equity in allowing the latter to retain the land and at the same time denying the mortgagees their rights under the personal covenant.

The respondent's Counsel relied on the following cases:—*Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (2), *Khuda Bakhsh* v. *Alim-un-nissa* (3), *Jhunku Singh* v. *Chatkan Singh* (4). In the first two cases the mortgagor was not himself in possession, and in all the cases the mortgage was held to be a pure usufructuary mortgage.

There is one grievance of the respondent which it will be just as well for me to notice here. It is said he has been put to great loss by reason of the land being allowed to remain uncultivated for so many years. The lower Appellate Court recognises the justice of the complaint but has somewhat reluctantly come to the conclusion that the evidence as to the amount of the loss is too vague and indefinite for the assessment of compensation in the accounts directed to be taken under section 76 of the Transfer of Property Act, where a mortgagee fails in his duties as prescribed by that section.

I hold then that the plaintiffs are entitled to interest at one per cent. per mensem on the mortgage-money due to them in 1310.

Appeal accepted.

(1) 2 M. I. A. 487 at p. 500; 6 W. R (P. C.) 10; 1 Suth. P. C. J. 109; 1 Sar. P. C. J. 222; 18 Eng. Rep. 386.

(2) 24 A. 521; 29 I. A. 148; 7 C. W. N. 97.

(3) 27 A. 313; A. W. N. (1904) 273; 1 A. L. J. 715.

(4) 2 Ind. Cas. 221; 31 A. 325; 6 A. L. J. 247.

ATHALUR MALAKONDIAH *v.* THATHA LAKSHMINARASIMHULU.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 18 OF 1913.

February 9, 1914.

Present:—Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

ATHALUR MALAKONDIAH—APPELLANT

versus

THATHA LAKSHMINARASIMHULU CHETTY—RESPONDENT.

Administration suit by annuitant legatee—Legacy paid into Court by executor—Power of Court to dismiss suit.

A suit by an annuitant legatee against the executor for a general administration of the testator's estate may, at the discretion of the Court, be dismissed, if the executor pays into Court the amount of the legacy and a sum sufficient to secure the payment of the annuity.

Wollaston v. *Wollaston*, 7 Ch. D. 58; 47 L. J. Ch. 117; 37 L. T. 631; 26 W. R. 77; Daniel's Chancery Practice, 7 Edn. 195, followed.

Campbell v. *Gillespie*, (1900) 1 Ch. 225 at p. 228; 69 L. J. Ch. 223; 81 L. T. 514; 48 W. R. 150, distinguished.

Appeal from the decree of the Hon'ble Mr. Justice Bakewell, dated the 19th of December 1912, in the Ordinary Original Civil Jurisdiction of the High Court and made in Civil Suit No. 125 of 1912.

FACTS.—The plaintiff and the defendant were appointed executors under the Will of a Hindu woman. She devised large properties to charities etc., and gave the plaintiff a legacy of Rs. 50, with a further payment of certain amount for the performance of religious ceremonies annually. The plaintiff renounced his executorship and claimed payment of the legacy to him. He then brought a suit for a general administration of the deceased testator's estate. The case was at first heard by his Lordship Justice Bakewell; on the defendant depositing, with the leave of the Court, a sum of money sufficient to satisfy the legacy and the expenses of the religious ceremonies; his Lordship dismissed the suit. The present appeal is against the decree in that suit.

Mr. *V. V. Srinivasa Aiyangar*, for the Appellant. Section 4 of the Probate and Administration Act vests the property of the deceased in the executor; section 112 requires the assent of the executor: in the absence of assent, I cannot sue for legacy; the legal right does not become vested until the executor assents and otherwise I am a mere beneficiary.

I can sue for legacy when I have acquired a legal right by assent, so long as that is not done, the only right a legatee has is to bring a suit for general administration of the estate.

[WHITE, C. J.—What are the words which give you a legacy?]

Mr. *V. V. S. Aiyanger*. The Will is not exhibited

Mr. *C. P. Ramaswamy Aiyer*, for the Respondent. But that is found in the plaint.

Mr. *V. V. S. Aiyanger*. Until the executor assents, the legatee is only a beneficiary, and he can sue only for a general administration.

Administration suit can be instituted by creditors or beneficiaries. Halsbury's Laws of England, Vol. 14, p. 335.

A legatee's action is also for the benefit of other legatees whether expressed to be so or not. Halsbury's Laws of England, Vol. 14, p. 337.

It is not stated in *Okhoy Coomar Bonnerjee* v. *Roylash Chunder Ghosal* (1) that the executor was ready and willing.

[WHITE, C. J.—Was that decision cited before Mr. Justice Bakewell.]

Mr. *C. P. R. Iyer*. Not cited before him.

[WHITE, C. J.—The Judge was deciding on the pleadings alone.]

Mr. *V. V. S. Aiyanger*. In *Purshottam Devjishet Thakar* v. *Kalu Govindji Thakar* (2) a legatee sued an executor for a legacy.

[WHITE, C. J.—It is not disputed that you could sue her.]

Mr. *V. V. S. Aiyanger*. In *Wollaston* v. *Wollaston* (3), an annuitant is entitled to administration.

[WHITE, C. J.—Where is the provision in regard to it in the Will?]

Mr. *V. V. S. Aiyanger*. The Will is not put in evidence *In the matter of the petition of Indarman* (4); *Cafe* v. *Bent* (5).

[WHITE, C. J.—Your short proposition is that as an unpaid legatee you have a right of administration.]

Mr. *C. P. R. Iyer*, for the Respondent. A Judge has a discretion to order general administration or not.

(1) 17 C. 387.
(2) 26 B. 301 at p. 304; 3 Bom. L. R. 932.
(3) 7 Ch. D. 58; 47 L. J. Ch. 117; 37 L. T. 631; 26 W. R. 77.
(4) A. W. N. (1895) 152; 18 A. 45.
(5) 67 Eng. Rep. 812; 5 Hare 24; 9 Jur. 653.

ATHALUR MALAKONDIAH *v.* THATHA LAKSHMINARASIMHULU.

In Annual Practice, Order XLV, rule 10 gives Court power to order general administration or not when the person suing claims a legacy, and when that claim can be effectually satisfied.

In *Campbell* v. *Gillespie* (6) it is held that general administration is not the best method.

In 14 Halsbury's Laws of England, p. 798, it is said that it is not necessary to order a general administration. In all these cases, the question is whether the suit is one for general administration action or merely one to compel trustees to administer it.

Will—1905.

Suit instituted—1912.

Death of testator—15th August 1905.

Both plaintiff and defendant appointed executors, plaintiff refused to act as administrator. Administration had begun and gone on partially. Cause of action arose on 15th July 1906, when the legacy became payable.

Under section 92 of Civil Procedure Code a suit can be brought by the Administrator-General. Williams on Executors, 796 (10 Edn.)

[WHITE, C. J.—In all cases cited, there must be something done and when that is done, there is a presumption of assent to the legacy by the executor.]

Mr. *C. P. R. Iyer.* When the admission of assets is proved, evidence can be given immediately in favour of the plaintiff and the plaintiff cannot compel the executors to go on with the administration suit to find out whether the executor is guilty of breach of trust or not.

[WHITE, C. J.—An annuitant may not be entitled to a general administration as is the case of a creditor, but when his right is deemed].

Mr. *C. P. R. Iyer.* Want of assent cannot alter the substantial nature of the suit which was to recover the legacy.

There is always an action to compel an assent and the legatee can come to the Court for that purpose. Williams, Vol. II, 1103; 14 Halsbury's Laws of England, p. 328, *Woodgate* v. *Field* (7).

In such circumstances, the administration is ancillary to the payment of the legacy.

The executor is entitled to have his action dismissed as soon as the money is paid into Court *Pemberton* v. *Topham* (8); *In re Gevenas* (9).

Such an action ought not to be maintained by a single legatee.

In the case of a residuary legatee, the question is different, for unless the residue is ascertained, no decree can be given.

Orders in suits brought by one legatee as against executor cannot be binding upon other legatees, and they cannot be compelled to proceed. Williams on Executors, page 1567.

In regard to *Okhoy Coomar Bonnerjee* v. *Koylash Chunder Ghosal* (1), there is no assertion that the defendant is not in possession of any assets.

The case in *Deeks* v. *Strutt* (10) reported in *Purushotam Devjishet Thakar* v. *Kala Gobindji Thakar* (2), does not support the position contended for.

Mr. *V. V. S. Iyenger* in reply. In *Campbell* v. *Gillespie* (6), there was nothing due on the date of the institution of the suit.

In the absence of any legal right, the only course open is only general administration.

It is not open to the defendant to say that I will assent to your legacy now and this form of action is not open to you, therefore, but one should have regard to the state of things existing on the date of the institution of the suit.

JUDGMENT.

WHITE, C. J.—This is an appeal from a decree dismissing a suit brought by a party who was a legatee and annuitant under the Will of a deceased person of which the defendant was the executor. It is contended on behalf of the appellant that it was obligatory on the learned Judge to proceed with the case and to hear the evidence and that the plaintiff, if the allegations in the plaint were established, was entitled to claim, as of right, a general administration decree. A written statement was put in and, after the written statement, the defendant paid into Court the amount of the legacy and a sum sufficient to secure

(6) (1900) 1 Ch. 225 at p. 228; 69 L. J. Ch. 223; 81 L. T. 514; 48 W. R. 150.

(7) 2 Hare 211; 11 L. J. Ch. 321; 6 Jur. 871; 67 Eng. Rep. 88; 62 R. R. 81.

(8) 48 Eng. Rp. 962; 1 Beav. 316; 2 Jur. 1009.

(9) (1881) 18 Ch. D. 554.

(10) 5 T. R. 690.

the payment of the annuity. I think the learned Judge had a discretion to adopt the course which he took. See Halsbury's Laws of England, Vol. XIV, paragraph 798 and the cases which are there cited. No doubt, the cases cited are instances where the Court has acted under Order LV, rule 10, of the Rules of the Supreme Court of England. But with the exception of one case, we have not been referred to any authorities which show that any alteration of the substantive rights of parties either in law or in equity was affected by the rule in question, a rule which enabled a party to apply for the administration of the estate of a deceased person by originating summons instead of by suit. It seems to me if the rule purported to affect the substantive rights of parties, it would be beyond the power of the rule making authority. In view of the pleadings in this case and having regard to the payment into Court to which I have referred, I am not prepared to say that the learned Judge exercised a discretion, which, I think, he had, wrongly when he dismissed the suit. We have been referred by the learned Vakil for the appellant to the case of *Wollaston* v. *Wollaston* (3). There the question before the Court was whether the annuitant under the Will in question was entitled to have a judgment for administration of the estate and it was held that he was. The argument turned on whether the annuitant *qua* annuitant was entitled to a judgment for administration.

If seems clear that under the English practice where one creditor sues on behalf of others for the administration of the estate of a deceased person, the defendant may at any time before judgment have the action dismissed on payment of the plaintiff's debt and all the costs of the action. See Daniell's Chancery Practice, Edition 7, Vol. I, p. 195 and the cases there cited. It has been pointed out that that was a case of a creditor's suit and the case now before us is a suit by a legatee and annuitant. But for the purposes of the question, whether there is a discretion in the learned Judge, I do not think any distinction can be drawn between suits by creditors and suits by legatees. As has been pointed out in the course of argument, in view of the payment into Court which has been made, the only question that would remain, if we follow the English practice, would be the question of costs. Our attention has been called to a case which, Mr. Srinivasa Aiyanger contended, showed that there was no discretion in the Court. He contended that the discretion, in England at any rate, was given by Order LV, rule 10, and that, prior to the introduction of that rule, there was no discretion. The case to which he referred is *Campbell* v. *Gillespie* (6). That was a case in which a creditor sued the trustee under a deed for the benefit of creditors charging him with fraud and misconduct and claiming an account of all his dealings under the trust-deed. No doubt, the learned Judge in that case observed that under the old law the plaintiff would have been entitled, as a matter of right, to a common account against the defendant but that under Order LV, rule 10, the Court had a discretion. I do not think the observations of the learned Judge, with reference to the particular facts of this case, require us to hold that in a case like the present there is no discretion in the Court. In regard to costs, the order dismissing the suit with pleadings was an order made by the learned Judge in the exercise of a discretion which, I think, he was entitled to exercise. This being so, I do not think his order as to costs should be disturbed.

The appeal fails and is dismissed with costs.

OLDFIELD, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 837, 838 AND 840 OF 1911.

February 25, 1914.

Present:—Justice Sir Herbert Carnduff, KT., and Mr. Justice Richardson.

HEM CHANDRA CHAUDHRI —PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Arts. 142, 144

HEM CHANDRA CHAUDHRI *v.* SECRETARY OF STATE FOR INDIA.

—*River shifting course*—Dobas *in old bed remaining joined with new channel at all seasons—Grantee of fishery right in river—Exercise of fishery right in new channel—Possession of* dobas.

Where a river shifts its course, leaving *dobas* in its old bed, the grantee of the exclusive right of fishery in the river retains his right over such *dobas* so long as the latter remain in communication with the main channel at all seasons of the year.

Bhabu Prasad v. *Jagadindra Nath Rai*, 33 C. 15; 9 C. W. N. 934, followed.

Therefore, so long as the grantee has been fishing in the new channel, he cannot be said to have ceased to be in possession of the *dobas* and if he exercised his rights in the channel within the period of limitation, Article 142 of the Limitation Act is no bar to a suit by him for possession of the *dobas*. In such circumstances, the plea of limitation would prevail only if the defendant can show that he has held adverse possession of the *doba* portions of the fishery for more than twelve years; that is to say, the defendant must rely on Article 144 and the onus is on him and not on the plaintiff.

Appeal from the decrees of the District Judge of Mymensing, dated January 13th, 1911, reversing those of the First Sub-Judge of that District, dated March 22nd, 1909.

IN No. 837.

Dr. *Rash Behary Ghosh*, Babus *Kishori Lal Sarkar*, *Jogesh Chandra Roy* and *Ramani Mohun Chatterjee*, for the Appellant.

IN No. 838.

Babus *Bipin Bihary Ghosh* (Junior) and *Debendra Nath Bagchi* (Senior), for the Appellant.

IN No. 840.

Babu *Priya Sankar Majumdar*, for the Appellant.

Babus *Ram Charan Mitra*, (Senior Government Pleader), *Dwarka Nath Chakaravarti*, *Satish Chandra Ghosh* and *Satish Chandra Bhattacharyya*, for the Respondents in all.

JUDGMENT.

CARNDUFF, J.—These appeals are against the dismissal by the District Judge of Dacca of three suits brought by the appellants against the Secretary of State and others for a declaration of their right to fish in a certain *doba* or backwater of the Brahmaputra river, and for recovery of possession of the same.

The *doba* referred to is admittedly situated in what was formerly the bed of the river. The appellants' case is that the fishery in this part of the Brahmaputra was settled with them as *Jal Hatna* by the Government, and that in 1897 the river, by reason of the great earthquake of that year, suddenly changed its course and left the *doba*. In 1901 the respondents, who are the lessees of an adjoining *khas mahal*, refused to allow them to exercise their rights in the *doba*, and these suits were in consequence instituted.

The suits were decreed by the Court of first instance; but the lower Appeliate Court has dismissed them as being barred by Article 142 of the Schedule to the Limitation Act, the appellants having failed to show that they had exercised their rights in the *doba* within twelve years of suing. They admit that they have never fished in the *doba* since it was formed; and the learned District Judge, having arrived at the finding of fact that the *doba* was not formed in 1897, as alleged by them, but was in existence as far back as in 1892, holds that, on their own showing, their suits, which were not brought till 1907, were time-barred under the Article mentioned.

The judgment under appeal is a most careful one, and if Article 142 applies, the decision of the District Judge cannot successfully be assailed. But Dr. Rash Behary Ghosh, who appears for the appellants, contends that an erroneous view of the situation has been taken, and that the Article applicable is Article 144, and not Article 142. It was found by the first Court and that finding has not been displaced—that the *doba* is connected throughout the year with the new channel in which the Brahmaputra now flows, and it has been held in *Bhabu Prasad* v. *Jagadindra Nath Rai* (1) that, where a river shifts its course, leaving *dobas* in its old bed, the grantee of the exclusive right of fishery in the river retains his right over such *dobas* so long as the latter remain in communication with the main channel at all seasons of the year. Obviously it is as unnecessary as it would be impossible for the grantee of a fishery to exercise his rights over every part of the fishery in order to avoid losing them by mere lapse of time. So long, then, as the appellants have been fishing in the new channel, they cannot be

(1) 33 C. 15; 9 C. W. N. 934.

said to have ceased to be in possession of the *doba* and, if they exercised their rights in the channel within the period of limitation, Article 142 (even if it be applicable at all where the matter in dispute is an interest in immoveable property) is no bar to these suits. In such circumstances, the learned Vakil urges, the plea of limitation can prevail only if the respondents can show that they have held adverse possession of the *doba* portion of the fishery for more than twelve years, or, in other words, that they have prevented the appellants, not since 1901, as the latter have alleged, but for twelve years before the 29th June 1907, from fishing in the *doba*. That is to say, the respondents must rely on Article 144, and the onus is on them, and not on the appellants.

There is, so far as I can see, no answer to this contention; and I think that these appeals must be allowed and the cases remanded to the lower Appellate Court for a fresh decision, in the light of the principles laid down above, on the evidence as it stands on the record. The costs of this appeal should, I think, be costs in the cause.

RICHARDSON, J.—I agree.

Case remanded.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 127 OF 1913.
December 12,1913.
Present:—Mr. Justice Ryves and Mr. Justice Piggott.
JAGARNATH SAHI—PETITIONER—APPELLANT
versus
KAMTA PRASHAD—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 148, O. IX, r. 13—Order setting aside ex parte *decree conditioned on payment of costs—Condition not fulfilled—Extension of time—Appeal.*

An *ex parte* decree was set aside on condition that a sum of money was paid before a certain date. The money was paid one day too late and the plaintiff refused to accept it. The Court refused to extend the time, holding that it had no jurisdicion to do so and formally dismissed the application to set aside the *ex parte* decree:

Held, that the final order dismissing an application to set aside the *ex parte* decree is appealable.

Held, further, that the Court had power under section 148 of the Civil Procedure Code to extend the time fixed for the payment of the prescribed amount if good cause were shown, or to pass a fresh conditional order in place of the former which had become ineffectual owing to the applicant's failure to comply strictly with the prescribed condition.

Suranjan Singh v. *Rambahal Lal*, 21 Ind. Cas. 585; 11 A. L. J. 950; 35 A. 582, distinguished.

First appeal from an order of the Subordinate Judge of Jaunpur, dated the 12th of April 1913.

The Hon'ble Mr. *Gokul Proshad* (with him Mr. *P. L. Banerji*,) for the Appellant.

Dr. *S. M. Suleman*, for the Respondent.

JUDGMENT.—The appellants before us were defendants in a suit in which an *ex parte* decree was passed on the 12th August 1911. They applied in due course under Order IX, rule 13, Civil Procedure Code, to have the *ex parte* decree set aside. Under circumstances with which we are not now concerned, this application only came up for disposal before the Subordinate Judge of Jaunpur on the 31st March 1913. After evidence had been taken, the learned Subordinate Judge expressed himself as satisfied that the applicants had shown sufficient cause for having the *ex parte* decree set aside. He then passed an order: the first portion of which formally allows the application, sets aside the *ex parte* decree and directs the suit to be restored to its original number for re-trial.

To this, however, the following direction was appended: "But the order of restoration will be subject to the payment of Rs. 15 as damages by the applicants within three days to the plaintiff." The learned Subordinate Judge who passed this order happened to be transferred almost immediately afterwards, and on the 4th April 1913 the matter came before his successor. It appears that the applicants had neither made nor tendered any payment to the plaintiff before the 4th of April 1913, on which date the money was tendered in Court and the plaintiff refused to accept it. The question then arose whether the learned Subordinate Judge had jurisdiction to extend the time fixed by the order of March 31st, 1913, for payment of this money, and in any case what orders should now be passed on

JAGARNATH SAHI *v.* KAMTA PRASHAD.

the application to set aside the *ex parte* decree.

The learned Judge of the Court below has recorded a detailed order in which he concludes by expressing his opinion that he has no jurisdiction to entertain the application for extending the time and also that the order dismissing the suit *ex parte* must now stand. In accordance with the judgment, a formal order was drawn up definitely dismissing the application to have the *ex parte* decree of August the 12th, 1911, set aside. Hence the appeal now before us. It was contended at the outset on behalf of the respondents that no appeal lay, as the order under appeal was merely an order refusing to extend time, for which no appeal is provided. It is admitted that an appeal lies from an order rejecting, though not from an order allowing an application under Order IX, rule 13, but it was contended on behalf of the respondent that the only order passed under the provisions of Order IX, rule 13, was the order conditionally granting the application. It seems to us that the appeal before us is in substance and reality an appeal against the formal order which followed on the judgment of April the 12th, 1913, by which formal order the application for setting aside the *ex parte* decree was finally disallowed. We are, therefore, satisfied that an appeal does lie.

The next question is as to the jurisdiction of the learned Subordinate Judge when on the 4th April 1913, the money directed to be paid as damages was tendered by the applicants, one day after the prescribed time. It seems to us that the provisions of Order IX, rule 13, do not contemplate the passing of a conditional order such as to have an effect analogous to that of a preliminary decree in a suit for pre-emption or on a mortgage. The proper order for the learned Subordinate Judge to have passed on March 31st, 1913, if he desired to put the applicants to terms in the manner in which he did, would have been an order directing that the applicants should deposit in Court a sum of Rs. 15 on or before the 3rd of April 1913, and that their application should then be put up for final disposal. In our opinion, the order actually passed can only be dealt with as one having substantially the effect stated above. On the order as passed, the application to have the *ex parte* decree set aside was not finally disposed of, and further formal order of some sort or kind remained necessary to be passed after the expiry of the time fixed by the Court.

The case is, in our opinion, in no way analogous to such a case as that of *Suranjan Singh* v. *Rambahal Lal* (1), in which it was held that section 148 of the Civil Procedure Code does not authorise the Court to extend the time fixed by the decree for payment of purchase-money in pre-emption cases.

We are unable to treat the order of March 31st, 1913, as having the effect of such a decree. In our opinion the learned Subordinate Judge on the 4th April 1913 was still seized of the original application under Order IX, rule 13, of the Civil Procedure Code, and had power to pass suitable orders in respect of the same. He could extend the time fixed for the payment of the prescribed damages, provided good cause were shown, under the powers recognised by section 148 of the Civil Procedure Code or he could proceed to pass a fresh conditional order, setting aside the decree upon terms, in place of the order of March 31st, 1913, which had become ineffectual through the failure of the applicants to comply strictly with the prescribed conditions.

We are, therefore, clearly of opinion that the order in appeal before us, *i. e.*, the order disallowing the application to have the *ex parte* decree set aside, dated the 22nd April 1913, should not be allowed to stand. We order accordingly and we return the case to the Court below, directing the learned Subordinate Judge to re-admit the application under Order IX, rule 13, on to his file of pending applications and to consider on its merits, which he has not yet done, the application of the 4th April 1913, made on behalf of the present appellants to pay into Court on that date the sum ordered to be paid as damages. He should then proceed to pass such orders as he may deem proper. The costs of this appeal will include fees on the higher scale and we leave them to abide the result.

Case remanded.

(1) 21 Ind. Cas. 585; 11 A. L. J. 950; 35 A. 582.

BEHRAM RASHID IRANI *v.* SORABJI.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 236 OF 1912.

October 3, 1913.

Present:—Mr. Justice Beaman and Mr. Justice Macleod.

BEHRAM RASHID IRANI—DEFENDANT—APPELLANT

versus

SORABJI RUSTAMJI ELAVIA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882)—Equitable mortgage—Facts to be proved—Deposit of title-deeds—Property outside Bombay—Proof of intention.

An equitable mortgage under section 59 of the Transfer of Property Act needs three facts to be proved (1) a debt, (2) deposit of title-deeds and (3) an intention that the latter should be security for the former.

No writing is necessary to create an equitable mortgage. It is of the very essence of such mortgage that it comes into being without any writing by mere conjunction of certain facts.

The intention must be clearly proved as a question of fact. Where to prove such intention the mortgagee offered as evidence a contemporaneous written agreement whereby (1) the mortgagor acknowledged the equitable mortgage, (2) agreed to the property being a further security for the loan, and (3) also agreed to execute upon demand a proper legal mortgage of the property covered by the title-deeds deposited:

Held, (1) that as the agreement created a charge on the property for more than Rs. 100, it was compulsorily registrable, and that not being registered, it was inadmissible in evidence, and consequently there was no evidence of intention to connect the deposit of title-deeds with the loan;

(2) that the mere fact that there was a subsequent or contemporaneous loan is insufficient in law to warrant a presumption, apart from any other evidence, that the contemporaneous or antecedent deposit of title-deeds was necessarily made as a security for the loan.

Per *Macleod, J.*—(*Beaman, J.*—dubitante).

Where title-deeds are deposited in the towns mentioned in section 59, an equitable mortgage is effected irrespective of the situation of the property to which the title-deeds refer.

Second appeal from the decision of the District Judge of Nasik, in Appeal No. 98 of 1911, reversing that of the First Class Subordinate Judge at Nasik, in Civil Suit No. 312 of 1910.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondent.

JUDGMENT.

BEAMAN, J.—In February 1907, the defendant deposited title-deeds of certain property in the Zilla of Nasik with the plaintiff. The plaintiff advanced to the defendant a sum of money and the present suit has been brought upon the footing of the said deposit which was made in the City of Bombay being an equitable mortgage of the Nasik property. I doubt much whether the Legislature ever intended to extend the doctrine of equitable mortgage by mere deposit of deeds in Bombay to lands lying anywhere outside Bombay. But as the section is worded I will not press that doubt here. Now, an equitable mortgage under section 59 of the Transfer of Property Act needs three facts to be proved: (1) a debt, (2) deposit of title-deeds, and (3) an intention that the latter should be security for the former. I have often had to notice in these Courts the growth of the doctrine of equitable mortgage which was very summarily introduced by three judgments of Lord Thurlow given in rapid succession. The doctrine thus created amounted at that time to very much what the law now is, as I have just expressed it, although the learned Chancellor, I think, lent strongly to the supposed legal presumption arising from the fact of indebtedness and the contemporaneous or subsequent deposit of title-deeds. Then, for the better part of a century, the Courts in England virtually adopted this presumption as a presumption of law and the need of proving intention almost disappeared. Latterly, however, the legal doctrine in England veered in the opposite direction and the Courts began to insist more and more strongly upon the proof of intention as a question of fact, and that has been embodied in our own statute law and that is the law we have to administer.

Now, the difficulty in the present case arises out of the manner in which the plaintiff has sought to discharge the burden of proof upon this question of fact. He has offered in evidence a contemporaneous writing or agreement which does, no doubt, fully set forth the very clear intention of the defendant that the deposit of the title-deeds should be a security for the loan to be advanced on or before the signature of that agreement, and the paper goes on to bind the defendant to execute upon demand a proper legal mortgage of the property covered by the title-deeds doposited. It appears to me that, having regard to the opening part of that document, it does in itself create a charge upon the property and is viewed in that light com-

pulsorily registrable. I am not disposed here to go into the very nice questions which arise and have often been discussed in this and the other High Courts upon contemporaneous writings of this kind, the question being usually whether these writings do in themselves create a mortgage or are merely subsequent records of it or anticipatory statements leading up to it. But I may observe, speaking generally, that no equitable mortgage is ever "created" by a writing. It is of the very essence of the equitable mortgage that it comes into being without any writing by the mere conjunction of certain facts. The inclination of my own mind has always been very strongly against any conclusion which implies that an equitable mortgage needs any such contemporaneous writing for its complete legal effect and consequences, and I think, rightly and logically viewed, this writing can never be put higher than proof of the intention of parties. Where it is limited to an agreement to execute a legal mortgage, if called upon to do so, I should doubt myself whether it would ever be compulsorily registrable. But as I say that question is one of much nicety and opinions have differed widely upon it. I do not consider it necessary to go further into it here because, in my opinion, this agreement requires registration in itself, because it creates, very clearly creates, a charge upon the property to the extent of more than Rs. 100, and that being so, it is compulsorily registrable and cannot be received in evidence of any transaction relating to or affecting that immoveable property. Now, if this document be excluded on this ground, as I think it must be, there remains no evidence whatever of intention to connect the deposit of title-deeds with the loan borrowed by the defendant from the plaintiff, and the mere fact that there was a subsequent or contemporaneous loan is not now, in my opinion, sufficient in law to warrant a presumption, apart from any other evidence, that the contemporaneous or antecedent deposit of title deeds was necessarily made as security for the loan. That is to say, on the question of fact there is absolutely no evidence, apart from this writing, which cannot be admitted to discharge the onus of proof which lies upon the plaintiff, and that is the ground to which I would prefer to restrict myself in reversing the decree of the lower Appellate Court, restoring the decree of the Court of first instance and dismissing the plaintiff's suit with all costs.

MACLEOD, J.—I agree with my brother Beaman that this appeal must be allowed, and that the decree of the lower Court dismissing the suit must be restored, the plaintiff paying the costs throughout. It has been held by the High Courts of Calcutta and Allahabad that in the case of deposit of title-deeds actually made in the towns mentioned in section 59, the mortgage can be effected irrespective of the situation of the property to which the title-deeds refer. I do not think there is anything in the contention that in the case of an equitable mortgage, the property in the *Mofussil* cannot be affected by a deposit of title-deeds in Bombay. In this case it appears to me that the plaintiff in order to prove his mortgage must rely on the document of the 9th of February 1907. That is the only evidence of the contract, and, as it requires registration, a contract of mortgage cannot be proved. Plaintiff, therefore, must fail.

Decree reversed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 681 OF 1911.

February 2, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

MANNIAN NAMBUDRIPAD, STYLED KATTAMATATH ELETATH MANAKKAL ESANAM KANDAN AND ANOTHER—APPELLANTS

versus

AGNIHARMAN NAMBUDRIPAD STYLED KATTAMATATH MOOTHATATH MANAKKAL SANKARANKANDAN (DIED) AND OTHERS—RESPONDENTS.

Malabar Law—Urulans—*Delegation or alienation of powers—Custom—Proof.*

Ordinarily, the powers and duties of the office of *Urulan* are incapable of alienation to a stranger or delegation to an agent. But if such a custom is

set up and strictly proved, it may be recognised provided that the alienation or delegation is strictly, confined to its narrowest limits.

Second appeal against the decree of the Court of the Subordinate Judge of North Malabar, in Appeal Suit No. 59 of 1910, preferred against that of the District Munsif of Cannanore, in Original Suit No. 60 of 1909.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Mr. *J. L. Rosario*, for the Respondents.

JUDGMENT.—The ordinary rule is that the duties of the office of *Urulan* with its powers are incapable of being alienated to a stranger or even delegated to an agent. (See Moore's Malabar Law, page 379).

If there is a custom to so delegate some or all of the powers, such a custom if not wholly unreasonable or opposed to public policy, might be recognized but that custom must be strictly proved and the delegation permitted by the custom must be strictly confined to the narrowest limits.

In this case, there is no proof of any custom by which each of the three *Uralars* could delegate his power separately to an agent or by which two of them together could delegate their united power to an agent.

It may be that there is a custom that all three of them together might appoint such an agent by a resolution passed unanimously or by a majority at a meeting properly convened after due notice (such appointment to last for a definite period) but it is unnecessary to decide whether there has been such a custom and if that is a valid custom.

What the majority of the *Uralars* (two out of three) have attempted to do in this case was to appoint an agent to exercise the powers of all three *Uralars* without consulting the third or giving notice to him. This, of course, could not be allowed under the ordinary law and no custom was set up or proved allowing this [*Kunhan* v. *Moorthi* (1).]

The lower Court's decisions are right and the second appeal is dismissed with costs.

Appeal dismissed.

(1) 7 Ind. Cas. 422; 34 M. 406; 8 M. L. T. 208; (1910) M. W. N. 359; 20 M. L. J. 951.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1253 OF 1913.

December 5, 1913.

Present:—Justice Sir Harry Stephen, KT., and Mr. Justice Mullick.

EAST INDIAN RAILWAY COMPANY—DEFENDANTS—PETITIONERS

versus

RAMGATI RAM—PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 77, 140—Notice to District Traffic Superintendent, whether notice to Agent.

A notice to a Railway Company's District Traffic Superintendent is not a notice to the Agent within the terms of section 140 of the Railways Act, 1890.

Janki Dass v. *Bengal Nagpur Railway Company*, 13 Ind. Cas. 509; 15 C. L. J. 211; 16 C. W. N. 356; *Nadir Chand Shaha* v. *Wood*, 35 C. 194; 12 C. W. N. 450 *East Indian Railway Company* v. *Madhulal*, 19 Ind. Cas. 673; 18 C. L. J. 147; 17 C. W. N. 1134, followed.

Radha Kissen Chooni Lal v. *East Indian Railway Company*, 21 Ind. Cas. 970, referred to.

Woods v. *Meher Ali*, 3 Ind. Cas. 479; 13 C. W. N. 24; 4 M. L. T. 427, distinguished.

Rule against the decree of the Small Cause Court Judge of Sasseram.

Babus *Mahendra Nath Ray* and *Ambikapada Chowdhury*, for the Petitioners.

Babu *Haribar Prasad Singh*, for the Opposite Party.

JUDGMENT.—In this case goods were consigned through the East Indian Railway Company, the defendants in this case to the opposite party in this Rule. They never arrived and the opposite party accordingly sued the Railway Company for the loss of the goods under section 77 of the Indian Railways Act (IX of 1890). The opposite party was thereupon bound to give notice of the loss within six months and under section 140 of the Act this notice was to be given to the Agent of the Company. They gave notice within the time allowed but they gave it to the District Traffic Superintendent. The Judge of the Court below held that this notice met the requirements of section 77 of the Indian Railways Act. The petitioners, the East Indian Railway Company, have obtained a Rule calling upon the plaintiffs to show cause why the decree of the Small Cause Court should not be set aside on the ground that it was contrary to law.

The question before us is whether the notice to the District Traffic Superintendent was a notice to the Agent within the terms of the section we have mentioned. Following the decisions in the cases of *Janki Dass* v. *Bengal Nagpur Railway Co. Ld.* (1) *Nadir Chand Shaha* v. *Wood* (2) and *East Indian Railway Company* v. *Babu Madhulal* (3), we have no hesitation in holding that this notice was not a good one. There is also a recent case decided in the same sense, *Radha Kissen Chooni Lal* v. *The East Indian Railway Company* (4). These decisions seem to be to some extent in conflict with the decision in the case of *Woods*, v. *Meher Ali Bepari* (5). That case has, however, been distinguished from the cases we have mentioned and the same distinction exists between that case and the present. The result, therefore, is, that this Rule must be made absolute and the order of the lower Court set aside. The defendants, petitioners, are entitled to their costs in this Rule, the hearing fee being assessed at one gold *mohur*.

Rule made absolute.

(1) 13 Ind. Cas. 509; 15 C. L. J. 211; 16 C. W. N. 356.
(2) 35 C. 194; 12 C. W. N. 450.
(3) 19 Ind. Cas. 673; 18 C. L. J. 147; 17 C. W. N. 1134.
(4) 21 Ind. Cas. 970.
(5) 3 Ind. Cas. 479; 13 C. W. N. 24; 4 M. L. T. 427.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 426 OF 1912.

February 17, 1914.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

HERBERT ARCHIBALD POCOCK AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE DELHI AND LONDON BANK LTD. AND OTHERS—DEFENDANTS—RESPONDENTS.

Will—Executor—Power of executor to settle claims in respect of testator's property—Legatee, right of.

Executors acting *bona fide* have power to settle claims in respect of the estate of their testator, and this power cannot be disputed by the legatees.

First appeal from the decision of the Subordinate Judge of Dehra Dun, dated the 3rd September 1912.

Mr. *Nihal Chand*, for the Appellants.
Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—The facts connected with the present appeal are shortly as follows: A Mr. George Pocock made his Will on the 4th of October 1909. In this Will he referred to the fact that he had a fixed deposit in the Delhi and London Bank, Ld., Mussoorie Branch, of about Rs. 10,000. He proceeded to give certain legacies out of that fund. The said George Pocock died on the 15th of November 1909 and his Will was duly proved by the defendant, Mr. Bodycot who was the executor named. The Bank alleged that during his life-time, namely, some time in the year 1906, the Bank advanced to a Mrs. Taylor, a daughter of the deceased, the sum of Rs. 4,000 at the request of Mr. Pocock, the testator, and that he had agreed that the deposit should be security to the Bank for the advance. The executor went into this matter and came to the conclusion that the representation of the Bank was true. There can be very little doubt that the executor was justified in the conclusion to which he came. The Bank had in their hands a letter which Mr. Pocock had received from the Lucknow Branch of the Bank asking him whether he would give security for the advance to his daughter. This letter was handed over to the Manager of the Bank at the time when Mr. Pocock is alleged to have agreed to be surety for the loan to his daughter and that the deposit should be security. Having satisfied himself on this matter the executor allowed the Bank to

deduct the amount due for the advance to Mrs. Taylor and all other sums due by the deceased himself and received the balance of the deposit. The executor says that he did this with the assent of the legatees themselves. There can be no doubt that they did assent to this course, but it is possible that they thought that they were reserving to themselves the right to take any further proceedings they thought fit against the Bank. It is somewhat difficult to see how the present suit could be maintained by the legatees against the Bank. The Bank was entitled to look to the executor and to settle all questions with the executor so long as there was no fraud. In the present case, however, the plaintiffs, who are some of the legatees of the deceased Mr. Pocock, have made not only the Bank but also the executor parties to the suit, and it is contended on their behalf that the settlement made by the executor with the Bank was equivalent to the payment of an invalid claim and that accordingly not only the executor but the Bank also are liable for the amount. It is contended that it was impossible to create a lien on the deposit save by writing under the hand of the deceased and that, inasmuch as Mrs. Taylor's debt was more than three years old, the Bank could not have sued her, and, therefore, could not have sued the executor as representing the estate of the deceased and that on these grounds the claim of the Bank was an "invalid claim." In our opinion the power of executors acting *bona fide* to settle claims in respect of the estate of their testator cannot be disputed. There is certainly no evidence to show that Mrs. Taylor's debt had become time-barred ; on the contrary, having regard to the practice of banks, it is much more probable that the debt was still in force against her. The reason why neither the Bank nor the executor thought fit to proceed against her is because she was not considered a "mark" for the amount. It is not suggested and could not be suggested, that the executor did not act perfectly *bona fide* in his dealing with the Bank. We think it quite unnecessary to decide the question whether what occurred between the deceased and the Manager of the Bank at Mussoorie was sufficient to create in law a valid lien on the deposit, because, in our opinion, under the circumstances of the present case, the executor was quite justified in settling with the Bank in the way he did, that is to say, allowing the Bank to deduct the amount of the deceased's own debt and the moneys advanced to his daughter, Mrs. Taylor, for which he had, at least, become surety, they taking over the balance of the money. We think in all probability this was not only the honest course but it was the wisest course that the executor could have adopted. The appeal accordingly fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2138 OF 1910.

February 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

SRINIVASA CHARIAR AND OTHERS—RESPONDENTS.

Shrotriam *tenure—Grant made by pre-British Government—Confirmed by British Government—* Inam *deed and its terms—Absolute title—Right of State to minerals—Levy of seigniorage fees, legality of—Enfranchisement of* inam *confers absolute title—Right of Government to minerals also passes.*

Where the terms of an *inam* title-deed are absolute and confer a free-hold in the village, the right of the State to the minerals also passes with the grant.

Sadasiva Aiyar, J.—On enfranchisement, the full free-hold interest in a village passes and the estate so vesting is not liable to any further imposition of burden in the shape of revenue assessment by the Government, other than the burden of the enhanced quit rent imposed by the *Inam* Commissioner.

Gunnaiyan v. *Kamakchi Ayyar*, 26 M. 339, *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya*, 30 M. 434; 17 M. L. J. 101 (F. B.); 2 M. L. T. 101, *Subbaroya Chetty* v. *Aiyaswamy Aiyar*, 1 Ind. Cas. 749; 32 M. 86; 5 M. L. T. 80, referred to.

Spencer, J. (*dissenting*)—A Shrotriam grant gives no right over the lands.

Chinnan v. *Kondama Naidu*, 23 Ind. Cas. 113; 26 M. L. J. 169; 1 L. W. 41; *Papala Narayanaswami Naidu* v. *Secretary of State* (*Pensalani Kanniappa Naidu*), 14 Ind. Cas. 261; (1912) M. W. N. 496; 24 M. L. J. 36, referred to.

SECRETARY OF STATE FOR INDIA *v.* SRINIVASA CHARIAR.

A grant made by Government means only grant of revenue unless the terms of the grant expressly and clearly convey anything else.

Woolley v. *Attorney General (Victoria)*, 46 L. T. P. C. 18; 2 App. Cas. 163; 36 L. T. 121; 25 W. R. 852, referred to.

Even where Government have, from time to time, expressed varying views in regard to their right to share in the minerals found in the village covered by an *Inam* grant, those views will not debar Government from claiming such right, unless they have, by express words, surrendered such right.

Nor will such right become extinguished by the law of limitation.

Boddupalli Jagannadham v. *Secretary of State for India in Council*, 27 M. 16, referred to.

The term "minerals" includes freestone, limestone, granite, clay, and stone used.

Bell v. *Wilson*, 35 L. J. Ch. 337; L. R. 1 Ch. 303; 12 Jur. (N. S.) 263; 14 L. T. 115; 14 W. R. 493; *Fishbontine* v. *Hamilton*, 25 L. R. Ir. R. 483; *Attorney-General* v. *Welsh Granite Company*, 35 W. R. 617; *Earl of Jersey* v. *Neath Union*, 58 L. J. Q. B. 573; 22 Q. B. D. 555; 37 W. R. 388; 53 J. P. 404; *Midland Railway* v. *Checkley*, 36 L. J. Ch. 380; L. R. 4 Eq. 19; 16 L. T. 260; 15 W. R. 671, referred to.

Tituram Mukerji v. *Cohen*, 33 C. 203; 2 C. L. J. 408; 9 C. W. N. 1073; 15 M. L. J. 379; 7 Bom. L. R. 920; 3 A. L. J. 59; 32 I. A. 185 (P. C.), referred to.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 368 of 19.9, preferred against that of the District Munsif of Tirukoilur, in Original Suit No. 594 of 1903.

The *Government Pleader*, for the Appellant.

Mr. *T. R. Venkataramasastri*, for the Respondents.

JUDGMENT.

SPENCER, J.—The plaintiffs are the owners of the Shrotriam village of Kollur in the South Arcot District. They brought this suit against the Secretary of State for India in Council for a declaration of their exclusive title to all the rocks and hills lying within the said village except the portion acquired by the Government under the Land Acquisition Act, for a perpetual injunction against interference with their rights, for recovery of damages and for refund of the sums levied from them by way of seigniorage or royalties. Though the plaint relates to the title of the lands described as mountains and hills, the parties have gone to trial on the mutual understanding that the matter at issue between them was the right of the State to collect seigniorage fees on minerals.

The first issue dealt with the question whether there was an outright grant to the plaintiffs of the village including the minerals in the village and whether it was binding on the defendant. The 2nd issue was directed to a consideration of the question whether the Inam Commissioner at the time of enfranchisement conferred a right to take minerals free of taxation, and if so, whether the Government was bound by his act, supposing it to be an act in excess of his authority. The plaintiffs succeeded in both the lower Courts but the injunction was refused.

The District Munsif found on the first issue that, although the grant impliedly included the right to quarries and minerals, Government did not, at the time of the grant, disable itself from claiming royalties, *i. e.*, the State's share in the mineral produce. On the 2nd issue he held that by enfranchisement Government had deprived itself of all rights to claim revenue or minerals, and that the prerogative of Government could not give it a right to derogate from a grant once made.

The District Judge found both the issues against the appellant. He held that the right to impose assessment which Government surrendered at the time of the *Inam* Settlement included the right to collect revenue on all produce of the lands, produce being treated as including minerals.

The *Inam* Register, Exhibit J, and the *Inam* title-deeds Exhibits A, A (1) and A (2) show evidently that poramboke was included in the grant. Government do not dispute this fact, but they claim, not a full right to minerals, but a right to take a share in such produce; in other words, the prerogative right to levy royalties at certain rates which are given in the Appendix to Standing Order No. 25 of the Standing Orders of the Board of Revenue.

On the first point, it must be regretted that the ten original documents of title in Hindi, Telugu and Persian referred to in column No. 12 of the *Inam* Register were not available at the trial. We have referred to Exhibit I which is an English translation of a *purwana* produced from the Collector's office which purports to be a re-grant by Nabob Anwaradeen Khan Bahadur on a perpetual Shrotriam tenure of the entire village of Kollur to Lakshminarasimhachari, Zunardar, for subsistence, in order that "having

appropriated to his own use the produce of the seasons, each year, he may be assiduous in offering up prayers for the lasting prosperity of the Empire." The document then imposes on him the term that he should pay regularly to the Sirkar the established amount of the Shrotriam which is stated to be the sum of 110 *Gory chuckrams.*

In *Chinnan* v. *Kundama Nayudu* (1) we referred to the meaning of the Shrotriam tenure as defined in *Papala Narayanasawmi Naidu* v. *Secretary of State for India* (*Pensalani Kanniappa Naidu*) (2) and in Wilson's Glossary. According to that definition, a Shrotriam consists of lands or a village held at favourable rates. According to the author of Wilson's Glossary, "a Shrotriam grant gives no right over the lands and the grantee cannot interfere with the occupants as long as they pay the established rents." In *Adusumulli Suryanarayana* v. *Acchutta Potanna* (3) we referred to *Rajya* v. *Balakrishna Gangadhar* (4) in which grants to *inamdars* were considered to be ordinarily grants of the Royal share of the revenue. There is no language in Exhibit I which can be regarded as depriving Government of its right to charge royalties on minerals. In *Woolley* v. *Attorney-General* (*Victoria*) (5) it was held that the prerogative right of the Crown to minerals in mines in the Colonies would not pass under a grant of waste land from the Crown, unless the intention that it should so pass was expressed by apt and precise words. Minerals have been held to include freestone in *Bell* v. *Wilson* (6); limestone in *Fishbontine* v. *Hamilton* (7); granite in *Attorney-General* v. *Welsh Granite Company* (8); clay in *Earl of Jersey* v. *Neath Union* (9) and stone used for mending roads and worked by quarrying from the surface in *Midland Railway* v. *Checkley* (10).

(1) 23 Ind. Cas. 113; 26 M. L. J. 169; 1 L. W. 41.

(2) 14 Ind. Cas. 261; 24 M. L. J. 36; (1912) M. W. N. 496.

(3) 22 Ind. Cas. 339; 26 M.L.J. 99; 15 M. L. T. 268.

(4) 29 B. 415; 7 Bom. L. R. 439.

(5) 46 L. J. P. C. 18; 2 App. Cas. 163; 36 L. T. 121; 25 W. R. 852.

(6) 35 L. J. Ch. 337; L. R. 1 Ch. 303; 12 Jur. (N. S.) 263; 14 L. T. 115; 14 W. R. 493.

(7) 25 L. R. Ir. 483.

(8) 35 W. R. 617.

(9) 58 L. J. Q. B. 573; 22 Q. B. D. 555; 37 W. R. 388; 53 J. P. 404.

(10) 36 L. J. Ch. 380; L. R. 4 Eq. 19; 16 L. T. 260; 15 W. R. 671.

In *Tituram Mukerjee* v. *Cohen* (11) the Privy Council agreed with the Calcutta High Court holding that a grant of rents and profits for the life of the grantee could not be presumed to carry with it the right to open mines and remove minerals which are a subjacent portion of the soil.

It is contended for the respondent that, as the title-deeds Exhibit A series, and the extract from the *Inam* Register, Exhibit J, show that poramboke, waste and uncultivable land was included in the grant and as quarrying is the only use to be made of land which is bare rock apparent on the surface, Government must have intended to give such use of the land as it was capable of. The Government Pleader concedes that some interest in waste land has passed to the Shrotriamdars, but he points to the fact that Government fixed the assessment on the basis of cultivation as an indication that it was the agricultural rights, not other rights, that Government parted with. The District Judge's view that, if the proprietary right in the lands belongs to the plaintiffs, then they are the owners of the subsoil and, therefore, of the minerals is not supported by authority. The District Munsif's finding that, though the Government could not claim exclusive rights over quarries and minerals in this village, there was nothing to prevent them from claiming the State's share of the produce in the minerals is sounder, and this finding is enough for deciding this point in defendant's favour, seeing that by imposing charges for quarrying Government did not go further than exercise the right which they claim to share in the mineral produce. Granting that Shrotriamdars got by virtue of their grant a right to make use of the surface of the soil for certain purposes and to extend cultivation without liability to further assessment, the prerogative right of the Crown to a share in the minerals which are underground is not impaired by an absolute grant in which there are no words to signify the surrender of such prerogative.

The second question to be determined is whether the Act of enfranchisement in 1862 interpreted in the light of the rules

(11) 33 C. 203; 2 C. L. J. 408; 9 C. W. N. 1073; 15 M. L. J. 379; 7 Bom. L. R. 920; 3 A. L. J. 59; 32 I. A. 185 (P. C.).

for enfranchising *inams* and in the light of Acts IV of 1862 and VIII of 1869 had the effect of destroying the rights of Government, if any existed after the grant under Exhibit II in 1750. The scheme of *inam* enfranchisement was a matter deeply considered by Bhashyam Iyengar, J. in *Gunnaiyan* v. *Kamakchi Ayyar* (12). At page 345 he observes: "The declared policy of Government, when the *Inam* Commisssioner was appointed in 1859 and rules framed for his guidance, was to waive its right of resumption and enfranchise personal *inams* and convert them into ordinary heritable property and forego its reversionary right in consideration of the holder of the *inam* agreeing to pay a quit-rent, the rates of which varied with reference to the value and prospect of the reversionary claim of the Government in each case." Before enfranchisement, if the line of the grantee became extinct, the reversion lay with the Government. By the process of enfranchisement, what the Government did was to exchange its reversionary rights for a favourable quit rent or *jodi* and it gave an indefeasible right to property. That this was its effect, is apparent by a reference to Standing Order No. 52 which contains rules for enfranchising *inams*. The rates of conversion are made more or less favourable in proportion as the *inamdar* had competent heirs at the date of enfranchisement, or had no heirs competent to continue the family, or was without heirs altogether, or had a legally defective title. The rules appear to have been framed purely on a calculation of the chances of the reversion falling in.

In Board's Standing Orders Vol. II Appendix, p. 182, Rule 3, quit-rent is described as a "sufficient compromise for the right of reversion possessed by the Government over the *inam*," and again in Rule No. 2, the *Inamdar* is given an option "to convert this restricted tenure into a freehold with the full powers of alienation by gift, sale, adoption or otherwise, by consenting to the payment of an annual quit-rent." No value is placed on the nominal rights in computing the value of the rights parted with and settling quit-rent at one-eighth, one-fourth or one-half of the assessment of the land.

Rule 28 runs as follows:—"*Inams* once converted into freeholds in accordance with the foregoing rules will be subject to no further interference on the part of the Government, except such as may be necessary for the punctual realisation of the quit-rent charged thereon; and even this degree of interference may be avoided, at the discretion of the *Inamdar*, by the purchase, once for all, of the fee simple of the land by paying a sum equal to twenty (20) times the amount of the annual quit-rent." The respondent's Pleader relies on this undertaking of Government not to interfere, as forfeiting the right of Government to make any additional charges. The language of the rule is, no doubt, wide and the importation of English legal phraseology by the words freehold, fee simple, is unfortunate and misleading. But I would read this rule together with the preceding rules and conclude from it that Government only meant that they would not interfere with the estate and interest of the land vested in the *Inamdar*. I do not think that it was intended that those words should affect the existence of the rights of the state over minerals if they then existed.

In the Board's Standing Orders, Edition of 1890, Chapter I, Order No. 15, conditions regarding quarrying and excavating are set out. In this order, it is declared that, "the State lays no claim to minerals in enfranchised *inam* lands." But in the Edition of 1907, there is a change. Here it is declared that "no claim to minerals should be made on behalf of the State in lands held on *inam* tenure where, apart from the title-deed issued by the *Inam* Commissioner, there has been conveyance of the State's rights to minerals in the original grant either expressly or by necessary implication;" and in the next paragraph clause (*e*) it declares that "claim should be made to the State's share (as determined by the rules below) in all mineral produce in lands held on *inam* tenure which do not fall under paragraphs 1 (*c*) (stated above) or 3 (*c*) (which relates to service *inams*)." Government appear to have changed their views as to the rights they possessed to minerals in *inam* lands and this change seems to have taken place about 1905, but the circumstances which led up to it have not

(12) 26 M. 339.

been disclosed. The Board's Standing Orders have not the force of law but are merely directions for the guidance of executive and administrative officers of the State in the Revenue Department. In my opinion, any misdirection which appeared through a misconception of what rights were vested in the Crown would not operate as a forfeiture of such rights by its publication in a work of this sort, provided that Government had not expressly or by implication surrendered such rights to the holders of the *inam* lands by any previous grant or by the act of enfranchisement.

No issue has been taken on the question of estoppel, although the District Munsif's judgment contains some observations on the point.

The question whether the plaintiffs have acquired any prescriptive right is the subject of issue No. 3 and this has been found against them. The District Munsif rightly held that the right of the Crown to claim its share in minerals was a prerogative right which could not be extinguished by limitation. See *Boddupalli Jagunnadham* v. *The Secretary of State for India in Council* (13) as to the limitation period within which the Government should exercise its prerogative of imposing assessment. Moreover, the District Munsif held that adverse possession had not been proved.

It is unnecessary to consider whether Government has any power to derogate from its grant, seeing that I have found that there was no forfeiture or surrender of mineral rights by any grant to these Shrotriamdars at any time. The award of compensation by Government for the acquisition of a certain extent of land in this village taken up for quarry cannot be treated as an admission against them of their right to claim a share in the proceeds of minerals, seeing that what was acquired under the Act was, whatever rights the Shrotriamdars possessed in the surface soil of the land in which that quarry was situated.

As I have held that the *Inam* Commissioner did not dispose of the Government's mineral right when he enfranchised the *inam*, it is unnecessary to consider the effect of Acts IV of 1862 and VIII of 1869 which were passed to validate the acts of the *Inam* Commissioner and to remove doubts as to the rights of the parties.

I would, therefore, allow this appeal and dismiss the suit with costs throughout.

SADASIVA AIYAR, J.—In this case, the learned District Munsif, Mr. M. R. Narayanaswamy Aiyar, has written an able and very well considered judgment which has been confirmed by the learned District Judge who heard the case on appeal. As I agree with the judgments of both the lower Courts, I shall try to be as brief as possible in expressing the reasons for my own judgment, especially as I need not repeat the facts which have been fully set out by my brother in the judgment just now pronounced by him.

Reading the entries in the *Inam* Register (J) with the title-deeds A, A1, and A2 granted by the *Inam* Commissioner, I think it difficult to come to any other conclusion than that full free-hold interest in the whole village was recognized by the *Inam* Commissioner on behalf of the Government as vesting in the *Inamdars*, the estate so vesting being not liable to any further imposition of burdens in the shape of revenue assessment by the Government other than the burden of the enhanced quit-rent of Rs. 360 imposed by the *Inam* Commissioner. As decided in *Gunnaiyan* v. *Kamakchi Ayyar* (12), *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (14) and *Subbaroya Chetty* v. *Aiyaswamy Aiyar* (15), the primary object of enfranchisement by the *Inam* Commissioner is, no doubt, to give up the reversionary estate vested in the Government. The object was, in other words, to free the owners of the lands from the liability to forfeiture of their estates if they made alienations to a stranger and to convert the lands into ordinary heritable and alienable property (not to restrict the inheritance to lineal heirs) and to permit the owner, (if a Hindu) to make adoptions according to the ordinary Hindu Law (and not merely from the sons of undivided agnates), that is, the restrictions imposed by the old *Inam* rules in respect of succession, adoption, and

(13) 27 M. 16.

(14) 30 M. 434; 17 M. L. J. 101 (F. B.); 2 M. L. T. 101.

(15) 1 Ind. Cas. 749; 32 M. 86; 5 M. L. T. 80.

alienation were done away with. See *Gunnaiyan* v. *Kamakchi Iyer* (12).

By the enfranchisement the *inam* is confirmed in free-hold to whoever was the person then entitled to the lands as *Inamdar* and this free-hold is paraphrased in the *Inam* title deed itself as follows:—"In other words, the *inam* will be your absolute property to hold or dispose of as you think proper, subject only to the payment of the above-mentioned quit-rent."

As Dr. Maclean says in his book referred to in paragraph 19 of the Munsif's judgment, these *imam* title-deeds show "the greatest extent to which the Government has parted with its own powers to make revenue demands" upon the lands forming enfranchised *inams* "The *inam* title-deed shows property against Government and a quit-rent fixed for ever." The enfranchised *Inamdars* are in that book treated as owning a better title in their *inam* lands as against the Government than even the *zemindars*. That *zemindars* under the Permanent Settlement *sannads* have had their varying assessments changed into fixed demands cannot be denied. And Sir Bhashyam Aiyangar, J., in *Gunnaiyan* v. *Kamakchi Aiyar* (12) says that "the *Inam* Settlement has got the same effect as the Permanent Settlement, that is, the effect of changing a precarious tenure into permanent property and a varying assessment into a fixed demand and thus enfranchising the estate from a tenure that subjects it to the burden of assessment thereon being increased *from time to time, at the will and pleasure of the Sovereign authority.*" Sir Bhashyam Aiyanger, J., quotes as authority for this opinion of his the observations of Sir T. Muthusamy Aiyar, J., in *Narayana* v. *Chengalamma*, (16). I am, therefore, quite clear that the Government has no right to impose further revenue burdens on the *inam* estate whether they call it royalty or assessment, as *Inamdars* have got a free-hold title to their lands under the *inam* title deeds granted to them at the enfranchisement.

That the poramboke including the rocks and the mines underneath the land were recognized by the *Inam* Commissioner, (who was the authorized agent of the Government to inquire into and settle the mutual rights of the Government and the *Inamdars*) seems to me to be beyond controversy. Before the *Inam* Commissioner, not only the single title-deed (a copy of a translation of which was filed by the defendants as Exhibit I) was produced for his inspection but nine other title-deeds which are not now forthcoming seem to have been put forward before him. The *Inam* Commissioner was the officer fully empowered to go into those title-deeds, and into the previous history of the enjoyment of the *inam* lands and to recognize on behalf of the Government whatever rights are, in his opinion, proved to exist in the *Inamdars*. His recognition of the title of the *Inamdar* (whichever individual the *Inamdar* may happen to be) as the title stood before the enfranchisement and also his power to bargain with the *Inamdar* on behalf of the Government so as to make the *Inamdar* consent to the enfranchisement on certain terms, were not restricted and his decisions within the scope of this large authority are clearly binding upon the Government. The recognition of a free-hold right is the same thing in the eye of the law as the recognition of a right to the soil of waste land including the right to all the minerals, rocks and stones, up to the centre of the earth. The recognition or grant of a right to rents and profits during the life-time of a person may, no doubt, not entitle that person to remove part of the soil itself in the shape of quarried stones or minerals but the recognition or grant of a perpetual free-hold right in the soil cannot, in my opinion, be construed so as to limit the right of the owner to take only agricultural or sylvicultural products from the soil.

While I am always inclined to hold that the State does not lose its right to communal sites like public pathways and the sites of the beds of natural streams even if the streams are not tidal or navigable, whether in *zemindari* or *Inam* Estates, I feel myself unable to say that a Permanent Settlement by which a fully authorized officer settles the revenue in perpetuity, recognizes the pre-existing right of the *Inamdar* in Rocky Poramboke lands, and confirms such right, can be repudiated by the Government. As pointed out by the learned District Munsif, the Government till about 1902 never thought that they had any right after enfranchising an *inam* in perpetuity to impose

(16) 10 M. 1.

afterwards an additional assessment upon the *Inamdar* simply because the owner of the enfranchised *inam* is able to obtain further profits than he was obtaining at the time of the *Inam* Settlement from the rocky soil fit for quarrying. Though the quit-rent was based principally upon a calculation of the agricultural rents or profits derived by the *Inamdar*. (Just as the *peishcush* was fixed in the case of *zemindari* at the time of the Permanent Settlement on the actual average profits which the *zemindars* were obtaining) that fact was never intended to detract from the right of either a *zemindar* or an *Inamdar* to get in future as much profit from his land by developing his estate (without, of course, detriment to the customary rights of occupancy and other tenants which were protected by Act VIII of 1869).

So far as the Government was concerned, full rights accrued to the enfranchised *Inam*-holder in his estate, relieving him from liability to pay any further assessment or revenue except the quit-rent. He had even the right to commute the quit-rent itself by payment of a lump sum to the Government as consolidated quit-rent so as to become a land-holder holding an estate in fee-simple. It is a question of fact based on the construction of the documents (including the title-deeds) in this case as to what the nature of the title of the *Inamdar* is in the rocks in the estate comprised in his holding and the lower Courts have, in my opinion, come to a correct conclusion in this matter. I do not see that they have misconstrued any document and they were entitled, from the conduct of the Government officers which, though it may not be binding upon the Government, is strong evidence against them and from the facts of this case, to arrive at the conclusion which they have come to in respect of the extent of the plaintiff's rights. By enfranchising, the Government absolutely renounces its rights on the land and as between the Government and the *inamdar* the grantee's title becomes absolute. As regards the title given under the original grant by the ruling authority which reigned before the British Government, I agree with the Munsif that the *Inam* Commissioner's entries, remarks and decisions are strong evidence that even the original grant included the soil of the Rocky Porambokes in the village of Kollur and by necessary implication carried with it the right to the stone quarries and the mines in the Kollur village lands. The British Government at the time of the enfranchisement or at the time of the confirmation of the original *Inam* might have taken into consideration the possibility of the then useless rocks yielding large profits in future to the *Inamdar* and they might have increased the quit-rent in consequence but their officers failed to do so. This, however, is no justification for the Government going back in 1905 (about 40 years after the *Inam* Settlement) from the contract made by their authorized Officer by which he gave up the Government's rights to impose in future, any assessment upon the holding of the *Inamdars* other than the increased quit-rents imposed by him.

As pointed out by the District Munsif, "it must be remembered that rule 28 of the *Inam* rules framed in 1859 was one of the rules on the faith of which the *Inamdars* in A2 agreed to pay the quit-rent imposed and thereby have the *inam* enfranchised. That rule gave them the assurance that *inams* once converted into free-holds in accordance with the rules would be subject to no further interference on the part of the Government except such as might be necessary for the punctual realization of the quit rent charged thereon." I agree with the above observation and I may be permitted to express my surprise that after the framing of the rule 28 so long ago as in 1859, the Government should try by indirect means to impose additional revenue simply because the *Inamdar* has been fortunate enough to turn into profit those lands granted to him which were almost useless at the time of the enfranchisement.

In the result, I would dismiss this second appeal with costs.

Under section 98 (2) of the Civil Procedure Code, the second appeal will stand dismissed with costs. Time for Government satisfying the decree will be two months from this date.

Appeal dismissed.

BASAWA SINGH *v.* NATHA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEALS NOS. 196 AND 197 OF 1912.

March 10, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

BASAWA SINGH—PLAINTIFF—APPELLANT

versus

NATHA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905*)*, s. 12 (*c*), secondly—"*Sub-division*," *meaning of*—Thulla *Hari Singh, of* Mauza *Burj Hari Singh, Jagraon Tahsil, Ludhiana District, whether sub-division—Vendee joining stranger, whether can resist pre-emption.*

Thulla Hari Singh of *Mauza* Burj Hari Singh, Tahsil Jagraon, District Ludhiana, is a sub-division within section 12 *(c), secondly*, of the Punjab Pre-emption Act,

The intention of the Legislature in enacting clauses (*c*) and (*d*) of section 12 of the Punjab Pre-emption Act was not only to recognise the main or primary sub-divisions of a village but also any further divisions of such sub-divisions as may be well marked and authenticated by the Settlement Record and the history of the village.

Bhagat Hira Nand v. *Lal Khan*, 169 P. R. 1889, *Uttam* v. *Buta*, 69 P. R. 1893, *Sadda* v. *Majja Singh*, 76 P. R. 1894, followed.

Bija v. *Bishan Singh*, 45 P. R. 1897, *Sher Singh* v. *Maluk Khan*, 142 P. L. R 1905, distinguished.

A vendee who associates with himself in the purchase a stranger co-vendee loses his right to resist a pre-emptor's claim.

Second appeals from the decrees of the Divisional Judge, Ludhiana Division, dated the 19th December 1911, reversing those of the District Judge, Ludhiana, dated the 17th June 1911, decreeing plaintiff's claim.

Lala *Lajpat Rai*, for the Appellants.

Bhai *Dasundha Singh*, for the Respondents.

JUDGMENT.

C. A. No. 196 OF 1912.

This appeal and Appeal No. 197 of 1912 are connected and both will be disposed of in one judgment. These two appeals have arisen out of two pre-emption suits brought by Basawa Singh, plaintiff, against the defendants in respect of two separate plots of agricultural land which are situate in *Thulla* Hari Singh of *Mauza* Burj Hari Singh, *Tahsil* Jagraon, District Ludhiana, and which were sold by two sale-deeds, dated the 15th June 1908 and 1st May 1909, respectively. One of the pleas raised by the vendees was that the *Thulla* in which the lands in suit are situate is not a sub-division of the village within the meaning of section 12 (*c*), *secondly*, of the Punjab Pre-emption Act II of 1905, and that, therefore, the plaintiff had no preferential right of pre-emption as against the vendees. We may state here that the village is divided in two *pattis*, called *Patti Jatan* and *Patti Gujran*, and *Patti Jatan* is further sub-divided into two *thullas* known as *Thulla* Hari Singh and *Thulla* Guttu Singh. The land in suit is situate in *Thulla* Hari Singh; and the plaintiff is also a land-owner in that *Thulla*. Of the ten vendees, three own lands in *Thulla* Hari Singh, but the rest do not, having only a share in the *shamilat* of *Patti Jattan*. If *Thulla* Hari Singh be held to be a "sub-division" of the village within the meaning of clause (*c*) of section 12 of the Pre-emption Act, then it is clear that the plaintiff has a superior right of pre-emption not only against the vendees who own no land in the said *thulla* but also against the three vendees who are landowners therein, inasmuch as the last mentioned vendees have by associating with themselves in the purchase persons who are strangers forfeited their own right of pre-emption.

The first Court held that *Thulla* Hari Singh is a recognised sub-division of the village, and, therefore, decreed the plaintiff's claim in each suit. On appeal, the Divisional Judge has come to a contrary conclusion holding that *Thulla* Hari Singh was not such a well-marked section of the village as to be considered a sub-division of it for purposes of pre-emption. He has accordingly held that the plaintiff has not a preferential right of pre-emption in respect of the lands sold and has dismissed both the suits. The question involved in both these second appeals is whether or not *Thulla* Hari Singh is a sub-division of village Burj Hari Singh within the meaning of section 12 (*c*) *secondly*, of Act II of 1905. For the appellant, reliance has been placed upon *Bhagat Hira Nand* v. *Lal Khan* (1) (page 588, para. 2), *Uttam* v. *Buta* (2) and *Sadda* v. *Majja Singh* (3); while the Pleader for the respondents has cited *Bija* v. *Bishan Singh* (4) and an unpublished decision of this Court in Civil Appeal No. 518 of 1902, printed as *Sher Singh* v. *Maluk Singh* (5).

(1) 169 P. R. 1889.
(2) 69 P. R. 1893.
(3) 76 P. R. 1894.
(4) 45 P. R. 1897.
(5) 142 P. L. R. 1905.

The history of the village which is given in the *shajra-nasab* of the Settlement of 1882 shows that the village was founded in *Sambat* 1882, and that soon after its foundation it was divided into two equal *pattis* called *Patti Jatan* and *Patti Gujran*, the division of the village area taking place on the *chak-bat* principle. Thereafter, the land comprised in *Patti Jatan* was divided half and half and constituted into two *thullas*, *Thulla* Hari Singh and *Thulla* Guttu Singh, but the division was made on the *khet-bat* basis. The lands in *Thulla* Hari Singh are said to be owned by 13 tribes, eight of which are *Jats* of different *gots*. The Divisional Judge has held that since the lands of *Patti Jatan* were divided into two *Thullas* on the *khet-bat* principle, and not on the *chak-bat* basis, neither of the two *thullas* can be regarded as a sub-division of the village within the meaning of section 12 (*c*) of the Punjab Pre-emption Act.

Now, in *Bhagat Hira Nand* v. *Lal Khan* (1) where the question for decision was whether a *taraf* in *Mauza* Rawalpindi (which, according to the entries in the Settlement Record, was divided into *tarafs*) was or was not a sub-division within section 12, clauses (*c*) and (*d*) of the Punjab Laws' Act, it was observed by Rivaz, J.:—"There is nothing in section 12 of the Punjab Laws Act which leads us to believe that the term 'sub-division' in clauses (*c*), and (*d*) is to be construed with reference to any particular principle of division. All that is necessary to show to bring a case within the above clause is that the village is divided into recognized sub-divisions, and it is shown by the *Patwaris*' evidence, and the other evidence in this case, that Rawalpindi is so divided, and that the boundaries of the *taraf* are entered in the Settlement Record".

Uttam v. *Buta* (2) was a case relating to village Baddowal in the Ludhiana District. The village was divided into two *pattis*, each of which was sub-divided into *thullas*. The plaintiffs claimed pre-emption on the ground that their land and the land sold was in the same *thulla* whereas the vendees held no land in this *thulla* but in another *thulla* of the same *patti*. It was held by this Court that the *thullas* were sub-divisions within the meaning of section 12, clauses (*c*) and (*d*) of the Punjab Laws Act. Mr. Justice Rivaz in the course of his judgment says:—"There appears to us to be no straining of language necessary to enable us to hold, in construing the above clauses, that a village sub-divided into *pattis*, which are again sub-divided into *thullas*, may be not incorrectly spoken of as sub-divided into *thullas*. * * * On principle, * * it seems most desirable that, in villages at least, a proprietor holding land in any sub division recognized by the Settlement Record, be it *taraj*, *patti*, *thulla* or *dheri*, should have as regards land sold in that sub-division a right superior to any one whose land is outside it. * * * On the whole, then, we are of opinion that the intention of the Legislature in enacting clauses (*c*) and (*d*) of section 12 of the Act was not only to recognize the main or primary sub-divisions of the village, but also any further divisions of such sub-divisions as are well-marked and authenticated by the Settlement Record and the history of the village."

In *Sadda* v. *Majja Singh* (3) it was held, that where a *patti* of a village is sub divided into *thullas* a *thulla* may be a sub-division of the village within the meaning of clause (*d*) of section 12 of the Punjab Laws Act, and in the particular instance before the Court it was found that the *thulla* in which the land sued for was situate, was such a sub-division.

Bija v. *Bishan Singh* (4) was a case relating to *Mauza* Jhalian *khurd* which according to the pre-emptor was divided into two *pattis*, one of *Sainis* and the other of *Jats* and the claim was based on the ground of the plaintiff being a land-owner in the *patti* in which the land sued for was situate. This Court found that there were no recognized *pattis* in the village. At page 208 of the Punjab Record the judgment runs as follows:—"We are of opinion that on the whole the finding on it (*i. e.*, on the question whether the *Sainis* and *jats* were members of distinct *pattis*) must be that they are not. There is admittedly no territorial division between the two groups. The Settlement Record does not recognize any *pattis*. On the contrary the *shajra nasab* says that there are none. The two sections hold their lands for the most part in different portions of the village, but some

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lands lie inter-mixed. * * * * There is no *shamilat patti* and nothing common to one group of proprietors, in which the members of the other group have no interest. The *shamilat* of the village was lately divided, not according to *pattis*, but among proprietors according to *khewat*, taking the village as a whole. * * * The fact that the Settlement Record does not recognize any sub-divisions in the village based on the separate grouping of the *Jat* and *Saini* proprietors, seems to us to to be a very strong argument against giving priority to the plaintiff under section 12, clause (*d*)."

In the unpublished decision in Civil Appeal No. 518 of 1902, (*Sher Singh* v. *Maluk Singh*) (5), it was held that in village Pheru Shehar, Tehsil Ferozepur, *zails* into which a *patti* was sub-divided were not sub-divisions of the village for the purposes of section 12 (*c*) of the Punjab Laws Act: as a reference to the history of the village and the Settlement Record showed that the *zails* in question were constituted by mere arbitrary grouping together of certain holdings, so as to form an association of proprietors with no connecting ties of any great sort. Within the *zails* there was no measure of rights other than actual possession, and the village as a whole was classed in the Record as *bhaia-chara*. The learned Judges observed that no rule of universal application can be laid down as to what constitutes the village sub-divisions for the purposes of pre-emption law, and they were of opinion that "there must be some one or more well-defined attributes to justify treatment of a section of the village as a sub-division, * * * and in determining the point the first thing to be looked to is the history of the village so far as it can be ascertained from the Settlement Record".

In the present case we find that each of the two *thullas* in *Patti Jatan* has the separate *shamilat thulla* in which the proprietors of the other *thulla* have no share and each *thulla* is entered in and authenticated by the Settlement Record. In view of the observations of the learned Judges in *Bhagat Hira Nand* v. *Lal Khan* (1), that the term sub-division is not "to be construed with reference to any particular principle of division," we are unable to agree with the Divisional Judge that, because *Patti Jatan* has been sub-divided into two *thullas* on the *khet-bat* principle, therefore *Thulla* Hari Singh, in which the land in suit is situate, is not a sub-division of the village within the meaning of section (12) (*c*), *secondly* of the Punjab Pre-emption Act

Bija v. *Bishan Singh* (4) on which the Divisional Judge has laid so such stress does not help the vendees at all, because there the Settlement Record of the village not only did not recognise any *pattis*, but on the contrary the *shajra-nasab* distinctly stated that there were none. There was no separate *shamilat patti* at all and the *shamilat* of the whole village was held in common.

On the whole, then, we are of opinion that *Thulla* Hari Singh is a sub-division within section 12 (*c*), *secondly*, of Act II of 1905, and it follows that the plaintiff has a preferential right of pre-emption as against the vendees in respect of the lands in disputes in the two suits. We, therefore, accept both the appeals, and setting aside the decrees of the Divisional Judge, we remand both the suits to him under Order XLI, rule 23, Civil Procedure Code, for decision on the merits. The stamps on each appeal will be refunded and other costs will be costs in the cause.

C. A. No. 197 OF 1912.

For reasons given in our judgment in Civil Appeal No. 196 of 1912, decided to-day we accept this appeal, and setting aside, the decree of the Divisional Judge, we remand the suit to him under Order XLI, rule 23, Civil Procedure Code, for decision on the merits. The stamp on appeal will be refunded and other costs will be costs in the cause.

Appeals accepted; Cases remanded.

HAKIKAT RAI *v.* RAM SARAN DAS.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 512 OF 1911.

July 3, 1913.

Present:—Mr. Justice Agnew and Mr. Justice Shadi Lal.

HAKIKAT RAI—PLAINTIFF—APPELLANT

versus

RAM SARAN DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Khatri *traders of* Mouza *Khairabad, Jullundur District—Hindu Law or custom, test for applying—Presumption.*

The mere fact that the *khatri* traders of *Mouza* Khairabad, Jullundur District, have owned land for six or seven generations does not create any presumption in favour of their being governed by agricultural custom in matters of alienation.

Musammat Maya v. *Gurdit Singh*, 4 Ind. Cas. 947; 1 P. R. 1910; 145 P. L. R. 1909; 128 P. W. R. 1909, distinguished.

The primary test for determining whether agricultural custom or Hindu Law applies is whether agriculture is followed as a chief means of livelihood.

Lachman Das v. *Pahla Mal*, 59 P. R. 1908; 121 P. W. R. 1908; *Dhera Singh* v. *Tara Singh*, 7 Ind. Cas. 527; 88 P. R. 1910; 85 P. W. R. 1910; 175 P. L. R. 1910, followed.

In the case of *Khatris*, the initial presumption is that they follow Hindu Law.

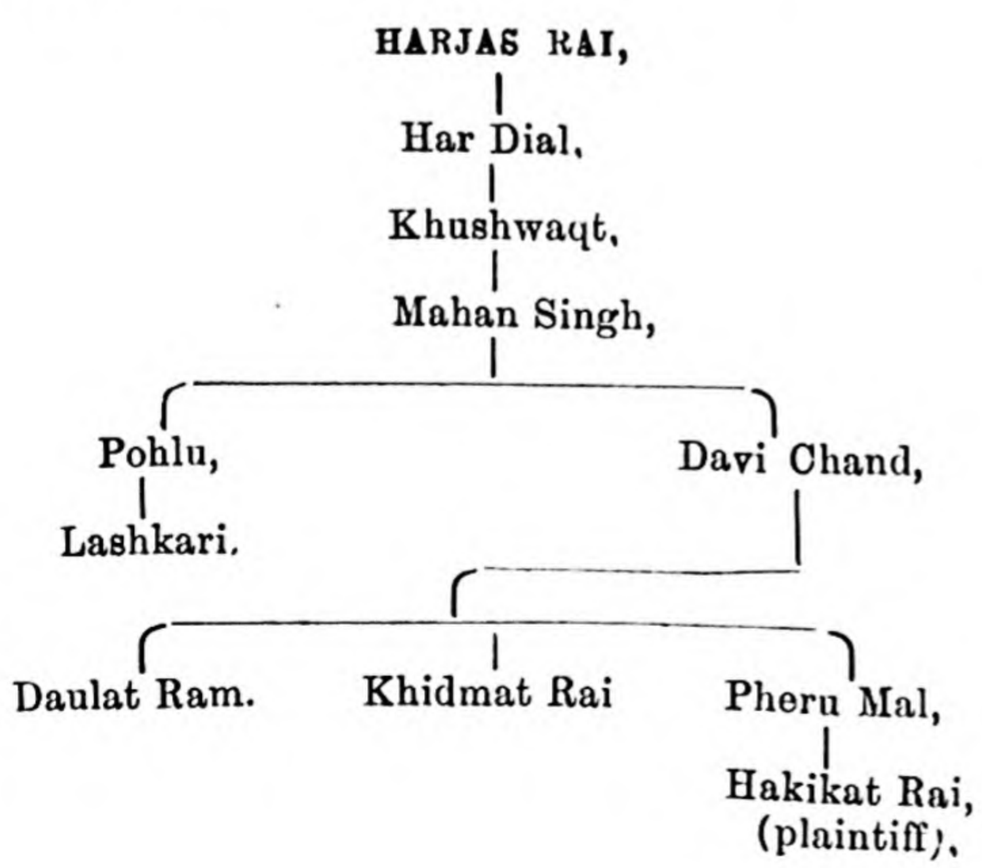
Harnam Singh v. *Musammat Hardevi*, 10 Ind. Cas. 365; 43 P. R. 1911; 86 P. W. R. 1911; 137 P. L. R. 1911, followed.

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 24th February 1911, affirming that of the Sub-Judge, 1st class, Jullundur, dated the 12th November 1910, dismissing the claim.

Mr. *Dalip Singh*, for the Appellant.

Lala *Salamat Rai*, for the Respondents.

JUDGMENT.—The pedigree-table is as follows:—



The suit was for declaration that a mortgage of 334 *kanals* of land for Rs. 4,800, executed by Pheru Mal, father of plaintiff, on 9th February 1909 in favour of Ram Saran Das should not affect the plaintiff's rights after the death of his father.

The points for decision are:—

(1) Whether the parties are governed by Hindu Law or by agricultural custom in matters of alienation?

(2) Whether the mortgage was for consideration and necessity?

As regards the first question the lower Appellate Court found, that in *Sikh* times Harjas Rai acquired 250 acres of land in *Mauza* Sheikhupura, which was, during the Settlement of 1881, separated off into the "*be chiragh*" estate of Khairabad; that the descendants of Harjas Rai had never followed agriculture as a practical pursuit but had adopted trade and money-lending as a profession. He, therefore, decided that these people followed Hindu Law. There is upon the record overwhelming evidence that Pheru Mal and Daulat Ram, his brother, are ordinary *Khatri* traders, dealing in cloth, grain etc., and borrowing capital for the purpose. It is clear, moreover, that they in no way subsist upon agriculture, although the family happens to own the "*be chiragh*" estate of Khairabad which they have inherited from their ancestor, Harjas Rai. The mere fact that they have owned this land for six or seven generations does not, in our opinion, create any presumption in favour of their being governed by agricultural custom in matters of alienation. Counsel for appellant in this Court relies on *Musammat Maya* v. *Gurdit Singh* (1) and especially on the test there applied as to whether the family had been in possession of land for some generations, as a factor in deciding whether those concerned followed Customary Law or not. That, however, is only one of many tests which are applicable in the decision. The primary test, as has been held in numerous rulings of this Court, is whether agriculture is followed as a chief means of livelihood or not. In the present case there can be no doubt that the chief means of livelihood is trade. Even where, as in *Lachman Das* v. *Pahla Mal* (2), a case

(1) 4 Ind. Cas. 947; 1 P. R. 1910; 145 P. L. R. 1909; 128 P. W. R. 1909.

(2) 59 P. R. 1908; 121 P. W. R. 1908.

some of them followed other professions such as trade or service, a Division Bench of this Court held that it was for the plaintiff to establish affirmatively that his family, in matters of alienation, were governed by Customary Law.

Again, in *Dhera Singh* v. *Tara Singh* (3), the parties were Bunjahi *Khatris* of the Rawalpindi District following the occupation of *dhobis* and owning no land in the village, it was held that, since agriculture was not the principal occupation of the parties, the onus of proving that the rules of Customary Law prevailed, was on the plaintiff seeking to set aside the alienation.

In *Harnam Singh* v. *Musammat Hardevi* (4); it was held that in the case of *Khatris* the initial presumption is that they follow Hindu Law. Further, as pointed out in that ruling, stress is always laid on the question, whether the claimants form a compact village community or at least a compact and considerable body of land owners in a more or less homogeneous village. In the present case the family to which plaintiff belongs merely possesses some 250 acres of land which has for revenue purposes been measured off into a separate estate and the family stands alone.

Counsel for appellant also points out that, when Daulat Ram died his widow was recorded as holding a share equal to that of each of her brothers-in-law and, that if Hindu Law had been followed, the two brothers of Daulat Ram would have taken his share. We do not think, however, that this incident, easily explainable as it is on the ground of convenience in affording the widow a separate maintenance, can be held to tell in favour of the contention of the learned Counsel. Nor does the fact that in the mortgage deed impugned, a specific share amounting to 1/6th or 43 acres is mortgaged, show that the parties are not governed by Hindu Law.

We have no hesitation then in concurring with the finding of the learned Divisional Judge in the matter.

In view of this decision it is perhaps hardly necessary to enter into the question of necessity. We may, however, state that after hearing Counsel we are satisfied that the mortgage was executed in order to pay just antecedent debts or for the legitimate purposes of trade. As regards the allegation that Pheru Mal was of immoral life, it is not proved that any portion of the mortgage money was raised for, or spent upon, any immoral purpose. The suit is clearly collusive between father and son; the episode in which Pheru Mal was fined for alleged drunkenness after the institution of this suit, appears, as held by the Divisional Judge, to be a childish attempt to manufacture proof of loose conduct for the purposes of this case; and if in 1908 there was some case against him about a woman, that is not enough to say that his general life was immoral. There is, we hold, no satisfactory evidence on the record to show that Pheru Mal was of immoral life. On the contrary, there is evidence to show that he is a competent man of business and that he was selected in 1907 as *Lambardar* of this "*be chiragh*" estate with a chorus of testimony to his good character from his own relatives. An even closer relative than any of the latter now seeks for his own purposes to blacken the character of his father.

We dismiss the appeal with costs

As regards the cross appeal relating to costs, we think that the defendant-appellant in the cross-appeal should get his full costs in the lower Court. The suit was a declaratory suit and Pleader's fee is not in such cases assessed on valuation of the subject-matter of the suit. The fee allowed was small and we increase it to Rs. 16. We accept the cross-appeal and grant defendant-appellant, Ram Saran Das, his costs amounting to Rs. 30 with costs in proportion.

Appeal dismissed.

(3) 7 Ind. Cas. 527; 88 P. R. 1910; 85 P. W. R. 1910; 175 P. L. R. 1910.

(4) 10 Ind. Cas. 365; 43 P. R. 1911; 86 P. W. R. 1911; 137 P. L. R. 1911.

UMRAOSINGH *v.* SUGANCHAND.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 41-B OF 1912.

July 29, 1913.

Present:—Mr. Mitra, Offg. A. J. C.

UMRAOSINGH—APPLICANT

versus

SUGANCHAND—NON-APPLICANT.

Hindu Law—Family business--Attachment of one member's share — Execution — Jurisdiction of Small Cause Court.

The share of an undivided brother in the ancestral family money-lending business cannot be attached in execution of a decree against him personally.

Nga Tha Yah v. *F. N. Burn*, 2 B. L. R. 91 at p. 97; 11 W. R. (F.B.), 8 and *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*, 7 B. L. R. 186; 14 M. I. A. 40 at p. 51; 2 Suth. P. C. J. 434; 2 Sur. P. C. J. 656; 20 Eng. Rep. 701, followed.

A Small Cause Court has no jurisdiction to attach a half share in a joint family property, consisting partly at least of immoveable property.

Application for revision against the order of the Judge, Small Cause Court, Amraoti, dated the 28th February 1912.

Mr. *N. M. Bedarkar*, for the Applicant.

Mr. *G. V. Deshmukh*, for the Non-Applicant.

JUDGMENT.—In execution of a decree for money, the Small Cause Court at Amraoti attached the judgment-debtor's half share out of "the whole estate in the shop of Khushalsingh Buddhusingh". The judgment-debtor and his minor brother were members of a joint undivided Hindu family carrying on an ancestral money-lending business under the name and style above mentioned. The assets consist of money, ornaments, negotiable instruments, bonds and mortgage-deeds. A prohibitory order under section 268 was issued to the judgment debtor and later on to his brother. In the sale proclamation, the property to be sold was described in similar terms. It was purchased by the respondent Suganchand for Rs. 18 on whose application the lower Court has passed a vesting order under Order XXI, rule 81. The details of what the property was were never at any stage of the proceedings specified. The Pleader for the decree holder on 15th September 1908, stated that "the property is moveable, the judgment-debtor's interest in which he wishes to attach."

The judgment-debtor has applied for revision under the Berar Small Cause Courts Act. My attention has been drawn to many irregularities in connection with the sale, but I need not notice them. The judgment-debtor, it would seem, was ignorant of the proceedings for sale having been revived in 1909.

It seems to me that the attachment and sale are void on the ground of uncertainty and vagueness. At any rate the Small Cause Court had no jurisdiction to attach a half share in joint family property consisting partly at least of immoveable property. It is admitted that the judgment-debtor was joint with his brother at the date of attachment. His share can only be determined in a general partition and until such a partition is effected, all that can be sold is the equity to obtain a partition of the whole estate, moveable and immoveable. This, in my opinion, cannot be done by the Small Cause Court.

The attachment is also void on the ground of uncertainty. It is impossible to say what property will be allotted to the share of the judgment-debtor in a partition. The law does not contemplate an attachment of something which is unknown and unascertained. As Sir Barnes Peacock in *Nga Tha Yah* v. *F. N. Burn* (1) says: "An attachment must specify what is attached.....For instance, it would not do to stick up in the zillah that the creditor attaches all the rights and interests which the debtor possesses in any property in the entire zillah."

In the case of *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (2) their Lordships of the Privy Council observe that "their Lordships feel that it would be a cruel wrong and injustice if under colour of an execution, a thing described as a 'claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to arbitrators' could be put up to judicial sale; a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a description as if it had been 'all the claims of Ramnath against all his debtors."

I have held that the mortgage-deeds or some at least would represent immoveable property, which the lower Court was not competent to deal with. But even apart from

(1) 2 B. L. R. 91 at p. 97 (F. B.); 11 W. R. F. B. 8.

(2) 14 M. I. A. 40 at p. 51; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 Eng. Rep. 701.

this, a sale of this vague and uncertain kind can convey no title.

If each item of property had been separately attached, various forms of attachment would have to be resorted to and it is difficult to see how under one form of attachment, properties of various descriptions can be dealt with, as has been attempted in this case.

I, therefore, set aside the vesting order passed by the lower Court and declare the attachment and sale null and void. There has been some delay on the part of the applicant in moving this Court. He will bear his own costs in both Courts. He will also pay the costs of the auction-purchaser in both Courts. I fix the Legal Practitioner's fee at Rs. 15 in each Court. I note that the applicant's learned Pleader has, on behalf of his client, offered to return the money deposited by the auction-purchaser and interest (*damdupat*) thereon.

Order set aside.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 273 OF 1912.

September 15, 1913.

Present:—Mr. McColl, A. J. C.

NGA PO THIN—APPELLANT

versus

U THI HLA—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 9—*Suit relating to monastery between Buddhist layman and monk—Monks may possess property—Monastery not* poggalika *property but* sanghika—Withathagaha *gift defined.*

A suit between a layman and a Buddhist monk in regard to land on which a monastery stands is cognizable by the Civil Courts.

U Te Za v. *U Pyinnya*, (1892—96) 2 U. B. R., 59; *U. Thatdama* v. *U. Meda*, (1897—01) 2 U. B. R., 42, distinguished.

U. Teik Ka v. *Nya Tin Byu*, 10 Ind. Cas. 996; (1910) 1 U. B. R. 78, followed.

Buddhist monks at the present day do and may possess property.

Maung Talok v. *Ma Kun*, (1892—96) 2 U. B. R. 78, dissented from.

A monk can act as owner of a monastery whether dedicated to him personally by the Kyaungtaga or allotted to him by other monks for 12 years at most, but he cannot according to the *vinaya* give away to an individual, either a monk or a layman, a monastery dedicated to him personally. Such a monastery is *sanghika* property and cannot be *poggalika*.

Maung On Gaing v. *U. Pandisa*, P. J. L. B. 614 dissented from.

Poggalika property is such as a monk can dispose of as he thinks fit.

If a monk takes the property of another monk and appropriates it to his own use, the appropriation is valid and is called a *withathagaha* gift, provided (according to the *vinaya*) five conditions are fulfilled, *viz.*, (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property; (4) the owner must be alive when the property is taken and (5) the taker must know that the owner would be pleased at the taking.

Mr. *J. C. Chatterjee*, for the Appellant.

Mr. *San Wa*, for the Respondent.

JUDGMENT.—This is a case of very considerable difficulty, as it involves questions of the Buddhist Ecclesiastical Law.

Section 9 of the Civil Procedure Code lays down that the Civil Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. And in the explanation to that section a suit in which the right to property is contested is declared to be a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

In *U Te Za* v. *U Pyinna* (1), which was a suit between Buddhist monks relating to a *kyaung-taik*, it was held that according to the custom in force before the annexation—such disputes were decided by the Ecclesiastical authorities, that the *Hlutdaw* never interfered with such decisions but, on the contrary, lent its aid to enforce them, that the rights which the Ecclesiastical authorities had acquired remained to them after the annexation and that the Civil Courts should adopt the same practice as the *Hlutdaw* had followed.

In *U Thatdama* v. *U Meda* (2), it was held that not only should the Civil Courts be among Brahmans of the Amritsar District, it was shown that the village proprietors were *Brahmans* devoted to agriculture, though

(1) U. B. R. (1892—96) 2, 59.
(2) U. B. R. (1897—01) 2, 42.

bound by the decisions of the Ecclesiastical authorities in matters within their competence but they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. In these two cases all the parties were Buddhist monks.

U Teik Ka v. *Nga Tin Byu* (3) was a case in which a layman had brought a dispute between him and three monks before the Thathanabaing, and having obtained an order in his favour applied to the Civil Court to enforce it. It was contended in that case that as the plaintiff was a layman the Ecclesiastical authorities had no jurisdiction. But it was held that as the Thathanabaing's order was a pronouncement on the religious duties of monks towards the descendants of a *taga* and was directed against subordinate ecclesiastics, it was an order within the Thathanabaing's competence and should be enforced.

This is clearly not an authority for holding, that in a dispute between a layman and a monk, the ordinary jurisdiction of the Civil Courts is ousted and a layman-plaintiff must submit to the jurisdiction of the Ecclesiastical authorities. In the present case, the plaintiff who is a layman did not do so but brought a suit in a Civil Court for trial on the merits, the defendant-respondent who is a monk raised no objection to the jurisdiction of the Civil Courts, and though the property in suit was admittedly at any rate once religious property, I am of opinion that the Township Court had jurisdiction to try the suit on the merits.

The plaintiff-appellant's case is that the land in suit on which a monastery stands was the *poggalika* property of a monk, U Ariza, that a monk, U Pandawa, who was U Ariza's pupil obtained it as a *withathagaha* gift and had subsequently given it to him. He sued for possession.

The defendant-respondent, U Thi Hla, who is living in the monastery standing on the land, raised two inconsistent defences, namely, (1) that he and U Pandawa took the land, and *kyaung* as a *withathagaha* gift jointly and that U Pandawa subsequently made a gift of his interest to defendant-respondent and (2) that on the death of U Ariza the property reverted to the original donor who again gave it to the defendant-respondent as his *poggalika* property.

The Township Judge found in plaintiff-appellant's favour and gave him a decree.

The lower Appellate Court found on the authority of *Maung Hmon* v. *U Cho* (4) that a monk can dispose of his *poggalika* property during his life-time, but that if he fails to do so, it reverts to the donor who can select a successor, but that if he fails to do so it becomes *thingika* property, but he went on and found that the land in suit had become *thingika* and, therefore, could not be the subject of a gift. He accordingly set aside the decree of the first Court and dismissed the suit.

The learned Additional Judge obviously quoted a ruling without referring to it. The ruling cited by him has no bearing on the point at all. Possibly he referred to Tha Gywe's Treatise on Buddhist Law, page 239, and quoted the ruling he did by mistake for *Maung On Gaing* v. *U Pandisa* (5) quoted a few lines lower down on the same page.

The first thing to consider is the principle on which the case should be decided. If the Dhammathats be referred to, it will be found that they are hopelessly contradictory and they are also inconsistent with the rules in the Vinaya. Thus in Volume I, U Gaung's Digest, page 464, the compiler says: "The rules laid down in the old Dhammathats are inconsistent with those in the Vinaya, and an attempt has been made in the present treatise to reconcile them, and readers are requested to exercise their own discretion in their application of the rules."

The rule laid down in *Maung On Gaing* v. *U Pandisa* (5) referred to by the lower Appellate Court is contained in section 410:

"Property (including a monastery) given to a specified *rahan* shall on the death of the original donee revert to the donor who shall be at liberty to again give it away as a charitable gift to whomsoever he likes."

But the rule given in section 405 is diametrically the opposite: "If a deceased *rahan* did not transfer his *poggalika* monastery to any one it shall become *sanghika* property . . . . . .

"The donor has no voice in the selection of a successor to the original donee, the

(3) 10 Ind. Cas. 996; U. B. R. (1910) I, 78.

(4) U. B. R. (1892—96) 2, 397.

(5) P. J. L. B. 614.

right to select being exercised by the members of the order."

Again, in section 399 a gift made by a *rahan* to take effect after his death is declared to be invalid, whilst in section 404 the gift of a *poggalika* monastery made by a dying *rahan* is declared to be valid.

The questions which arise for decision in this case are such as would be better decided by the Ecclesiastical authorities, but as I have found that the Civil Courts have jurisdiction to try this case, those questions must be decided, and I think the proper basis for the decision should be the texts of the Vinaya so far as they can properly be applied.

It might be objected that the Vinaya is at least three hundred years older than the Christian era, that law is progressive and that it would be as absurd to apply the rules contained in the Vinaya to modern conditions as to apply the law of mortgage contained in Leviticus to a dispute between Christians. But the cases are widely different. Christians do not profess to be bound in their disputes about property by either the Old or the New Testament. Whereas though, no doubt, the strict rules contained in the Vinaya are departed from by many monks, there are other monks who try to conform to them as well as the times will permit, and all monks profess to be bound by them, and when a case of this nature is brought before the Ecclesiastical authorities for decision, it is in accordance with texts from the Vinaya that they decided it [vide *U Te Zi* v. *U Pyinnya* (1)].

Now the questions for decision are—

(1) Can a monastery or land be the subject of a *poggalika* gift?

(2) If so, is the recipient monk competent to give it away either to another monk or to any one else?

(3) Was there a valid *withathagaha* gift from U Ariza to U Pandawa?

(4) Was there a valid gift from U Pandawa to the plaintiff-appellant?

If the plaintiff appellant is to succeed, all these points must be decided in his favour.

In *Maung Tulo* v. *Ma Kun* (6) the lower Appellate Court held that "looking to the accepted precepts of the Buddhist religion, it seemed evident that *pongyis* could not own *poggalika* property, and at most could only have a usufruct in such things as gardens, etc., for the purpose of obtaining by means of their produce those few things lawful to be possessed." It was held, however, by this Court that whatever may have been the primitive rules of Buddhism, Buddhist monks at the present day do and may possess property. But the authorities on which that decision was based were the Dhammathats, which are not the authorities on which the Ecclesiastical authorities themselves decide these matters.

No doubt, the proposition that a monastery cannot be *poggalika* property will sound novel, but nevertheless I have been unable to find any authority in the Vinaya—and I have spent a very considerable amount of time in the quest—for the opposite proposition, though some of the Dhammathats assume that a monastery can be *poggalika* property and in *Maung On Gaing* v. *U Pandisa* (5) and in other cases the Courts have followed these Dhammathats.

It would appear that originally the monks lived in the woods and forests and caves and anywhere where they could get shelter, as buildings had not been expressly allowed them, and when a rich man offered to build some dwelling houses for certain monks, they refused lest they should commit a sin. The matter was referred to the Buddha and he said: "I allow you O *Bhikkus*, abodes of five kinds—*viharas*, *addhagogas*, storied buildings, attics and caves." A *vihara* is clearly used over and over again in the Vinaya as equivalent for what is now known as a *kyaung*. The rich man thereupon built sixty *viharas* and asked the Buddha what he was to do with them. The latter replied: "Then, O householder, dedicate these sixty dwelling places to the *sangha* of the four directions, whether now present or hereafter to arrive." This story is given in the Kullavagga, Book VI, Chapter I, sections 2, 3 and 4, and clearly indicates that at the beginning, at any rate, dwellings dedicated as monasteries were to form the common property of the whole body of Buddhist monks.

It is perhaps worthy of note that apparently the first if not the only mention in the Vinaya of a garden (*aranna*) given

(6) U. B. R. (1892—96) 2, 78.

as a religious offering was dedicated to "the fraternity of *Bhikkus* with the Buddha at its head" (Mahavagga, Book I, Chapter 22, section 18).

When the people knew that monasteries were permitted they began to build with zeal, and a poor tailor who wished to gain merit in this way, but had not the necessary skill, on finding that his building kept tumbling down before it was completed complained that whereas the monks taught others, no one taught him or helped him to build. When the Buddha heard of this he said: "I permit you, O *Bhikkus*, to give new buildings in course of erection in charge to a *Bhikku* who shall superintend the work" (Kullavagga, Book VI, Chapter V). Next we find that this permission was taken advantage of by monks who wished to defeat what I consider was the plain rule, *viz.*, that a monastery was not to be considered the property of an individual monk, and buildings which were practically completed and required nothing but a little plaster or the socket for a bolt were given in charge to individual monks and the charge was assigned for 20 or 30 years or for life. The stricter monks objected and the Buddha was informed, and he forbade the practice and fixed as the limit of time during which a *Bhikku* might superintend the building of a *vihara* as twelve years (Kullavagga, Book VI, Chapter 17, section 1).

It is true that it is possible to read these passages as having reference only to monasteries dedicated as *sanghika* property, but, on the other hand, they are perfectly consistent with the proposition that monasteries cannot be other than *sanghika* property. But section 3 of the same Chapter seems to me to make the matter clearer. The question for the decision of the Buddha was what was to be done in case a monk in charge of building operations left the place or became incompetent by leaving the priesthood or otherwise, and he decided thus: "In case that occurs, O *Bhikkus*, as soon as he has taken charge, or before the building has been completed, let the office be given to another lest there should be loss to the *sangha*. In case the building has been completed, O *Bhikkus*, if he then leaves the place, it (the office and its privileges) is still his—if he then returns to the world or dies or admits that he is a *samanera* or that he has abandoned the precepts, or that he has been guilty of an extreme offence, the *sangha* becomes the owner." In their notes to this passage, Messrs. Rhys Davids and Hermann Oldenberg, from whose translation of the Vinaya these texts have been quoted, say that what is meant is that the monk in charge loses his special privileges, such as his lien on the best sleeping places, etc.

This passage appears to me to include buildings dedicated to an individual monk because if a *sanghika kyaung* only were referred to, it is difficult to see how any loss could be caused to the *sangha* owing to the owner's abandoning it. Reading these passages together, it seems to me that a monk could act as owner of a monastery whether dedicated to him personally by the *kyaungtaga* or allotted to him by other monks for twelve years at most. But whether this be so or not, I think it is clear from other texts which I shall now refer to, that a monk cannot according to the Vinaya give away to an individual, either monk or layman, a monastery dedicated to him personally.

The proposition that a monk can dispose of property received as a *poggalika* gift as he thinks fit appears to rest on a saying of the Buddha recorded in the Kullavagga, Book X, Chapter 15, section 1: "I allow you, O *Bhikkus*, to give away that which was given to special individuals." But this saying must be taken with the context. The story runs that the people gave food to the *Bhikkus* and the *Bhikkus* gave it to the *Bhikkunis* (or nuns). The people murmured, saying "How can their reverences give away to others what was given for them to have—as if we did not know how to make gifts." When the Buddha heard of this he said: "A *Bhikku*, O *Bhikkus*, is not to give away to others what was given for them themselves to have. Whosoever does so shall be guilty of a *dukkata*." Clearly this is the general rule but an exception was allowed.

"Now at that time the *Bhikkus* had come into the possession of some food. They told this matter to the Blessed One.

"I allow you, O *Bhikkus*, to give it to the *sangha*."

Too much came into their possession. They told this matter to the Blessed One.

"I allow you, O *Bhikkus*, to give away that which was given to special individuals."

"I allow food that has been stored up to be enjoyed by *Bhikkunis* after they have had it given over to them by the *Bhikkus*."

This is an authority for the giving away of such a thing as food by a monk, to whom it has been given as a *poggalika* gift to another monk or to a nun, but it is very far from being an authority for the proposition that a monk to whom individually a monastery or land has been given can give the same away to a layman. But there are other texts which, I think, are conclusive.

The Kullavagga, Book VI, Chapter 15, relates how certain monks were constantly worried by other monks from distant places claiming sleeping accommodation in their monastery, and how they tried to remedy matters by handing over all the sleeping accommodation to one of their number as his own property. This would, of course, be converting *sanghika* property into *poggalika* property which is obviously against the rules (for an exception, however, *vide* Mahavagga, Book VIII, Chapter 24, section 4), but when the Buddha heard of it, he went much further than forbidding this, he said: "These five things, O *Bhikkus*, are untransferable; and are not to be disposed of either by the *sangha*, or by a *gana* (a group of monks) or by *a single individual*. And what are the five? A park (*aranna*) or the site for a park . . . . . A *vihara* or site for a *vihara*—this is the second untransferable thing, that cannot be disposed of by the *sangha* or by a *gana* or by an individual. If it be disposed of, such disposal is void and whosoever disposed of it, is guilty of a *thuthakkaya* . . . . ." This passage is repeated in Chapter 16, section 2, with the word "divide" in place of the word "transfer," on the occasion of some monks dividing all the sleeping accommodations in a monastery amongst themselves, and it clearly has reference to the different kinds of religious gifts that may be made, mentioned in Mahavagga, Book VIII, Chapter 32, of which three only may be mentioned, *viz.*, a gift to the *shngha*, a gift to a specified number of monks (a *gani*) and a gift to an individual monk.

The distinction between such property as a monastery or land and the few requisites of a monk is again made clear by the Buddha's directions as to the disposal of a monk's property after his death given in the Mahavagga, Book VIII, Chapter 27, section 5. Now at that time a certain *Bhikku* who was possessed of much property and of a plentiful supply of a *Bhikku's* requisites completed his time.

They told this matter to the Blessed One.

"On the death of a *Bhikku*, O *Bhikkus*, the *sangha* becomes the owner of his bowl and of his robes. But now, those who wait upon the sick are of much service. I prescribe, O *Bhikkus*, that the set of robes and the bowl are to be assigned by the *sangha* to them who have waited upon the sick. And whatever little property and small supply of a *Bhikku's* requisites there may be (*lahubhan*), that is to be divided by the *sangha* that are present there; but whatever large quantity of property and large supply of a *Bhikku's* requisites there may be (*garubhan*), that is not to be given away and not to be apportioned but to belong to the *sangha* of the four directions, those who have come in and those who have not."

Thus, I think, it is extremely probable that the Buddha refused to allow a monk to own a monastery for more than 12 years and considered it the property of the general body of monks throughout the world, whatever the intention of the donor may have been, and that it is quite certain that he forbade the giving away of a monastery whether it has been dedicated to an individual or not.

It thus becomes unnecessary to consider the alleged *withathagaha* gift, but I will add that even if it had reference to such *poggalika* property as a monk can dispose of in his lifetime, the appropriation would have been invalid.

A *withathagaha* gift is described in the Mahavagga, Book VIII, Chapter 19, and in section 400 of U Gaung's Digest, but in the latter the rules are somewhat different.

If a monk takes the property of another monk and appropriates it to his own use, the appropriation is valid and is called a

withathagaha gift provided (according to the Vinaya) five conditions are fulfilled, *viz.*, (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property; (4) the owner must be alive when the property is taken, and (5) the taker must know that the owner would be pleased at the taking.

It was in connection with a linen cloth deposited with one monk by another and appropriated by the former that the Buddha pronounced this rule, which is clearly a sensible one and refers to property of little value, because if an intimate friend appropriated property of large value, he could not be sure that the owner would be pleased.

In the present case when U Ariza was dying and was lying insensible, some of the monks living in the *kyaung* told U Pandawa to take the *kyaung* and land as a *withathagaha* so as to prevent its becoming *sanghika* property. They frankly admit this. There was thus an endeavour to evade the rules by which they were bound by a pharisaical attempt to adhere to the letter of the law whilst breaking it in spirit. But, as a matter of fact, they also broke the letter of the law. Three and possibly four of the necessary conditions were fulfilled, but as U Ariza was on the point of death and insensible, he was incapable of being either glad or sorry at the appropriation, which, by the way was one in name only, and if U Ariza had not been on his death-bed and insensible, there is no reason to suppose that he would have been pleased at being deprived of his *kyaung* and land. The plaintiff appellant's suit thus fails completely and the appeal is accordingly dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 2, 1914.

Present:—Lord Shaw, Lord Moulton and Mr. Ameer Ali.

BIJOY GOPAL MUKERJI AND OTHERS—APPELLANTS

versus

GIRINDRA NATH MUKERJI AND OTHERS—RESPONDENTS.

Hindu Law—Family settlement—Alienation by widow—Necessity—Consent of reversioners—Acquiescence of reversioners.

In 1858 a Hindu widow, harassed by litigation and other difficulties, created an *ijara* extending over 60 years in favour of two out of three reversioners to save her husband's estate, of which she was in possession, from the operation of adverse possession. Subsequently a *dar-ijara* of a portion of the estate was granted in 1863 to the son of the third reversioner. One of the two reversioners died in 1882, and after his death his four sons remained in the full enjoyment of the *ijara* until 1893 when the widow herself died. Upon her death, the said four sons brought a suit to set aside the *ijara* on the ground that it had been created by the widow without necessity:

Held, that as the creation of the *ijara* and *dar-ijara* was a part of a general family settlement which was effected for the benefit of the estate and injured no body, that as the conduct of the objecting reversioners raised a presumption that they believed the arrangement to have been made in good faith and under such circumstances of necessity, as would give it validity according to Hindu Law, and that as it has always been a feature of Hindu Law to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman, as affording evidence that the alienation was under circumstances which rendered it lawful and valid, the plaintiffs' case must fail.

Appeal from a judgment reported in 4 Ind. Cas. 513; 13 C. W. N. 201; 8 C. L. J. 458 and three decrees of the High Court, dated June 4th, 1908, reversing a decree of the Subordinate Judge of Naddia, dated November 28th, 1898.

FACTS are sufficiently stated in their Lordships' judgment. Briefly put, they are as follows:

On the death of the widow Sayamoni, in 1893, the appellants brought a suit against the heirs of [illegible]*dars* and *dar-ijaradars*, to have the *ijaras* and *dar-ijaras* created by the said widow declared inoperative against them, in 1897 in the Court of the Subordinate Judge of Naddia.

The Subordinate Judge decided in favour of the appellants, holding that there was

no necessity on the part of the widow to justify the alienation in question. On appeal to the High Court in 1903, it was held (*see* 30 C. 990; 7 C. W. N. 864) that the suit was barred by limitation and the appeal dismissed. An appeal was then preferred to the Judicial Committee which remitted the appeal to the High Court for further consideration on the merits. The judgment, of the Privy Council is reported as *Bejoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (1). In 1905 the High Court delivered its judgment holding that the *ijara* was part of a family arrangement intended for the benefit of the estate and which did in fact benefit the estate; that the widow and other persons interested might mutually agree that the property should be managed in a particular way and that a Court of Equity would not set aside such an arrangement, unless it seriously prejudiced the parties to it or their successors. The plaintiffs were, therefore, held not to be entitled to possession till the expiry of the full term of sixty years.

Against this order of the High Court, the plaintiffs appealed to the Privy Council.

Mr. *De Gruyther, K. C.*, (with him Mr. *Eddis*), on behalf of the Appellants, contended that there was no legal necessity for the execution of the *ijara* which was, therefore, not binding on the plaintiffs after the death of Sayamoni, the widow.

[LORD SHAW. You cannot take necessity in the abstract.]

[LORD MOULTON. I do not think it means *de facto* necessity—you must take the whole circumstances of the case into account.]

A Hindu widow executing an *ikrarnama* in favour of her daughter's son, then the apparent reversionary heir, in which she transferred to him the management of her husband's property but did not surrender her widow's estate therein, could not bind another daughter's son born after the execution of the said *ikrarnama* for beyond her life-time.

[LORD MOULTON. It is absurd on the face of the document—she proposed to give something which she had not got.]

(1) 34 C. 329 (P. C.), 11 C. W. N. 424; 9 Bom. L. R. 602; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87.

There is no other reason which the Hindu recognizes as binding the reversioners after the widow's death. The plaintiffs did not ratify or confirm the said *ijara* in respect of any part of the lands comprised therein. Such a family arrangement as forms the basis of the decisions of the High Court was not set up by the defendants, nor raised at the hearing of the case.

Reference was made to *Behari Lal* v. *Madho Lal Ahir Gaywal* (2); Mayne's Hindu Law, section 604, page 804.

Sir *Robert Finlay, K. C.*, and Mr. *Loundes*, for the Respondents, were not called upon.

JUDGMENT.

LORD MOULTON.—The substantial question in this appeal is the validity of an *ijara* executed on the 7th September 1863, for a term of 60 years, by a Hindu widow named Sayamoni Debi, under circumstances which it will be necessary to refer to in some detail.

Sayamoni Debi was the widow of Chandra Bhusan Mukerji. Her husband died in 1832 without leaving any issue, making her his sole heiress. The property consisted chiefly of landed property of considerable value.

Sayamoni was a *parda nashin* lady and probably not very capable of managing a large estate. She appears to have been dispossessed of the property by one of her husband's relatives, Baman Das Mukerji, and was compelled, in 1844, to bring a suit against him and his two brothers, Gouri Pershad and Annoda Pershad, to recover it. This litigation lasted till 1858, when, on appeal to Her Majesty in Council, the rights of Sayamoni to the estate of her husband were finally established. But although this was the case, it is evident that she did not thereupon obtain possession of the property. Further, difficulties were raised and much of the property was threatened with the growth of adverse rights in the actual possessors of the land, who refused to pay rent under the pretext that the title had not been settled, and seeing that, prior to 1858, adverse possession against a widow ranked as adverse possession against the reversioners, there can be no doubt that the whole estate was in very serious peril.

(2) 19 I. A. 30; 19 C. 236.

While this state of things was still continuing, the *ijara* now in question was executed by the widow. Although at this distance of time it is impossible to ascertain with accuracy all that then happened, it is evident that this *ijara* was part of a general family settlement whereby the widow divided up the family property amongst the various reversioners, reserving to herself only a comparatively small annual income which may fairly be looked on as representing maintenance. The *ijara* itself was granted to Annoda Pershad and Saroda Pershad, who was the son of Gouri Pershad who had died in the interval. The third brother, Baman Das Mukerji, did not directly take any interest under the *ijara*, but in October 1863 a *dar-ijara* was granted to his son of a portion of the property, and we find also that a large sum due from him on account of mesne profits was remitted by Sayamoni, so that it is clear that all branches of the family shared in the settlement.

If the term of the *ijara* had been for the life of Sayamoni, no question could have arisen such as is now before their Lordships. But doubtless from the necessities of the case, in order to facilitate the practical settlement of the property so as to obtain its full value, the term was made for a fixed period of 60 years. Inasmuch as the lady was 42 years of age at the date when the *ijara* was granted, it is evident that all the parties realised that the term would extend beyond her life-time, and thus affect the rights of the reversioners, whosoever they might happen to be. So far as the persons are concerned who then represented the reversion, it is clear that all this was done with their consent. They all took large interests under the arrangement, and have continued to enjoy them so long as they lived.

One of the parties who principally benefited by the *ijara* was Annoda Pershad, who was one of the actual lessees under the *ijara*. He died in 1882, so that Sayamoni, (who died in 1893) survived him 11 years. The appellants are four sons of Annoda Pershad, and on the death of Sayamoni, they became entitled directly to share in any family property of which she was the life-tenant, and they have brought this action to set aside the *ijara*, on the ground that it was an unauthorised interference by the widow with the reversionary interest which did not belong to her. The Court below, in a careful and well reasoned judgment, have decided that, on the facts of the case, the arrangement of which the *ijara* formed part was in truth dictated by the necessities of the case, and that the choice of the term of 60 years as the term of the *ijara* was made for the benefit of the estate and did not injure any one.

Their Lordships agree with this judgment. They are of opinion that the case depends entirely on the facts, and that it raises no new question of law as to the powers of a Hindu widow to deal with family property in case of necessity with the consent of the then present reversioners, and they are, therefore, of opinion that the appeal fails.

Counsel for the appellants laboured to show that the so called settlement by which peace for 30 years was brought into the family and, in their Lordships' opinion, the family property was in fact saved, was an outrageous and flagrantly unjust arrangement forced upon a helpless *parda nashin* widow by her influential relations in whose hands she was, and that any person either at the time or since must have known from its terms that it had been extorted by duress or engineered by fraud. Their Lordships are of opinion that Counsel entirely overlooked the evidence against this contention which is derived from the conduct of his own clients. From the year 1882, when Annoda Pershad died, to the year 1893 when Sayamoni died, they themselves took the benefit of this arrangement which they now stigmatise as a gross fraud. It is suggested on their behalf that they thus made themselves participants in it solely because it was profitable so to do. Their Lordships decline to believe them to be as unscrupulous as they desire to be considered. As against them, it is a fair inference from their conduct that they believed that the arrangement had been made in good faith, and under such circumstances of necessity as would give it validity according to Hindu Law, and as it has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant

reversioners of an alienation of property by a Hindu woman, as affording evidence that the alienation was under circumstances which rendered it lawful and valid, their Lordships in this case consider that the conduct of the appellants themselves during those years affords evidence upon which the respondents are entitled to rely.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Sanderson, Adkin, Lee* and *Eddis.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 286-B OF 1912.

September 19, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

NEMASA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMKRISHNA—DEFENDANT—RESPONDENT.

Amendment of plaint—Date of operation—Limitation—Original Court, disallowing amendment—Appellate Court, whether can order amendment after limitation.

The general rule that, in the absence of any special circumstance, a plaintiff will not be allowed to amend by claiming a fresh relief, which, since the institution of the suit, has become barred, does not apply when an amendment is ordered in the interest of and at the instance of a defendant.

Shriram v. *Ganpati Kunbi*, 2 N. L. R. 79, distinguished.

An amendment relates back to the date of the institution of the suit.

Mangal Prasad v. *Chandramall*, 1 N. L. R. 117, followed.

Where an amendment asked for by the plaintiff himself within the period of limitation is disallowed by a Court of first instance, an Appellate Court can give effect to the same, even though the appellate order is passed after the period of limitation.

Appeal against the decree of the District Judge, East Berar, dated the 26th April 1912, reversing that of the Munsif No. 1, Darwha, dated the 20th November 1911.

Sir *Bipin Krishna Bose*, for the Appellants.

Messrs. *F. W. Dillon* and *M. B. Dadabhoy*, for Respondent No. 1.

JUDGMENT.—On the 19th May 1892, one Honaji executed a mortgage-deed in favour of the plaintiffs, mortgaging two fields Nos. 1 and 53. Prior to this, on the 24th April 1892, Honaji had mortgaged field No. 53 to the second defendant Ramkrishna. The latter obtained a decree for foreclosure against Honaji in Suit No. 55 of 1897, without, however, making the plaintiffs a party. On the 25th March 1903, the plaintiffs filed the present suit, praying for redemption of the second defendant's prior mortgage. One of the pleas taken on behalf of the second defendant is that he had a right to redeem the plaintiffs. After a protracted trial, the Court of first instance decreed the plaintiffs' claim for redemption on the 30th March 1910. Against this decree, the second defendant appealed to Major Morris, the then District Judge who notes in his judgment that "the defendant No. 2 appeals on the grounds that he has the right to redeem plaintiffs and that the amount due to plaintiffs should be decided and he should be allowed to redeem them." The defendant's contention prevailed and on the 22nd December 1910, Major Morris remanded the case for determination of the amount due on the plaintiffs' mortgage. The Munsif found Rs. 951-8-0 the amount due to the plaintiffs for principal, interest and costs, and passed the usual foreclosure decree on the 20th November 1911. The defendant No. 2 appealed against this decree and in his second ground of appeal urged that the suit is barred by limitation. The plea prevailed in the lower Appellate Court and the plaintiffs have now filed this second appeal.

The decision of the lower Appellate Court is untenable. In any view of the case, the plaintiffs' original suit for redemption could not be dismissed. The learned District Judge thinks that a suit is barred by limitation, if a fresh relief or a new cause of action is allowed to be introduced into the plaint by way of amendment. The case of *Shriram* v. *Ganpati Kunbi* (1), which he cites, is no authority for this proposition. The amendment relates back to the date of the institution of the suit [*Mangal Prasad* v. *Chandramall* (2)]. What was laid

(1) 2 N. L. R. 79.
(2) 1 N. L. R. 117.

down by Ismay, J. C., in *Shriram* v. *Ganpati Kunbi* (1) is that "In the absence of any special circumstances, a plaintiff will not be allowed to amend by claiming a fresh relief which since the institution of the suit has become barred." This was a matter which might have been urged before Major Morris. No second appeal was filed from Major Morris' judgment and it is not open to the parties to question it. His successor cannot, at a later stage of the litigation, re-open the matter. I would go further and hold that the rule laid down in the above case has no application to the present case. As pointed out by Lopes, L. J., in *Weldon* v. *Neal* (3) "The effect of allowing the amendments in this case would be to deprive the defendant of his right to set up the Statute of Limitations. The amendments, therefore, cannot be allowed without doing injustice to the defendant." In this case the amendment was ordered in the interest of and at the instance of the defendant No. 2. I should note, the other defendant has no interest left in the mortgaged property and has since some time ceased to be a party. There appears to me to be another reason why the ruling of *Weldon* v. *Neal* (3) does not apply. Even if the amendment had been asked for by the plaintiffs themselves, it was asked for within the period of limitation and the fact of the first Court wrongly disallowing it, will not prevent an Appellate Court from giving effect to it, even though the appellate order is passed after the period of limitation.

The respondents have not pressed for a remand, but have asked me to modify the decree of the first Court. In the first place, in the schedule of property to be foreclosed, field No. 1 has been inadvertently omitted. This must be rectified in the new decree to be drawn up. Time for payment will be extended to the 20th December 1913, and the plaintiffs will be allowed interest at 6 per cent. per annum on Rs. 951-8-0 from the 20th May 1912 to the 20th December 1913. The second defendant must pay the plaintiffs' costs in the two Appellate Courts. In drawing up the decree, the net result of this judgment will be shown by adding the costs to the decretal amount and interest.

(3) 56 L. J. Q. B. 621 at p. 622; 19 Q. B. D. 394; 35 W. R. 820.

I note that the defendant No. 2 upon redemption will acquire all the plaintiffs' rights under the mortgage, dated 19th May 1892.

Let a decree be drawn up on the above lines.

Appeal accepted.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 10, 1913.

Present:—Lord Shaw, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Sri Raja VENKATA NARASIMHA APPA ROW BAHADUR ZEMINDAR (NOW REPRESENTED BY MEKA VENKATARAMAYYA APP ROW BAHADUR AND ANOTHER)—APPELLANTS

versus

Sri Raja PARTHASARATHY APPA ROW SAVAI ASWA ROW BAHADUR ZEMINDAR AND ANOTHER—RESPONDENTS.

Hindu Law—Madras Presidency—Adoption by widows under Will of husband—Will—Construction, rule of—Power to act given to more than one person, whether can be exercised by one of them—Executor—Trustee—Power to adopt given jointly to two widows—Whether surviving widow can adopt after other's death.

In the Madras Presidency, a Hindu widow has no power to adopt a son to a deceased husband, except by express authority given by husband in his lifetime or by Will. Where a deceased leaves more than one widow, only one of them can receive the child in adoption so as to step into the position of being its adoptive mother. But a power given to more than one wife to adopt is not necessarily invalid. Their Lordships without deciding the question of the validity of a joint power of adoption and its interpretation, assumed that in this case, such a joint power of adoption was validly given to two widows by their husband.

In construing a Will, it is the primary duty of a Court in all cases to ascertain from the language of the testator what were his intentions. In so doing, the Court is entitled and bound to bear in mind other matters than merely the words used; for example, it must consider the surrounding circumstances, (such as the testator's race and religious opinions and aims arising therefrom, or in the case of Indian testators, their ignorance of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect), the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things summed up in the picturesque figure: "The Court is entitled to put itself into the testator's

armchair." So soon as the construction is settled, the duty of the Court is to loyally carry out the intentions as expressed and none other. The Court is in no case justified in adding to the testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law, which provides for succession to property, in the absence of testamentary directions applying thereto. This duty of the Court is universal and is true alike of Wills of every nationality and every religion or rank of life.

If power is given to *A* and *B*, *persona designata*, to do an act if and when they think it desirable, the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. However, the case is different when the power is vested not in *persona designata* but in the occupants for the time being of a specified office, such as executors or trustees.

A Hindu testator conferred upon his two widows the power of adopting a son in the following words: "That if it should strike them (*i. e.*, the widows) to continue the *samustanum* (family), they should adopt a boy who is my *sannihita* (near relative)." No steps were taken to adopt a boy till some years after the death of one of the widows, when the surviving widow adopted one:

Held, (1) that the language of the testator pointed to the predominance of the secular and not of the religious motive of the testator, inasmuch as he did not direct that an adoption should take place, but he left it to depend upon the problematic concurrence of his widows in their views as to its desirability;

(2) that the words of the Will when properly construed related to choice and adoption by the two widows acting jointly, and referred only to the period of time when both widows were living, that at the death of one of them, the power to adopt given to both came to an end, and, therefore, the adoption by the surviving widow was of no validity.

Consolidated appeals and cross-appeals against a judgment and decrees of the High Court, dated November 20th, 1905, affirming the decree of the Subordinate Judge of Kistna, dated December 2nd, 1899, and modifying the decree of the Court of the District Judge of Godavari, dated December 12th, 1903.

FACTS are fully stated in 29 M. 437; 16 M. L. J. 178.

The main contentions of Narasimha were (1) that he and his brother Rangayya were entitled to share Medur equally and that Parthasarathi had no right thereto. This claim depended on questions as to the validity and effect of adoption of the last full owner of that estate named Narrayya. Rangayya, on the other hand, claimed (2) that he was entitled to both estates to the exclusion of his brother as well as his cousin on the ground that Nidadavole was impartible by custom and that Medur had been incorporated therein and that both had devolved on him under the law of primogeniture.

The case was argued on the 2nd point in June 1913 and the judgment of their Lordships (reported in 21 Ind. Cas. 339) was delivered on July 24, 1913, holding that as there were concurrent findings of the two lower Courts against the existence of the alleged custom of primogeniture, their Lordships, in view of a series of decisions of the Judicial Committee from 1886 down to the present time against interfering with the concurrent findings of facts by two lower Courts, did not wish to go on with the case on the point of custom and confirmed the findings of the lower Courts against the existence of the custom of primogeniture. Counsel were then directed to argue the first point, that of the validity of adoption by the elder widow. Application was then made to have the case postponed on the ground that Counsel and Pleaders who had come from India to explain the case had already left, and before they could return, the long vacation would have already commenced.

The application was granted and the case came on for hearing on November 4, 1913.

Sir *Robert Finlay*, *K. C.*, and Mr. *Brown*, appeared for the representatives of Venkata Narasimha Appa Row.

Messrs. *De Gruyther*, *K. C.* and *Dunne* appeared for Venkata Appa Row.

Sir *E. Clarke*, *K. C.*, Sir *E. Richard*, *K. C.*, Messrs. *Ross*, *K. C.*, and *Parkasam*, appeared for Raja Parthasarathy Appa Row.

There were four points in the appeal:

(1) Whether the Will was genuine?

(2) Whether it authorized Papamma to adopt?

(3) Whether the adoption was effected by coercion and could be ratified by Papamma as the High Court found?

(4) Whether assuming the adoption to be valid, the infant Narayya retained his ancestral estate or whether that estate was divested?

The second point depended on the construction of the document put forward as a Will, with which might be taken the petition to the Collector referred to therein. If the point were decided in favour of the appellants, it concluded the appeal. It was, therefore, proposed to argue it first. (Their Lordships acquiesced in the proposals).

Sir *Robert Finlay, K. C.*, contended that the power purported to be given to the two widows was invalid in law as being a joint power to do an act which only one widow could perform. The effect of adoption was to render the adopted son heir to his adoptive maternal relations. The adoptive mother was joint like his natural mother. Her parents became in the eye of the law his maternal grandparents. Such a relationship if created by more than one woman would lead to inextricable confusion in the law of inheritance. If a Hindu invites his wife to adopt with him, his other wives are postponed. Then man or his wife, if empowered, may adopt and in cases of conflicting evidences, probabilities were to be taken into account. The expression 'Maharani Sahiba' according to the true construction of the Will in which it was contained, had been held not to be a collective term comprehending both widows of the testator but applied to the senior widow alone except where the expression was qualified so as to leave no doubt that both were intended. In the present case, both had to exercise the power jointly. The power to adopt must be strictly carried out. The power of adoption given by the said alleged Will to the two widows was invalid in point of law and even if valid it could not be exercised by Papamma after the death of her co-widow. Even if the power be construed as a power to each widow to act with the consent of the other, it came to an end on the death of either, for the consent was a condition precedent and power could not be exercised until the condition was satisfied. Far from the adoption taking place during the life-time of both, it was not even mooted during the life-time of Chinamma. An authority to one's widow and executor to adopt had been held to be invalid. (The ceremony of adoption was performed by Papamma not of her free will but under coercion, and by her subsequent acts she did not and could not ratify the ceremony of adoption and thereby render it valid as against the reversioners. The motive on the part of Papamma for adoption was to avert a prosecution and to secure possession of the estate for herself and would render the ceremony void. The ceremony was performed not in due exercise of her power of adoption but in fraud thereof. Papamma believed and continued to assert in her appeals to the High Court until December 1892, that she had adopted the father of Narayya and that the adoption of Narayya was contingent on the result of the said appeals and, therefore, the adoption was invalid against the reversioners. Venkayamma as a Hindu widow had no authority to give her husband's only son in adoption, and such giving in adoption by her was invalid).

Reference was made to *Kali Komul Mozumdar* v. *Umma Shankar Moitra* (1); *Annapurni Nachiar* v. *Forbes* (2); *Haradhun Mookerjea* v. *Muthuranath Mukerjea* (3); *Maharani Indar Kunwar* v. *Maharani Jaipal Kunwar* (4); *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (5); *Mutasaddi Lal* v. *Kundan Lal* (6); *Sir Moses Montefiore* v. *Peter Browne* (7); *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar* (8); *Amrito Lall Dutt* v. *Surnomoye Dasi* (9); *Surendro Keshab Roy* v. *Doorgasoondery Dossee* (10); *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (11); Macnaghten's considerations of Hindu Law, page 171, and Appendix XXI.

West and Buhler, page 977, afford no assistance to respondents, for the law in force in Bombay is against joint adoption. Farwell on Powers 2nd Edition, page 454, Mayne's Hindu Law (7th Edition) page 144.

Sir *E. Clarke, K. C.*, contended that the Will of Narayya was proved to be genuine and the power given to the widows was valid and could be exercised by Papamma after the death of her co-widow. There is no authority for the statement that an adoption under coercion was *ipso facto* void, and that under the law of contract, it was only voidable. Papamma lived for many years and ratified the adoption by her conduct. The true construction of the Will was that two widows had to agree on the desirability of an adoption and as soon as this was done, the senior was to adopt. The joint power to adopt was valid

(1) 10 I. A. 138; 13 C. L. R. 379; 10 C. 232.
(2) 26 I. A. 156; 23 M. 1; 3 C. W. N. 730.
(3) 4 M. I. A. 414; 18 Eng. Rep. 758; 7 W. R. (P.C.) 71; 1 Suth. P. C. J. 213; 1 Sar. P. C. J. 375.
(4) 15 I. A. 127; 15 C. 725.
(5) 12 M. I. A. 350; 12 W. R. (P. C.) 1; 2 B. L. R. 101 (P. C.); 20 Eng. Rep. 371; 2 Suth. P. C. J. 219; 2 Sar. P. C. J. 447.
(6) 33 I. A. 55; 3 A. L. J. 246; 1 M. L. T. 93; 8 Bom. L. R. 371; 16 M. L. J. 174; 28 A. 377.
(7) 7 H. L. C. 241 at p. 263; 4 Jur. (N. S.) 1201; 11 E. R. 96; 115 R. R. 132.
(8) 16 I. A. 53; 16 C. 556.
(9) 27 I. A. 128; 27 C. 996; 4 C. W. N. 549.
(10) 19 I. A. 108; 19 C. 513.
(11) 12 I. A. 198; 12 C. 406.

according to Hindu Law and must be interpreted in the sense that on the death of one, the power passed on to the survivor. The adoption was for religious purposes in order to provide an heir to the deceased who could perform the religious ceremonies for the good of his soul. The second adoption was perfectly valid as unlimited power to adopt was not exhausted by one adoption, in case the adoptee died. The principles of the English Law regarding the powers of donees to exercise the same jointly should not be applied to the Hindu Law as a gift by a Hindu of a power of disposition by his Will over his estate was valid.

Reference was made to *Annapurna Nachiar* v. *Forbes* (2); *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (11); *Maharani Indar Kunwar* v. *Maharani Jaipal Kunwar* (4); *Kannapalli Suryanarayana* v. *Pucha Venkata Ramana* (12); *Hanoomanpersaud Panday* v. *Musammat Babooee Munraj Kunweree* (13); *Bai Motivahu* v. *Bai Mamubai* (14); *Bhagabati Barmanaya* v. *Kali Charan Singh* (15).

Sir *E. Richards, K. C.* supported the arguments of Sir *E Clarke, K. C.*

Sir *Robert Finlay, K. C.*, in reply referred to *Rani Srimati* v. *Khazendra Narain Singh* (16) and *Hunter* v. *Attorney General Hood* (17).

At the time the judgment was delivered, the question of costs was raised.

Sir *R. Finlay* argued that costs should be given to the successful party.

[LORD MOULTON: What order should we make?]

[LORD SHAW: Is this a large estate?]

[MR. AMEER ALI: The questions were delicate and important and the parties had to come into the Court to have the matter settled.]

[LORD SHAW: Is there any general fund which should bear the costs?]

[MR. AMEER ALI: Action arose on account of the Will of the testator.]

(12) 33 I. A. 145; 10 C. W. N. 921; 4 C. L. J. 171; 16 M. L. J. 276; 8 Bom. L. R 700; 3 A. L. J. 702; 29 M. 382; 4 C. L. J. 171; 1 M. L. T. 260.

(13) 6 M. I. A. 393; 18 W. R. 81 (*note*); 18 Eng. Rep. 347; Sevestre 253 N.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552.

(14) 21 B. 709; 24 I. A. 73, 1 C. W. N. 366.

(15) 10 Ind. Cas. 641; 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 21 M. L. J. 387; 8 A. L. J. 433; 13 Bom. L. R. 375; 38 C. 468; (1911) 2 M. W. N. 295; 38 I. A. 54 at p. 64.

(16) 31 I. A. 127; 31 C. 871; 9 C. W. N. 74.

(17) (1899) A. C. 309; 68 L. J. Ch. 449; 47 W. R. 673; 80 L. T. 732; 15 T. L. R. 384.

Mr. *De Gruyther* argued that as the dispute arose on administration, the costs should come out of the estate.

Sir *E. Clarke* contended that his client was successful in Nazvid case and obtained costs in the High Court. Costs should be given only on issues on which their Lordships had given their judgments. His client was brought in a very late stage in the proceedings and, therefore, he was entitled to all costs except what would fall to the share of the issues on which judgments were given.

JUDGMENT.

LORD MOULTON.—The further question now for consideration in these consolidated appeals is the ownership of the *Zemindari* of Medur. It is common ground that at one time this *zemindari* belonged to Narayya Appa Row, the son of Venkataramyya Appa Row, who will for convenience be referred to as Narayya the younger. It is also common ground that Narayya the younger died intestate on the 4th August 1895. The points in dispute are whether at the time of his death, Narayya the younger had become by adoption the son of Raja Narayya Appa Rao Bahadur Garu, who died on the 7th December 1864 (and who will for convenience be referred to as Narayya the elder), and whether if such adoption took place, it had the effect of divesting him of the *Zemindari* of Medur. In order that the respondents in this appeal may sustain their claim to a share of the *Zemindari* of Medur, it is necessary that they should succeed on both these points, inasmuch as their claim by inheritance from Narayya the younger depends on his having been validly adopted into the family of Narayya the elder. Their claim must, therefore, fail if he was not validly adopted, or if, having been so adopted, he thereby forfeited his right to the *Zemindari* of Medur, which appears to have been ancestral property in his family of origin.

The alleged adoption took place after the death of Narayya the elder and was made by this widow Papamma. The respondents claim that this adoption was a valid exercise of the powers given by the last Will of Narayya the elder. The appellants, on the other hand, contend that the power of adoption which purported to be given by the said Will was in itself invalid, and that even if the power was valid as given in the Will, the alleged adoption was not in accordance with that power, and

was accordingly of no force or validity. If the appellants succeed in making good either of these objections to the validity of the adoption, the whole claim of the respondents admittedly falls to the ground, and their Lordships have, theereore, considered it desirable that these points should be fully argued in the first instance as preliminary points, and that they should express their opinion on them before considering the other portions of the case.

The Will of Narayya the elder is dated the 6th day of December 1864, *i. e.*, immediately previous to his death. He was a member of the *Velama* branch of the *Sudras* caste. He had two wives named respectively Papamma and Chinnamma. So much turns upon the language of this Will that it is advisable to cite it in full. It reads as follows:—

"As my illness increased, and as I think I would not survive, you both should divide in equal shares my *zemindari* Nidadavole and Bahargali *parganas* and Amberpet *pargana*, the cash in the upstair building and all other moveable and immoveable property. It has been arranged that my nephew (sister's son) Chiranjivi Vellanki Venkata Krishna Row should enjoy hereditarily from son to grandson the profits of the village of Mandur attached to Amberpet Muttah, and also of Nagulapalli and Rojupotepalli villages attached to the *taluqdari*, and that my brothers in-law Vellanki Jagannadha Row Garu and Vellanki Sura Row Garu should enjoy hereditarily the profits of the village of the Undrajavaram attached to Nidadavole *pargana*, paying every year the *peishcush* fixed therefor at the sub-division according to the *kistbund* (instalments). You both should maintain our Samastanam, servants, clerks, *dasis* and other servants. You should for the most part live in harmony with my younger brother Chiranjivi Venkatadri Appa Row. You should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our *samastanam* should continue. In all matters, both should act without quarrelling. I have this day alone caused a petition to be written and sent to the Collector of Godavari in regard to this matter. You both should without fail act according to the aforesaid *paddhalis* (terms)."

The Will is signed by the testator and witnessed by four witnesses, and under their names come the words:—

"We both have agreed to act according to the aforesaid terms."

and this is signed by Papamma and Chinnamma.

Chinnamma died in 1881. It was not until the year 1885 that any steps were taken with regard to the adoption of a boy, but in that year, the surviving wife Papamma purported to adopt Venkataramayya, the father of Narayya the younger. This so-called adoption of Venkataramayya was declared by the Court to be invalid, and thereupon in the year 1890, Papamma purported to adopt Narayya the younger.

The appellants contend that the proper construction of the language of the Will is, that it gives a joint power of adoption to the two wives, to be exercised when they shall think it desirable that the testator's *samastanam* should continue. They contend that such a joint power of adoption is in itself invalid, inasmuch as only one wife can adopt, and they further say that, even if this be not so, the occasion for the exercise of the power is when the two wives should jointly decide that it was desirable that the family should be continued, and the act must then be the joint act of the two wives. If this be so, it follows that the power could not be exercised after the death of one of the two wives, since thereafter there could be neither agreement nor joint action.

It is somewhat difficult to set out precisely the contentions of the respondents on these points. Their Counsel admit that while both the widows were living, no adoption could take place without the consent of both. But they contend that the proper interpretation of the language of the Will is that when the two widows should agree on the desirability of adoption taking place and on the person to be adopted, the adoption should be carried out by one of the widows (preferably the first wife) who would thereby become in law the mother of the adopted child. They contend that a joint power of adoption is valid by Hindu Law and must be interpreted in the above sense, and, further, that on the death of the one widow, the power both of choice and adoption would, under the terms of the Will, pass to the survivor.

Before examining the validity of these contentions, it will be well to clear up one or two points upon which their Lord-

ships are of opinion that no reasonable doubt can exist.

In the first place there could be no power of adoption by either or both of the widows in the present case excepting such as might be derived from the powers given by the Will. In this part of India, at all events, a widow has no power to adopt a son to a deceased husband excepting by express authority given by him in his life-time or by Will. In the next place, only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother, to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance.

But it does not follow as a matter of necessity from these considerations, that a power given to more than one wife to adopt must be an invalid power. In many matters, custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships, there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife. But their Lordships are of opinion that the validity of a joint power of adoption and its interpretation are questions of far-reaching importance in Hindu Law and that in the present case the materials for deciding them are very insufficient. They would greatly regret to find themselves compelled to decide such questions on imperfect materials, and inasmuch as in the view which their Lordships take of this case, it is not necessary that these points should be decided, they desire to express no opinion upon them, and will assume for the purposes of their decision that the respondents are right in their contention that such a joint power of adoption given to the two widows was, if properly interpreted, a valid power, and that if they had agreed to a person to be chosen for such adoption, they could have validly executed the power.

There remains the second point, *i.e.*, whether the power given by the Will was exerciseable by the surviving widow alone after the death of the other.

The arguments of the appellants on this point are, that upon a proper construction of the Will, it gives a joint power to the two wives to be exercised when they jointly come to the conclusion that it is desirable that it should be exercised, and that it should then be exercised only in case of a boy to be chosen by them jointly. As a mere matter of construction, their Lordships are of opinion that the appellants are right in this contention and in an ordinary case of the giving of a joint power to two donees, the legal consequences claimed by the appellants would follow.

But the respondents claim that this must not be treated as a mere question of construction. They submit that the continuation of the line of the testator must be taken to have been for religious purposes, in order that he might have the advantages of an heir who could perform the religious ceremonies affecting his future life. They, therefore, contend that this Board should put aside all rules of law prevailing in England with regard to joint donees of a power and should, as a matter of judicial duty, give effect to the intention of the testator with respect to procuring for himself an heir by adoption, and not permit that intention to be defeated by its becoming impossible of execution by the two donees jointly by reason of the death of one of them.

Their Lordships are of opinion that this reasoning is unsound. In all cases, the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i. e.*, to construe the Will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure "The Court is entitled to put itself into the testator's armchair". Among such surrounding circumstances, which

the Court is bound to consider, none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the Will as properly construed, and this duty is universal, and is true alike of Wills of every nationality and every religion or rank of life.

This fundamental principle does not clash with the principle that the Court will not necessarily apply English rules of construction to such a Will as we have here to deal with. These rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *prima facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or the surrounding circumstances, the Court can come to the conclusion that it is there used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of immediate vesting of an estate. Such rules are purely an English product, based on English necessities and English habits of thought, and there would be no justification in taking them as our guide in the case of Indian Wills. Nor does this fundamental principle clash in any way with what is sometimes called "giving a liberal interpretation" to native Wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the "surrounding circumstances" which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from.

Applying these principles, their Lordships have to ascertain the true intentions of the testator from the language used in the Will. The words are "You should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our *simastanam* (family) should continue." Such an adoption would have effects of two very different kinds. In the first place it would provide someone who would offer the customary oblations for the good of the soul of the testator, and in the second place it would change the succession of the property. The devolution after the death of the widows would no longer be to the persons entitled to succeed on an intestacy, but to the heirs of the person adopted. Counsel for the respondents would have us regard the religious motive as the overmastering one, so that the intentions of the testator must be treated as if they were dictated by it alone. Their Lordships fully appreciate how strong such a motive may be expected to be in the mind of a Hindu. But in their Lordships' opinion the language of the testator points to the predominance of the secular motive. He does not direct that there shall be an adoption, as he would naturally have done, had he wished in all events to secure that there should be a son to perform the due religious rites. He makes it depend on the opinion of his widows whether and when an adoption should take place. It is common ground that the occasion for an adoption would not arise in the lifetime of the two widows unless they both agreed to use the power, and there is nothing which indicates any intention to interfere with their freedom of choice in the matter, whether the true interpretation be that the power was joint or several.

But this does not exhaust the material which we have for arriving at the testator's true intentions. In judging of the light in which the directions of the testator are to be regarded, it is legitimate to look at the contemporaneous document referred to in the Will which he wrote or caused to be written with the express intent to render clear his wishes with regard to his succession. This document has, of course, no testamentary effect, but it is legitimate to look at it as one of the surrounding circumstances in order to test the soundness of the principle of interpretation pressed upon us by Counsel for the respondents. In the Will the testator writes: "I have this day alone caused a petition to be written and sent to the Collector of Godavari in regard to this matter." This petition, which is signed by the testator and bears the same date as the Will, is substantially a repetition of it, though the language is not precisely the same. The passage relating to adoption reads thus: "That, if it should strike them (*i.e.*, his widows) to continue the *samastanam*, they should adopt a boy who is my *sannihita*." This language emphasizes that which is expressed also in the Will, *viz.*, that the adoption should only take place if and when the widows thought it desirable that such should be the case, or in other words if and when they thought it desirable that the succession to the property should be changed. Had the testator been moved by an overmastering religious motive to secure that there should be someone to act as his son after his death, it is inconceivable that he would have used such language or made such provisions relating to the future adoption of a son. He would have directed that an adoption should take place and not left it to depend on the problematical concurrence of his widows in their views as to its desirability.

For what it is worth, it is clear that this was the interpretation put upon the Will by the widows themselves. It will be remembered that they signed the Will at the date of its execution and promised to act according to its terms. Three days after this, they wrote to the Collector of Godavari referring to these provisions of the Will in the words "and that if it should strike us that the *samastanam* should continue we should adopt a boy who is our *sannihita*." The testator died in 1864. His widow Chinnamma died in 1881 leaving Papamma surviving her. It is not until 1885, four years after the death of Chinnamma, that any steps to adopt a boy were taken. It is clear, therefore, that the widows who were acquainted with the provisions of the testator's Will at the time and undertook to carry them into effect, did not interpret them as doing more than leaving them quite free to adopt or not, as they might think desirable.

Their Lordships are, therefore, of opinion that in the present case, there is nothing which requires or justifies them in interpreting the provisions of the Will with regard to the adoption in any special way arising from the fact that the testator was a Hindu. They must adhere to the plain meaning of the language used. So construing it, they are of opinion that it gives to the widows jointly the power to adopt a son, should an occasion arise which in their opinion makes it desirable so to do. The power is a joint power and the occasion on which it is to be exercised depends on their joint opinion. In other words, the exercise of the power is vested in the discretion of the joint donees. Now it is clearly the law that in such a case the death of one of the donees puts an end to the joint power. This is not by virtue of any peculiar doctrine of English Law or of any series of English decisions. It flows from the nature of a joint power. If power is given to *A* and *B* *persona designata* to do an act if and when they think it desirable, the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. This cannot be the case after the death of one of them and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague nor can he then do the act, seeing that the authority to do it is only given to the two acting jointly The case is different when the power is vested not in *persona designata* but in the occupants for the time being of a specified office such as executors

or trustees, but that is not the case which we have to consider here.

The point may perhaps be put in a simpler form not involving any appeal to legal doctrines as to joint donees of a power. Their Lordships are of opinion that the words of the Will when properly construed relate to choice and adoption by the two widows acting jointly. Hence those words refer only to the period of time when both widows are living. The Will is silent as to the period after the death of one of the widows and if their Lordships were to hold, that Papamma could adopt a son after Chinnamma's death, they would be providing for a period of time which the testator left unprovided for, and unnoticed in his Will, *i.e*, they would be making an addition to his testamentary dispositions which is a thing that no Court is entitled to do.

It follows, therefore, that at the death of Chinnamma the power to adopt given to his widows by the testator came to an end, and, therefore, the alleged adoption of Narayya the younger is of no validity.

On the consolidated appeals (judgment in one of which has already been delivered on the 24th July 1913*) their Lordships will, therefore, humbly advise His Majesty to affirm the decree of the High Court of Madras, dated the 20th November 1905, so far as it dismissed with costs Appeal No. 32 of 1904, and to reverse the said decree and the decree of even date therewith so far as they dismissed with costs Appeals Nos. 122 and 123 of 1900, and allowed with costs Appeal No. 41 of 1904, and that it ought to be declared that the adoption of Narayya Appa Row, the son of Venkataramayya Appa Row, the *Zemindar* of Medur and Venkayamma Row his wife, by Papamma the widow of Narayya Appa Row, the *Zemindar* of Nidadavole, was invalid, and that on the death of Venkayamma Row, Rangiah Appa Row and Venkata Narasimha Appa Row, both now deceased, become entitled as reversionary heirs to the estate of Medur and the lands and moveable properties appertaining thereto and further that the said estate and the lands with mesne profits and the moveable property appertaining thereto, ought to be divided into moieties between the appellants, *viz*: (1) Venkatadri Appa Row, the only son of the said Rangiah Appa Row, as to one such moiety, and (2) Meka Venkataramayya Appa Row and Sobhanadri Appa Row, the two sons of Venkata Narasimha Appa Row, as to the other moiety.

With regard to the costs, their Lordships think that as to the Nidadavole estate, there ought to be no costs in the Privy Council, and as to the Medur estate, there ought to be no costs either in the Privy Council or in the Courts below.

Decree affirmed.

Solicitors for the Representatives of Raja Narasimha Appa Row: Messrs *T. L. Wilson & Co.*

Solicitors for Raja Parathasarathy Appa Row: Messrs. *Chapman, Walker & Shephard.*

Solicitor for Raja Venkatadri Appa Row: Mr. *Douglas Grant.*

* *See* 21 Ind. Cas. 339; 17 C. W. N. 1221; 14 M. L. T. 259; (1913) M. W. N. 791; 25 M. L. J. 386; 18 C. L. J. 393; 15 Bom. L. R. 1010.—*Ed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 122 OF 1912.

February 13, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

SESHAPPIER—PETITIONER

versus

SUBRAMANIA CHETTIAR AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 48, 49—Moveable property, originally obtained lawfully but subsequently converted unlawfully—Article 48 applies—Contract Act (IX of 1872), ss. 108, 178—Possession of vendor to pass good title, must be juridical and not physical—Mere bona fide *of purchaser, not enough.*

A suit for the recovery of a specific moveable property, which has been originally obtained lawfully but has since been unlawfully converted or retained is governed by Article 48 and not Article 49 of the Limitation Act.

Arunachalam Pillai v. *Alagianambia Pillai*, 3 M. L. T. 324, not applied.

Ram Lal v. *Ghulam Hussain*, 29 A. 579; A. W. N. (1907) 181; 4 A. L. J. 671, *Gopalasami Iyer* v. *Subramania Sastry*, 12 Ind. Cas. 207; 22 M L.J. 152; (1911) 2 M. W. N. 190; 35 M. 636; 10 M. L. T. 572, *Nandlal Thakersey* v. *The Bank of Bombay*, 4 Ind. Cas. 652; 11 Bom. L. R. 926 and *Nandlal Thakersey* v. *The Bank of Bombay*, 5 Ind. Cas. 457; 12 Bom. L. R. 316, followed.

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Sections 108 and 178 of the Contract Act as well as section 41 of the Transfer of Property Act and the sections dealing with reputed ownership in the various Insolvency Acts proceed upon the principle, that *prima facie* the rights of the legal owner should be protected, unless he has done something to induce innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner. Mere *bona fide* on the part of the purchaser or pledgee is not enough; he will have to prove that by some act or omission, the true owner has forfeited his right to recover back his possession. It is, therefore, incumbent upon the party resisting the claim of the true owner to adduce strict proof of the equities which have arisen in his favour or of the laches on the part of the owner which have led him to advance the moneys.

Sections 108 and 178 of the Contract Act apply only to cases where the intermediate possessor is entitled to a legal dominion over the property and not to cases where he has simply the custody of the property.

Greenwood v. *Holquette*, 12 B. L. R. 42; 20 W. R. 467, *Seager* v. *Hukma Kessa*, 24 B. 458; 2 Bom. L. R. 403; *Naganada Davay* v. *Bappu Chettiar*, 27 M. 424; 14 M. L. J. 69, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Nagapatam, in S. C. No. 1023 of 1911.

Mr. *R. Kuppusawmy Aiyer* (with him Mr. *V. Vaidyanatha Aiyar*), for the Petitioner.

Mr. *T. V. Gopalasawmy Mudaliar*, for the Respondents.

JUDGMENT.—The plaintiff's case is that he gave the jewel in dispute to one Kolandasawmy Pather, the husband of the 1st defendant and the father of the 2nd defendant, on the 19th May 1907 on the representation of Kolandasami that "there was a demand for the said jewel, that he would show it and bring it back and that if the purchaser liked the jewel, he would settle the price in the presence of the plaintiff." Kolandasami did not act up to his representations, but on the 20th June 1907, he pledged it with the 3rd defendant and received from him a sum of Rs. 175. Kolandasami not having redeemed the jewel from the 3rd defendant, the 3rd defendant asked the plaintiff to sell this jewel for him. The plaintiff then came to know that it was his own jewel and he asked the 3rd defendant to restore it to him. The third defendant refused. Hence the suit. I ought to mention that Kolandasami died two or three months after the jewel was given to him.

The plea of the 3rd defendant is that the suit is barred by limitation, inasmuch as the pledge to him was on the 20th May 1907 and the present suit was brought in 1911. His second plea is that under any circumstances he is entitled to be re-paid the money given by him to Kolandasami with interest, before the plaintiff can claim to recover the jewel.

The Subordinate Judge came to the conclusion that the suit was not barred by limitation. He held that Article 48 of the Limitation Act was applicable to the suit and that, as the suit was brought within three years of the plaintiff's knowledge that the jewel was in the possession of the 3rd defendant, it was within time. Mr. Kuppusami Aiyar argued that the proper Article applicable to the case was Article 49. I cannot accede to this contention. There is no doubt that this was a case of conversion. The original undertaking which was a lawful one was to show the jewel to persons willing to purchase it. It was on the 20th June 1907, when Kolandasami conceived the idea of treating the property as his own and of pledging it, that he converted to his own use the plaintiff's jewel. The case of *Arunachalam Pillai* v. *Alagianambia Pillai* (1) has no bearing upon this question. The observations of the learned Judges in *Ram Lal* v. *Ghulam Husain* (2) go to show that in the case of a specific moveable property, which was originally obtained lawfully but has since been unlawfully retained, the proper Article applicable would be Article 48. The case of *Gopalasami Iyer* v. *Subramania Sastry* (3) is also an authority for that position. See also *Nandlal Thakersey* v. *Bank of Bombay* (4) and *Nandlal Thakersey* v. *Bank of Bombay* (5). I agree with the Subordinate Judge that the suit is in time.

The second question is not altogether free from difficulty. Mr. Kuppusawmy Aiyar relies upon section 178 of the Contract Act and says that the pawnee in this case got the jewel in good faith and consequently

(1) 3 M. L. T. 324.
(2) 29 A. 579; A. W. N. (1907) 181; 4 A. L. J. 671.
(3) 12 Ind. Cas. 207; 22 M. L. J. 152; (1911) 2 M. W. N. 190; 35 M. 636; 10 M. L. T. 572.
(4) 4 Ind. Cas. 652; 11 Bom. L. R. 926.
(5) 5 Ind. Cas. 457; 12 Bom. L. R. 316.

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he had acquired a good title for the payment of the money which Kolandasami had taken from him; and he argues that the proviso to section 178 has no application to this case as the jewel was not obtained by his client or by Kolandasami by means of an offence or fraud.

Before I refer to the decided cases on the point, I may observe that sections 108 and 178 of the Contract Act, as well as section 41 of the Transfer of Property Act and the sections dealing with reputed ownership in the various Insolvency Acts proceed upon the principle that *primâ facie* the rights of the legal owner should be protected, unless he has done something to induce innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner: mere *bona fide* on the part of the purchaser or pledgee is not enough; he will have to prove that by some act or omission, the true owner has forfeited his right to recover back his possession. It is, therefore, incumbent upon the party resisting the claim of the true owner to adduce strict proof of the equities which have arisen in his favour and of the laches on the part of the owner which have led him to advance the money.

It has been pointed out in *Greenwood* v. *Holquette* (6) that section 108 of the Contract Act will apply only to cases where the intermediate possessor is entitled to a legal dominion over the property and not to cases where he has simply the custody of the property; and it is further pointed out that the person in possession in order that he may give a good title must have a qualified ownership over the property and if the property had been given to him for a particular time or for a stated purpose, such possession will not enable him to give a good title. That is also the view taken by Sir Lawrence Jenkins, C. J., in *Seager* v. *Hukma Kessa* (7). The learned Chief Justice points out that, unless there is judicial possession in a person, he cannot confer any title on a third party. The only Madras case cited in argument is *Naganada Davay* v. *Bappu Chettiar* (8). That case concurs with the view taken in *Greenwood* v. *Holquette* (6). The observations in the judgment are opposed to the contention of the learned Vakil for the petitioner that under section 178 all that is needed is physical possession in the pawner and *bona fides* on the part of the pawnee, whereas under section 108, it is necessary to show further that the pawner was the ostensible owner of the article. The case of *Naganada Davay* v. *Bappu Chettiar* (8) was, no doubt, one of gratuitous bailment, but the principles laid down by the learned Judge apply to cases of entrustment for a particular purpose. It has been strenuously argued before me that the possession of Kolandasami was that of an agent for sale and that he had a right to retain possession of the jewel and he cannot be said to have come into possession of the property by means of any offence or fraud. I have gone through the evidence fully, and I am satisfied that the statement in the plaint that Kolandasami was given the jewel only for the purpose of showing it to intending purchasers, has been established. The sale price was to be settled in the presence of the plaintiff and I cannot accede to the contention that Kolandasami was an agent for the sale of the jewel. I have, therefore, come to the conclusion that this plea of the defendant that he has got a right to be paid back his money before he can be asked to deliver the jewel is unsustainable. I hold that upon both the points, the Subordinate Judge was right and I dismiss the petition with costs.

As regards the memorandum of objections, I do not think that the plaintiff can claim any costs against the 3rd defendant. He acted honestly throughout. As defendants Nos. 1 and 2 are not before me, I do not think it necessary to vary the order of the Subordinate Judge in this respect. The memorandum of objections is also dismissed. No costs.

Petition dismissed.

(6) 12 B. L. R. 42; 20 W. R. 467.
(7) 24 B. 458; 2 Bom. L. R. 403.
(8) 27 M. 424; 14 M. L. J. 69.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 542 OF 1913.
CRIMINAL REVISION PETITION No. 438 OF 1913.
AND
CRIMINAL APPEAL No. 509 OF 1913.
January 16, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Oldfield.

IN CR. REV. CASE No. 542.

MARGAM AIYAR—COMPLAINANT—PETITIONER

versus

S. J. MERCER—ACCUSED—RESPONDENT.

Railways Act (IX of 1890), ss 3 (4), 7, 122 (2), 138 —Right of owner to eject trespasser—Civil wrong may be criminal offence, if attended with force and violence—Possession lawful, when becomes unlawful—Railway employee how to be ejected from staff quarters.

Section 122 (2) of the Indian Railways Act (IX of 1890) cannot be applied to eject a Railway employee from the staff quarters occupied by him while under employment of the Railway Company. Staff quarters or any building of a residential character cannot be deemed to be part of a Railway "within the meaning of section 3 (4) of the Act."

Possession of the staff quarters lawfully obtained by a Railway employee, while under the service of the Railway, can be lawfully determined only by steps taken under section 138 of the Railways Act, and the fact of his dismissal does not, by itself, put an end to his right of possession.

In order to render such possession unlawful, there must be an interruption of possession, and a re-entry after such interruption.

It cannot be said that a true owner may, at all times, enter his own premises and use force and violence to eject a trespasser; such an act, though not tortious and actionable, may still give rise to criminal liability if attended with force and violence.

Harvey v. *Bridges*, 14 M. & W. 437; 3 D. & L. 55; 9 Jur. 759; 14 L. J. Ex. 272; 68 R. R. 718; *Lows* v. *Telford*, 1 A. C. 414; 45 L. J. Ex. 613; 35 L. T. 69; 13 Cox. C. C. 226, distinguished.

Beddal v. *Maitland*, (1881) 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484; *Newton* v. *Harland*, 1 M. & G. 644; 1 Scott. (N. R.) 474; 2 Jur. 350; 10 L. J. C. P. 11; 56 R. R. 488; 133 Eng. Rep. 490, followed.

Russell on Crimes, 7th Edition, Vol. I, p. 442, *Appavu Nayak* v. *Queen*, 6 M. 245; 7 Ind. Jur. 135; 1 Weir 68, referred to.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, to revise the judgment of the District Magistrate of Cuddapah, in C. C. No. 3 of 1913.

Appeal against the order of the District Magistrate of Cuddapah, in Case No. 3 of the Calendar for 1913.

Mr. *Barton*, instructed by Messrs. *Short, Bewes and Co.*, Attorneys, for the Complainant.

Mr. *Osborne*, instructed by Messrs. *King* and *Patrige*, for the Accused.

The *Public Prosecutor*, for the Government.

JUDGMENT.—The accused in this case, Mr. Mercer, was convicted by the District Magistrate of Cuddapah of an offence punishable under section 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 300. He was acquitted of an offence punishable under section 456. The case comes before us on a petition for the setting aside of the acquittal and a re-trial under the latter section and on an appeal against the sentence under the former. We deal first with the petition.

The findings of fact, which we accept in doing so and which complainant has, moreover, not disputed, are as follows:—Last May the complainant, Assistant Station Master of Settigunta on the Madras Railway, struck and left his employment, moving from station to station in the interests of the strike. By Exhibit IX, dated 3rd June 1913, he was informed that his services were dispensed with and directed to vacate his staff quarters. This communication, he admits, came to his notice at 6 P.M. on 9th June 1913. On the same date at 5 P. M. he had telegraphed from Settigunta to accused, his District Traffic Superintendent, to the effect that he had re-joined duty. Accused knowing that he had been specially dismissed, regarding him as a dangerous character and having good reason for doing so, went at once to Settigunta with a small Police force; arriving at about 1·30 A.M. at complainant's quarters, he kicked the door open, entered, and eventually incensed by his impertinent language, attacked him with his walking stick causing certain comparatively trifling injuries. He and the Police then expelled complainant forcibly from the house and kept him on the station platform till he could leave for Madras by train. The general findings are that (1) "it was accused's intention in entering the house to restrain or prevent complainant from remaining in the Railway premises at Settigunta," presumably by the use of any necessary force, (2) that it was not his intention to cause hurt to him independently of what his removal might involve.

Now for his actual use of force, which, (it is the finding) was induced by distinct subsequent occurrences, accused has been convicted and sentenced separately under section 323. His original intention, as found above, is alone material at present; and the question is whether, other ingredients of an offence under section 456, entry by night and house-breaking, being admitted, the entry made with that intention was a criminal trespass, and the offence should have been held established. The arguments for accused are that his conduct was (1) authorised by section 122 (2), Act IX of 1890, (2) merely the exercise of the right, which every owner possesses, to eject a trespasser and to enter the premises with the intent to use the force necessary in order to do so.

Section 122 (2), Act IX of 1890, is, in our opinion, inapplicable. It authorises any railway servant to remove from the railway any person who has entered upon it unlawfully and has refused to leave it on being requested to do so. *Firstly*, we do not think that staff quarters are part of the railway. The material portion of the definition of a railway in section 3 (4), is no doubt, expressed widely. But neither staff quarters nor any building of a residential character is among those specified in it, and it is with reference to the specific portion of the clause that the general later portion "other works constructed for the purposes of or in connection with a railway" must be construed. Maxwell on Interpretation of Statutes, third Edition, page 469. There is, moreover, positive reason against supposing, that staff quarters are included in the definition, in the fact that they are covered by expressions, used and that a remedy for the mischief, against which section 122 is invoked, is provided elsewhere in the Act. For in section 7 (1) the distinction between a Railway and its staff quarters is drawn twice, once when the administration is given powers to execute work for its Railway and accommodation connected therewith, and again, when in clause (1) (*a*), railways are referred to separately from the houses mentioned in clause 1 (*d*). And in section 138 a procedure is provided for summary recovery by the railway of property, moveable and immoveable, detained by its discharged or absent servants through the Police; and this provision cannot be treated as merely concurrent with section 122 or intended solely for the benefit of the administration and not of the person in possession, since it insists on a notice in writing, which section 122 does not require, and on an application to a Magistrate of the first class.

Further, complainant was not a person, who had entered on the railway unlawfully. The nature of his possession is important with reference to the argument based on section 122 as well as to that based on accused's general right to deal with a trespasser, though as regards the former only complainant's entry is in question, whilst as regards the latter, his remaining on the premises unlawfully is also material. On this part of the case, the lower Court's view is, as we understand it, that the entry and remaining were both unlawful. But we consider this finding defective, since the grounds for it, that complainant had been dismissed and impliedly admitted an interruption of duty in Exhibit VI, take account only of his legal right to possession, not his actual continuance in it. That and the lawful nature of its origin, his entry on his appointment, are the important matters. On them we have his own evidence that though he himself had been absent on strike business, his wife and mother were in the home, when he returned on the afternoon before the occurrence, and that during his absence they had remained at Settigunta. The suggestion that they did not necessarily remain in staff quarters, but may have lived elsewhere in the village, was not supported by the cross-examination of 2nd prosecution witness, the relieving Assistant Station Master, or any other witness and must be rejected. We are, therefore, we consider, justified in holding that complainant's occupation of the premises was not interrupted and that his original lawful entry on appointment was not superseded by an unlawful re-entry after he left service. His entry having been lawful, section 122 cannot be applied.

Then as to the wider ground, on which the case has also been argued, that accused acted in exercise of the right, which every owner has, to use necessary force to eject a trespasser from his property. It was, no doubt, argued with reference to section 27 of

the Indian Penal Code, that the possession was never that of accused, but was that of the railway throughout, through him as its servant, and that, therefore, no question of recovery of possession by the latter could arise; but it is not possible to treat his use of the premises as his private residence as on account of his master or to apply the provision referred to. It was not disputed by complainant that the railway was the true owner or that it or accused on its behalf was entitled to possession or that the latter would have been entitled to enter the premises to obtain it peaceably. The question is whether he could have used the force necessary in order to do so and whether his entry with the intention to use such force constituted a criminal trespass.

Mr. Osborne's principal argument for accused was that such an entry was not a civil and, therefore, could not be a criminal trespass. He based it mainly on the English cases of *Harvey* v. *Bridges* (1) and *Lows* v. *Telford* (2). They, no doubt, support him to the extent that the use of necessary force by the true owner to evict a trespasser is not ground for a civil action. But the consequence alleged, that it cannot be ground for a criminal charge, does not follow. In the first case there was no question of criminal liability and in the second, that question was raised with reference only to the conduct of the trespasser in evicting the true owner after his recovery of possessionn, ot of the latter's recovery of it; and, when Lord Selborne said that it made no difference whether such recovery was forcible or not, he did so only with reference to the fact of his possession, its legal consequences and its right to protection, not as deciding that the means used to obtain it were lawful. In the later case of *Beddal* v. *Maitland* (3) these cases and also *Newton* v. *Harland* (4) were considered; and, the facts being very similar to those before us, the law, civil and criminal, was stated clearly to the effect that though conduct, such as that of accused, would not be tortious or criminal under the common law, it might be the subject of indictment under statute. "The effect of the statutes is this, that when a man is in possession, he may use force to keep out a trespasser, but, if a trespasser has gained possession, the rightful owner cannot put him out, but must appeal to the law for assistance.....Defendant can recover no damages for the entry, because the possession was not legally his; and he can recover no damages for the force used, because, though the Statute of Richard II creates a crime, it gives no civil remedy." This statute and others of similar effect, the latest being one of Elizabeth, are referred to in Russell on Crimes, 7th Edition, I, 442. The argument that there was no civil and, therefore, no criminal trespass in the circumstances in question is, so far as it is founded on English Law, unsustainable unless the statutes are disregarded. We have then to consider with reference to the terms of the Indian Code, whether it has, by expression or omission, made a sort of violence lawful in India, which is criminal in England.

With reference to omission Mr. Osborne referred to section 141 as stating the measure of violence used in assertion of a real right, such as the true owners, against which the legislature has granted protection. That section, no doubt, penalises the use of violence in such cases by not less than five persons. But it does not follow from the existence of this special provision that other cases, in which the number concerned, is smaller, are withdrawn from the purview of other more general sections. For, apart from the terms of those sections, it is at least equally probable that section 141 was intended, not to specify or restrict the cases in which the use of violence by the true owner is punishable, but to provide a special remedy in aggravated circumstances.

The law, as expressed in section 441, postulates an intent to commit an offence or to intimidate, insult or annoy. The lower Court states in its paragraph 5 that the prosecution excluded all considerations save those of wrongful restraint and causing hurt and insisted on giving precedence to the question of the former; and no exception has been taken here to this statement. It is, however, impossible to base the charge of criminal trespass on any intent to res-

(1) 14 M. & W. 437 at p. 442; 3 D. & L. 35; 9 Jur. 759; 14 L. J. Ex. 272; 69 R. R. 718.

(2) 1 A. C. 414; 45 L. J. Ex. 613; 35 L. T. 69; 13 Cox. C. C. 226.

(3) (1881) 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484.

(4) 1 M. & G. 644; 1 Scott. (N. R.) 473; 2 Jur. 350; 10 L. J. C. P. 11; 56 R. R. 488; 133 Eng. Rep. 490.

train complainant wrongfully. For accused's intent was to make him leave the premises, not (as section 339 requires) to prevent his proceeding in a direction, in which he had a right to proceed. Acts by which a person is made to proceed against his will are provided for by section 352, relating to the use of criminal force; and it is possible that a reference to it was really intended. But, if the definition of that offence in section 350 be considered with reference to sections 43 and 44, it is clear that it again involves establishment of an intent to commit an offence, the only one suggested being that of causing hurt, or to cause fear or annoyance or to cause harm, either by commission of an offence or by an act, which is prohibited by law or furnishes ground for a civil action. As regards the last alternative, no intention to cause harm by committing any offence, other than those referred to, or by any act, not an offence, which has been prohibited by law, has been alleged. And there is no reason for supposing that the Indian law as to civil liability differs from the English as stated in the cases already referred to. *Pratab Daji* v. *Bombay, Baroda and Central India Railway* (5) is, in fact, authority to the contrary. There is, therefore, no ground for holding that accused intended any act, which would have furnished ground for a civil action.

The case founded on an intention to cause hurt, fear or annoyance remains; and the difficulty in dealing with it arises from the manner, already referred to, in which complainant's case was presented. It is, we think, possible that, if the lower Court's attention had been directed to the case founded on the causing of hurt or annoyance, it might and should have found on the facts that it was established. As regards the causing of hurt and Mr. Osborne's argument already referred to, no Indian authority, justifying accused's plea that he acted in assertion of the true owner's rights, has been adduced. For the only case, in which that argument appears to have been relied on, *Appavu Nayak* v. *Queen-Empress* (6), was decided with reference to section 147; there can be no question of the right of private defence, since it could not be invoked against complainant, who has not been found and does not appear to have been guilty of civil trespass; and section 99 (3) has not been shown to be inapplicable. The lower Court might, therefore, have found, if it had been asked to do so, that the causing of hurt, alleged to have been intended by accused, would have been covered by no exception and would have been an offence. It might also have found in favour of an intention to cause fear or annoyance if that had been relied on. Either of these findings would have entailed the framing of a charge of an offence punishable under section 456. This conclusion is, of course, subject to the correctness of the statement of findings of fact already given and to the assumption, which according to the accused, is not justified by them, that he intended to cause hurt or fear or annoyance, not merely to obtain possession, the use of force being no part of his purpose but only a possibility, which he would have desired to avoid.

We need not, however, consider whether this assumption is legitimate, because, we are in any case not prepared to direct a rehearing. If, as we hold, the lower Court's decision is unsatisfactory, it is so because of the limitations imposed on himself by complainant's Pleader at the trial; and the case is, therefore, not one for indulgence. This Court is not accustomed to interfere with an acquittal on revision except in the clear interests of justice; and they would not be served by interference here. The occurrence took place over six months back in the course of a widespread and bitter dispute, which it is inadvisable to re-open and it is evident from the foregoing that accused's conviction on a charge under section 456, Indian Penal Code, would entail no material enhancement of his sentence.

He has, in fact, contended with some force in his appeal for a reduction in that sentence as excessive. His conduct was, undoubtedly, criminal. But the hurt he caused was not serious, and there is much to be urged in extenuation. He said in his statement before the lower Court: "I am sorry that I allowed myself to be provoked into striking Margam Iyer but I ask the Court to take into consideration the very severe

(5) 1 B. 53 at p. 54.
(6) 6 M. 245; 7 Ind. Jur. 135; 1 Weir 68.

strain of continuous work both by day and night in the very hottest season of the year which was upon me at the time, the very grave anxiety which was in my mind with regard to the public safety and the very great provocation which was offered to me by Margam Iyer in the presence of my subordinates." And these are matters, which might fairly have weighed with the Court in awarding punishment. We have, however, no reason for supposing that they were not given full consideration by the learned District Magistrate, and, though the sentence is, in our opinion, somewhat severe, we do not think that we should interfere with the exercise of his discretion.

The revision petition and appeal are dismissed.

Revision and appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1088 OF 1913.

February 5, 1914.

Present:—Mr. Justice Ryves and Mr. Justice Piggott.

JAGAR NATH SAHU—APPLICANT

versus

PARMESHWAR NARAIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 133—*Nuisance—Obstruction to channel not used by public.*

The owner of a low levelled field, across which the surplus water of the neighbouring fields used to flow into a tank, raised the level of his field to such an extent that the flood water, instead of flowing into the tank, as it used to do, was held back and thus caused injury to the neighbouring fields:

Held, that the case was not one in which a Magistrate could proceed under section 133 of the Criminal Procedure Code.

Criminal revision against an order of the Magistrate of Deoria, District Gorakhpur.

Mr. *D. R. Sawhny*, for the Applicant.

Mr. *Simeon*, for the Opposite Party.

ORDER.—This is an application in revision to set aside an order purporting to have been passed under section 137 of the Code of Criminal Procedure. The facts appear to be as follows:—

The applicant, Jagarnath Sahu, owns a field No. 35 in the village of Jaraso. This field is on the extreme northern border of that village. It marches with field No. 52 and a portion of field No. 53 of village Deokali. It appears that the level of field No. 35 is below that of the surrounding fields and the result was that the surplus water had flowed in the past over this field into a tank to the south of the field in the village of Jaraso. It is said that Jagarnath Sahu has erected a *bund* on the north of this tank and has also raised the level of the field No. 35 to such an extent that the flood water instead of flowing into the tank as it used to do, is now held back and thus causes injury to the field No. 53 of Deokali in particular and also to some of the neighbouring fields. An application purporting to be made under section 133 was filed before the Magistrate by the owner of the field No. 53 in Deokali, whereupon the Magistrate issued notice to the other side. Jagarnath Sahu showed cause against that order stating that the field was not a channel to which section 133 could possibly apply. The learned Magistrate took evidence in the case on both sides and ultimately passed the order complained of. It has been argued on behalf of the applicant, that the learned Magistrate had no jurisdiction, on the facts of the case, to pass this order. Under section 133, he could only take action if he was satisfied that an unlawful obstruction required removal from a channel which is, or may be, lawfully used by the public. It seems to us that even if field No. 35 could be described as a channel, it is not such a channel as had been or could lawfully be used by the public. If injury has been caused by any tortious act done by Jagarnath Sahu, then the persons who have been damnified may have their remedy by civil suits. Reliance has been placed on the case of *Bharosa Patak* v. *Emperor* (1) and on *Zaffer Nawab* v. *Emperor* (2). The former decision must be taken in conjunction with the particular facts of that case. It is not an authority applicable to the present facts. The Calcutta case is clearly distinguishable. There the public had acquired a right to

(1) 13 Ind. Cas. 999; 34 A. 345; 9 A. L. J. 355; 13 Cr. L. J. 183.

(2) 32 C. 930; 2 Cr. L. J. 762.

ford a river at a particular place and obstruction to this public right was obviously within the purview of section 133 of the Code of Criminal Procedure. A case more in point is that of *Junnu Singh* v. *King-Emperor* (3). See also *In re Maharana Shri Jaswantsangji Fatehsangji* (4). In our opinion the learned Magistrate had no jurisdiction to pass the order. We, therefore, set it aside.

Order set aside.

(3) A. W. N. (1906) 190; 4 Cr. L. J. 65.
(4) 22 B. 988.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 152 OF 1913.
September 18, 1913.

Present:—Mr. Lindsay, A. J. C.

RAMPHAL—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 195, 259—Sanction to prosecute once availed of—Fresh sanction necessary for fresh complaint—Case of non-compoundable offence "struck off" for complainant's absence—Discharge—Jurisdiction—Cognizance.

Where a complaint of an offence under section 211, Indian Penal Code, was ordered to be "struck off" for the complainant's absence but the Magistrate took cognizance of the case on a fresh complaint by the same complainant:

Held, (1) that the Magistrate had no authority to pass an order striking off the case;

(2) that the order striking off the case was not tantamount to an order of discharge under section 259, Criminal Procedure Code, inasmuch as this section relates only to compoundable cases while an offence under section 211, Indian Penal Code, cannot be lawfully compounded;

(3) that once a sanction to prosecute is availed of and a complaint instituted on its strength, a fresh complaint on the basis of the same sanction is incompetent, inasmuch as one sanction covers only one complaint;

(4) that the Magistrate had no jurisdiction in the case after he had "struck off" the case.

Appeal against an order of the Sessions Judge, Rae Bareli, dated 5th August 1913, upholding that of the Deputy Magistrate, Partabgarh, dated 11th July 1913.

Mr. *M. A. Khan*, for the Accused.

The *Government Pleader*, for the Crown.

JUDGMENT.—The facts of this case are as follows: One Kalka Bakhsh Singh having obtained sanction to prosecute the applicant, Ramphal, on a charge under section 211 of the Indian Penal Code, brought the case into Court. On a subsequent date after proceedings had started, Kalka Bakhsh Singh was absent from Court and so was his Vakil and in these circumstances the Magistrate passed an order saying that the case was "struck off." I may observe here that I know of no warrant for the passing of such an order under the Code of Criminal Procedure. Later on, Kalka Bakhsh Singh appeared in Court and presented a petition alleging that on the day he was absent from Court, he had been ill with cholera. He asked the Magistrate to go on with the case again, saying that if the proceedings could not be continued on the original complaint, his petition might be treated as a fresh petition of complaint. The Magistrate accepted this petition. He said that he knew of no law which prevented him from taking up the case again. He also stated in his order that his previous order was neither one of discharge nor acquittal, and that in these circumstances there was no bar to his taking cognizance. The case was taken in revision to the Sessions Judge who rejected the application for revision. He was of opinion that the Magistrate was quite right in the view of the law which he took and that there was no obstacle to the second trial. I am unable to agree with the learned Sessions Judge's view of the law. In the first place, as I have said, the original order passed by the Magistrate was one which he had no authority to make. In the next place it cannot be said that the order passed by the Magistrate striking off the case was tantamount to an order of discharge which he was competent to make. Under section 259 of the Code of Criminal Procedure which relates to warrant cases (as this was) the Magistrate can only pass an order of discharge in those cases in which the offence complained of may be lawfully compounded. An offence under section 211 of the Indian Penal Code is not an offence which can be lawfully compounded. There was no jurisdiction, therefore, even to pass an order of discharge under section 259 of the Code of Criminal Procedure. Another point to be noticed is this, that this particular complaint was one which the Magistrate was

not authorised to entertain except with the sanction of the Court in which the false complaint had been made, and it seems to me that even if it were permissible for a fresh case to be brought, a fresh sanction would still be necessary. Kalka Bakhsh Singh, having once availed himself of the sanction which had been awarded him, enabling him to bring this case, was not entitled to institute a fresh complaint without obtaining a fresh sanction. The sanction once given, in my opinion, will only cover one complaint. I am satisfied that the proceedings in the Magistrate's Court taken after the case had been "struck off" are without jurisdiction. I accept the application, set aside the order of the Magistrate and direct that the accused-applicant be acquitted and released.

Application accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1199 OF 1913.

January 21, 1914.

Present:—Mr. Justice Tudball.

JAI RAM AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 349—Criminal force—Raising lathi *to strike.*

Where the accused raised their *lathis* to strike a particular person with the result that he had to flee to save himself:

Held that they were guilty of using criminal force as defined in section 349 of the Penal Code.

Mohammad Ishaq Khan v. *King-Emperor*, 1 Cr. L. J. 1057; 1 A. L. J. 602, distinguished.

Criminal revision against the decision of the Sessions Judge of Aligarh.

Mr. *E. A. Howard*, for the Applicants.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

ORDER—The applicants in this case were convicted of the offence of riot. The point pressed on their behalf is that the acts which they are found to have committed did not constitute the offence of riot. The facts found by the lower Courts are as follows:—

One Chunni, an occupancy tenant, died in January last year and the *zemindar* made an application to the Revenue Court stating that the tenancy had lapsed in the absence of heirs. Of the present applicants, Zaharya had cultivated the land as sub-tenant of Chunni. The *zemindar* gave a lease of the land to one Budhan, the latter cultivated it and sowed a crop. Zaharya and others put in an application in the Revenue Court applying that they should be entered as occupancy tenants, having jointly cultivated with Chunni. Pending orders in the case, Zaharya and his friends went to the field and cut the crop sown by Budhan and when the latter resisted, they raised their *lathis* to strike him. Budhan ran away to save himself.

The question is whether the applicants can be said in these circumstances to have used force towards Budhan? The definition of criminal force is given in section 349 of the Indian Penal Code: "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other * * *, provided that he thus causes that motion, or change of motion, or cessation of motion in one of the three ways mentioned in the section, the first of which is by bodily power."

The applicants having raised their *lathis* to strike Budhan, with the result that he had to flee to save himself, clearly used force to Budhan and that by bodily power.

Attention has been called to the decision of *Mohammad Ishaq Khan* v. *King-Emperor* (1). That decision is not in the present case at all applicable. There the applicant was not one who used force but who ran away when attacked by his opponents. It seems to me, the circumstances of this case show clearly that force was used to Budhan which caused him to flee to save himself.

There is, therefore, no force in this application, which is accordingly rejected. The applicants must surrender to their bail and serve the rest of their sentences.

Application rejected.

(1) 1 A. L. J. 602; 1 Cr. L. J. 1057.

SARABDAWAN SINGH *v.* EMPEROR.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 181 OF 1913.

December 15, 1913.

Present:—Mr. Lindsay, A. J. C.

SARABDAWAN SINGH AND OTHERS—ACCUSED

versus

EMPEROR—COMPLAINANT.

Penal Code (Act XLV of 1860), s. 141 cl. (4)—Unlawful assembly—Maintenance of existing peaceful possession with or without title—Enforcement of right by person out of possession.

Persons, merely acting in maintenance of an existing peaceful possession, no matter whether the possession was with or without title, cannot be said to enforce any right or supposed right and, therefore, cannot be held to form an unlawful assembly within the meaning of section 141, clause (4), Indian Penal Code.

A person who is out of possession must enforce his right, if any, in the way prescribed by law and he cannot be permitted to vindicate it by the use of criminal force.

Appeal against an order of the Sessions Judge, Rae Bareli, dated 25th October 1913, upholding that of the Magistrate, 1st Class, Rae Bareli, dated 20th September 1913.

Pandit *Jagat Narain*, for the Applicant.

The *Government Pleader*, for the Crown.

Mr. *A. P. Sen*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order in appeal passed by the Sessions Judge of Rae Bareli, upholding the judgment of a Magistrate by which the five applicants were convicted under sections 147 and 325/149, Indian Penal Code.

The facts of the case may be briefly stated. On the 5th July last a fight took place at the village of Mubarakpur regarding the possession of a dwelling house. The dispute as to the house lay between two persons Maha Narain and Mahadeo Bakhsh. The latter is the grandson of a lady called Batasa Kuar between whom and Maha Narain there had been litigation regarding the village of Mubarakpur. This litigation ended in a compromise by which a 14-anna share of the village was awarded to the lady and a 2 anna share to Maha Narain. The shares apparently have not as yet been divided off by partition—and in spite of the peaceful settlement of this litigation it seems clear, that the parties have been on bad terms. Batasa Kuar has made a gift of her 14-anna share to Mahadeo Bakhsh who is her grandson. Both parties up till March last were residing in houses situated in one enclosure to which there is only one approach, namely, through a gate. The houses themselves are separate but access from outside to the house which had been occupied by Maha Narain can only be had through the gate just mentioned which has also to be used by Mahadeo Bakhsh.

It has been found as a fact that Maha Narain was in actual occupation of his house till March 1913 when he went to live for a time at Rae Bareli on account of an outbreak of plague, it is said. There can be no doubt whatever on the facts as found, that Mahadeo Bakhsh availed himself of the opportunity of Maha Narain's departure to take possession of the house which the latter had been occupying. He may not have actually moved into the house to inhabit it but at any rate he was determined to prevent its re-occupation and was in a position to do so. And it was admitted by Maha Narain that Mahadeo Bakhsh had bricked up a back door of the premises leading into a garden or *phulwari* and that there was reason to believe that he had also tampered with the locks which had been put on the doors. And further it is beyond all question that Maha Narain was well aware that any attempt on his part to resume occupation would be resisted by force, if necessary. A few days before the riot, he had lodged a petition in Court asking that Mahadeo Bakhsh should be bound over to keep the peace and the 11th July was fixed for disposal of the case. Maha Narain did not wait for this date but on the 5th July proceeded to Mubarakpur with some men armed with *lathis*. He made an attempt to enter by force. There was armed resistance to this attempt and men were injured on both sides. It is proved that as Maha Narain and his party approached, the entrance gate was shut in their faces and they were told they would be denied admission. They then broke into the *phulwari* or garden and made an endeavour to scale the wall of the house at the place where the back door had been bricked up. Mahdeo Bakhsh's party, among whom were the applicants for revision, jumped down

from the wall of the house and drove Maha Narain and his party away.

These are the facts and there can be no doubt as to what the legal situation was on the 5th July before the fight took place. Mahadeo Bakhsh was certainly in possession of the disputed premises, rightly or wrongly does not matter. He was in effective occupation and clearly intended to retain occupation and whether he had title or not, he was in possession within the meaning of the law. And his possession, even if wrongful, was peaceable possession, that is to say, it had been acquired without any resort to force or violence. On the other hand, Maha Narain was out of possession. He may have had the rightful title to the house but he had no right whatever to attempt to enforce that right by violence as he clearly tried to do. He went to the spot with a body of men evidently prepared to overcome all resistance if he could, and he and his party constituted an unlawful assembly and were guilty of rioting although the Sessions Judge has erroneously held otherwise in his appellate judgment and has acquitted Maha Narain and his followers. The party entitled to acquittal was that of Mahadeo Bakhsh. It cannot, in my opinion, be said that these men formed an unlawful assembly within the meaning of section 141, clause (4), of the Indian Penal Code. They were not enforcing any right or supposed right but were merely acting in maintenance of an existing peaceful possession. Whether the possession was with or without title does not matter. The law recognises such a possession and declares that it must be respected. The person who is out of possession, if he has the right, must enforce it in the way prescribed by law. He cannot be permitted to vindicate it by the use of criminal force. And if it is necessary to invoke the doctrine of the right of private defence of property, I have no hesitation in finding that the acts done by Maha Narain and his party amounted to criminal trespass and that Mahadeo Bakhsh was entitled to protect his possession against persons committing such an offence. The right of protecting possession of property is substantially part of the right of private defence of property.

I allow this application and set aside the convictions and sentences of the accused applicants who are acquitted and released. Their bail-bonds may be discharged.

I also set aside the order passed by the Sessions Judge under section 522 of the Criminal Procedure Code and direct that possession of the house be left with Mahadeo Bakhsh.

This order will also have the effect of discharging the order of the Magistrate binding over the applicants to keep the peace under section 106 of the Code of Criminal Procedure.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 235 OF 1910.

July 21, 1910.

Present:—Justice Sir George Knox, Kt., and Mr. Justice Karamat Hussain.

LUCAS, C. J.—APPLICANT

versus

RAMAI SINGH—OPPOSITE PARTY.

Workmen's Breach of Contract Act (XIII of 1859), ss. 2, 3—Agreement by workman to work for fixed period of 50 months in lieu of advance made to him by his employer, whether enforceable under the Act.

A workman, agreeing to work in a factory for a period of 50 months, took an advance from his employer:

Held, that the contract fell under Act XIII of 1859 and the workman was bound to work till the expiration of the period fixed in the contract, after which he could re-pay the balance of the advance money and get himself free.

Criminal revision against an order of the Sessions Judge of Mirzapur.

Mr. *S. C. Mukerji*, for the Applicant.

Mr. *Hamilton*, for the Opposite Party.

ORDER.—The parties to this application entered into an agreement, dated the 27th of March 1906. The agreement was, as it purports to be, under Act XIII of 1859. This Act has been in existence in the town of Mirzapur from which the case comes for a number of years and so well-known in the factories of Mirzapur that we need not be under any apprehension, that persons who enter into contract under it, are ignorant of the law or do not know the nature of the con-

tract into which they are entering. We have examined the contract and in spite of what the learned Judge says, we are satisfied that it is a contract that is contemplated under Act XIII of 1859. The learned Judge has quite misunderstood the provisions of the law and also the terms of the contract and he has needlessly gone out of his way when he says that the order of the Magistrate before him was silent as to how the balance of the advance was to be paid or how long the appellant was to work for Mr. Lucas. The contract was for a term of 50 months and as soon as those 50 months expired and the money advanced under the contract has been re-paid, Ramai Singh is free to enter upon any other work and in any other place that seems good to him. What the learned Judge writes about Ramai Singh incurring the possibility, under this order of the Magistrate, of having to work for the rest of his life and yet the balance be not re-paid could only be true if Ramai Singh does not pay up the balance that may be due from him. As soon as the 50 months are over, Ramai Singh can pay the balance the very next day; till that time he must carry out the terms of the contract into which he has entered. We are most unwilling to interfere in cases of this kind but we feel that the terms of the learned Judge's judgment may be so mischievously interpreted that we are compelled to interfere. We set aside the order of the learned District Judge and we restore that of the Magistrate. It has not been shown to us that the terms of the bond are at all beyond the means of Ramai Singh.

Ramai Singh will work from the date the order of this Court is certified to the Court below until he has completed 50 months of work from the date of the contract and will pay up the sum of Rs. 19-4-0; until he has worked for this period and paid up this sum, he will continue to be liable for work. Any period for which he has worked in the past and has worked since the 6th of February 1910 is to be deemed as work under this order and any payment, made subsequent to the 6th of February 1910 and accepted by Mr. Lucas are to be deemed as payments made in liquidation of the sum of Rs. 19-4-0. Otherwise the order of the learned Magistrate will hold good.

Order modified.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CRIMINAL APPLICATION No. 228 OF 1913.

December 16, 1913.

Present:—Justice Sir George Knox, Kt.

SURAJ PROSAD VAISH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer—Magistrate putting questions to witnesses prejudicial to accused—Sufficient ground for transfer.

A Magistrate on the assurance of the Police *peshi* clerk in his Court asked a witness whether the accused had ever been challaned in a *badmashi* case:

Held, (1) that it was improper for the Magistrate to put such question, unless he had satisfied himself on the highest and best information that there was some real foundation for the facts mentioned in the question. The assurance received from the Police *peshi* clerk in his Court was quite insufficient to justify such a question.

(2) that the action of the Magistrate was sufficient to cause the accused to apprehend that a fair and impartial trial would not be had and that the case should be transferred.

Application for transfer of a case from the Court of the Magistrate, first Class of Etah.

Mr. *Dillon* (with him Mr. *Satya Chandra Mukerji*), for the Applicant.

Mr. *Wallach*, for the Crown.

JUDGMENT.—Babu Suraj Prosad Vaish has applied to this Court for the transfer of a case pending against him in the Court of Chaube Salig Ram Patak, Magistrate of the first Class, Etah. One of the grounds taken in the affidavit on which the application for transfer is based is set out as follows:—"That on the 29th of September Lala Kanaiah Lal, a big trader of Kasganj, was examined as a witness for the defence. That at the close of his examination the learned Magistrate asked the said witness whether the two accused had ever been challaned in any *badmashi* case." I called upon the learned Magistrate for a report as to the quarter from which he received the assurance that a case of being a bad character had ever been instituted against

either Babu Suraj Prosad or Babu Lachhman Prosad. In reply the learned Magistrate says that he received this assurance from the Police *peshi* clerk attached to the Court. Under the circumstances, the question asked by the Magistrate was in the highest degree an improper question, and I am surprised that any Magistrate should have allowed himself to have put such a question, unless he had satisfied himself on the highest and best information that there was some real foundation for the facts mentioned in the question. I do not consider that an assurance received from a Police *peshi* clerk attached to the Court was a sufficient ground for putting such a question. The learned Magistrate goes on in his explanation to add some further remarks which were never asked for by this Court and they are highly improper. It would have been well if the Magistrate before putting the question had made some inquiries which he now says he made, and had satisfied himself by sending for the register and seeing whether it was the case that at the present time there was any ground for the imputations suggested in the question. Sufficient ground has been shown that there is cause to apprehend that a fair and impartial trial will not be held. Therefore, I direct that the case be transferred from the Court of Chaube Salig Ram Pathak to the Court of the District Magistrate of Etah who will try the case himself or have it tried by some Magistrate, other than Chaube Salig Ram Pathak, who may be competent to deal with the case.

Application accepted.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 165-B OF 1913.

August 28, 1913.

Present:—Mr. Justice Twomey.

SEIN YIN—APPLICANT

versus

AH MOON SHOKE—OPPOSITE PARTY.

Workmen's Breach of Contract Act (XIII of 1859), s. 1—"Artificer", whether includes head-artificer or supervisor.

It is not necessary for a prosecution under Act XIII of 1859 that an artificer should work with his own hands. Section 1 of the Act covers the case of a head-artificer or workman who undertakes to get certain work done by other artificers, workmen or labourers under his own supervision and direction.

Mr. *Robertson*, for the Applicant.

JUDGMENT.—This is a case under the Workmen's Breach of Contract Act, 1859. It appears from the agreements filed in the Magistrate's proceedings that the respondent Ah Moon Shoke received an advance from the petitioner Ma Sein Yin to build a house for her. It is alleged that when the house was only half finished, the respondent refused to go on with the work. Ma Sein Yin admitted that Ah Moon Shoke "did not build himself" though she said he is a head-carpenter. The Additional Magistrate dismissed the complaint holding that the respondent is not an "artificer, workman or labourer" within the meaning of the Act, because he took no part in the work himself. No authority is given for this decision. It is apparently incorrect to say that the respondent took no part in the work. Though he may not have handled any tools himself, he was presumably the supervisor and director of the manual labour engaged in building the house. It is not necessary for a prosecution under the Act that the artificer should work with his own hands. This is clear from section 1 which expressly provides for cases where a head-artificer or workman (such as Ah Moon Shoke appears to be) undertakes to get a certain work done by other artificers, workmen or labourers according to the terms of a contract. In the Madras ruling *Gilby* v. *Subbu Pillai* (1), the ordinary business of the accused was that of a contracting bricklayer and the contract which he was accused of breaking was a contract for earthwork. Subbu Pillai was not himself a workman at earthwork and it was held that he did not come under the Act. The case is clearly distinguishable from the present case in which the accused is a "carpenter-contractor" or "head-carpenter" under whose supervision and direction the house was to be built by journeymen carpenters. I think the case falls clearly within the scope of the Act.

The order of dismissal is set aside and it is ordered that the complaint shall be restored to the file of the Additional Magistrate, who should enquire into it and dispose of it under the Act.

Order set aside.

(1) 7 M. 100; 1 Weir 690.

In re SINNU GOUNDEN.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No 673 OF 1913.
CASE REFERRED No. 95 OF 1913.
January 22, 1914.
Present:—Mr. Justice Miller and Mr. Justice Spencer.
In re SINNU GOUNDEN AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898*)*, *ss.* 247, 403, 438, 439, 417, 428—*Summons case—Acquittal of accused obtained by improperly procuring complainant's absence—Revision—Appeal from acquittal—Additional evidence.*

A brought a complaint against *B* under section 426, Indian Penal Code. On the date fixed for the trial, *B* improperly procured *A*'s arrest on a false charge of committing nuisance, and the Magistrate acting under section 247, Criminal Procedure Code, acquitted *B* because *A*, the complainant, did not appear. Upon *A's* application the District Magistrate referred the case to the High Court recommending that the order of acquittal may be set aside and a new trial directed but the High Court declined to interfere, inasmuch as

(1) the order of acquittal was strictly in accordance with law;

(2) it is a sound rule of practice not to interfere in revision when there is no error in law on the face of the record;

Keshab Chunder Roy v. *Akhil Metey*, 22 C. 998; *Emperor* v. *Tirth Das Tewalram*, 17 Ind. Cas. 403; 6 S. L. R. 120; 13 Cr. L. J. 771; (1913) 1 Cr. L. Rv. 15, followed.

(3) there was an appeal from an acquittal.

In the matter of Aurokiam, 2 M. 38; 2 Weir 566; 2 Ind. Jur. 858; *Thandavan* v. *Perianna*, 14 M. 363; 2 Weir 571; *Emperor* v. *Madar Bakhsh*, 25 A. 128; A. W. N. (1902) 200 and *Empress* v. *Miyaji Ahmed*, 3 B. 150, followed.

Suraiya Sastri v. *Venkata Rao*, 2 Weir 457; *Narayanasami Aiyar* v. *Jannaki Ammal*, 2 Weir 308; *Rangasami* v. *Narasimhulu*, 7 M. 213; 8 Ind. Jur. 247; 2 Weir 477; and *Queen-Empress* v. *Hardeo Singh*, A. W. N. (1891) 120, distinguished.

There is nothing in the language of section 417, Criminal Procedure Code, to limit appeals against acquittals to cases in which Courts have, owing to some error of law or misappreciation of evidence, come to a wrong decision on the evidence before them.

Queen-Empress v. *Judoonath Gangooly*, 2 C. 273; 1 Ind. Jur. 629, followed.

There is no distinction under the Code between the right of appeal against an acquittal and the right of appeal against a conviction.

Queen-Empress v. *Bibhuti Bhusan Bit*, 17 C. 485; *Queen-Empress* v. *Prag Dat*, 20 A. 459 at p. 464; A. W. N. (1898) 117 and *Emperor* v. *Chattar Singh*, 7 P. R. 1904 Cr.; 28 P. L. R. 1904; 1 Cr. L. J. 781, followed.

Section 428, Criminal Procedure Code, allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions.

Under section 403, Criminal Procedure Code, an acquittal under section 247, Criminal Procedure Code, operates as a bar to a trial for the same offence and a District Magistrate cannot order a re-trial of the acquitted person.

Suranja Sastri v. *Venkata Rao*, 2 Weir 457; *Narayanasami Aiyar* v. *Janki Ammal*, 2 Weir 308; *Rangasami* v. *Narasimhulu*, 7 M. 213; 8 Ind. Jur. 247; 2 Weir 477; and *Queen-Empress* v. *Hardeo Singh*, A. W. N. (1891) 120, followed.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of South Arcot, in his letter, dated 12th October 1913.

Mr. *J. C. Adam*, for the Public Prosecutor, for the Government.

ORDER.

MILLER, J.—As the Criminal Procedure Code does not permit a Magistrate to review his judgment in the light of evidence subsequently obtained or to re-admit to his file a case in which the accused has been acquitted under section 247 owing to the absence of the complainant, even if good reasons were shown for his non-appearance, I should hesitate without further consideration to hold that the Legislature intended to permit this Court in appeal or revision to set aside an acquittal merely on the ground that fresh evidence is available which could not be produced at the trial, or on the ground that a complainant has shewn sufficient reason for his failure to appear and prosecute his complaint, before the Magistrate in a summons case. But in the present case we must take it that the acquittal of the accused under section 247 was procured by his own trick; he himself is responsible for the complainant's failure to appear. The order was, we may say, obtained by a fraud on the Court and though even in these circumstances the Code does not permit the Court which made the order, to vacate it on proof of the fraud, interference by this Court may be a proper exercise of our powers in revision, or possibly in appeal, to avoid a miscarriage of justice.

We have not been referred to any case in England in which *certiorari* has been had to quash an order of acquittal made by an inferior Court for fraud in the person procuring the order. There is a case *R.* v. *Unwin* (1) (referred to in Archbold's Criminal Pleadings, 23rd Edition, page 132; 10 Halsbury's Laws of England, page 197 foot-note) which seems to have been something like

(1) 7 Dowl P. C. 578.

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the present case and in which *certiorari* was refused but I have not been able to see the report of that decision. But we have the authority of Archbold's Criminal Pleadings (23rd Edition page 292) for saying that a new trial after acquittal in a case of misdemeanour would be granted if the verdict had been obtained by irregularities committed by the defendant himself and though no case is there cited in which a new trial has actually been allowed on these grounds, the authority of Archibold's Treatise is so high that it is not unsafe to accept it as correctly stating the principle on which the Courts would have acted in England in former days.

In India we have power to revise an order which is improper (section 435 of the Code of Criminal Procedure) and an order, though strictly in accordance with the law as in the present case, may, I think, be said to be improper if it was procured by the fraud or trick of the party asking for it, and would not have been made but for that fraud or trick. The order before us is one which but for the accused's deceit would not have been made in the circumstances, and so may be said to be an improper order though the Magistrate's action was strictly correct.

Our powers in appeal are not defined by the Code further than this, that an appeal may lie on a matter of fact as well as on a matter of law except in a case tried by a Jury (section 418). The Code does not expressly state whether these matters are matters appearing upon the record, matters, that is, which the inferior Court has or might have determined, or whether we are at liberty to admit an appeal on some extraneous matter which ought to have affected the decision, had it been known at the time of the trial—but which was not before the inferior Court.

I have not found a case in any of the High Courts which decides this point. In *Queen-Empress* v. *Pray Dat* (2), the learned Judges state as one of the requirements of an appeal that the ground for interference should be apparent on the record, but it cannot be said that they were deciding the present point.

(2) 20 A. 459 at p. 464; A. W. N. (1898) 117.

But there is nothing in the Code of Criminal Procedure to suggest that, so far as the right of appeal is concerned, there is any difference between the case of an appeal from a conviction and from an acquittal, and I should not like to hold that an appeal from a conviction could not be entertained, if based on the concealment of a material fact from the Court which conducted the trial. I agree, therefore, that in this case, the Local Government might have directed the filing of an appeal against the acquittal and that being so, I agree also that we ought to refuse to interfere on the District Magistrate's report of the case.

The District Magistrate is, no doubt, not the party entitled to appeal from an acquittal but his report to the High Court is intended to move the Court to act under section 439 of the Criminal Procedure Code, that is, to act as a Court of revision and though it is made at the instance of the complainant, it contains the District Magistrate's presentation of the case and it seems to me that to entertain proceedings by way of revision on a District Magistrate's report in a case where an appeal would lie from an acquittal is contrary to the spirit, if not, to the letter of sub section 5 of section 439 of the Criminal Procedure Code.

SPENCER, J—In this case, the complainant preferred a complaint of mischief under section 426, Indian Penal Code, on June 14th against two individuals; process was issued against them and the complainant was informed of the date of hearing in person. On June 23rd, the date fixed for the trial, the Magistrate acquitted the accused under section 247, Criminal Procedure Code, owing to the complainant not being present in Court when the case was called on. It subsequently transpired that the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge of committing nuisance, after he had come to Gingee where the Magistrate's Court was situated, (see the judgment in C. C. No. 638 of 1913 on the file of the 2nd class Magistrate of Gingee). Under these circumstances the District Magistrate has under section 438 referred the case to the High Court for setting aside the order of acquittal and for directing a new trial.

In re SINNU GOUNDEN.

The question for our decision is whether, assuming that the 2nd class Magistrate would have exercised his discretion differently by adjourning the hearing to another day, had he been aware of the cause of the complainant's failure to appear, this Court acting as a Court of Revision will set aside the acquittal and order a fresh trial.

Upon the materials before him when the order under section 247 was passed, the Magistrate's procedure was strictly proper and in accordance with law. This section declares that the Magistrate shall acquit the accused unless for some reason, he thinks proper to adjourn the hearing of the case to some other day. Such an acquittal, after the accused has appeared and answered to the charge, will operate as a bar to his being again tried for the same offence as he is a person "tried" by a Court within the meaning and for the purposes of section 403, Criminal Procedure Code, [*Suraiya Sastri* v. *Venkata Rao* (3)]. The Magistrate has no power to revive the proceedings, as there is no provision in the Code of Criminal Procedure resembling Order IX, rule 4, of the Civil Procedure Code, by which a case can be restored to file by the Court which dismissed it; nor can the District Magistrate order a re-hearing [*Narayunasami Aiyar* v. *Janaki Ammal* (4), *Rangasami* v. *Narasimhulu* (5) and *Queen-Empress* v. *Hardeo Singh* (6).]

Coming next to a consideration of what are the powers of the High Court in such a matter, I think there can be hardly any doubt that if this matter came up for determination in a Court governed entirely by English Law, the answer to the question whether the acquittal could be interfered with, would be in the negative.

In English Courts the maxim of *nemo debet bis vexari* is given full scope. It has been repeatedly held in England that if an accused person has been once tried and acquitted upon the merits by a Court of competent jurisdiction so as to have been put in peril of conviction, he cannot again be tried upon the same charge, but if charged, he can successfully plead *autrefois acquit*. It is true that in *Reg.* v. *Scaife* (7), a new trial was ordered in a case where one of the accused indicted for felony procured the absence of a witness whose evidence taken before a Magistrate was read against himself and others jointly tried with him.

But *Reg.* v. *Scaife* (7) was dissented from in later cases, *Reg.* v. *Bertrand* (8) and *Reg.* v. *Murphy* (9).

In England the Courts have resolutely set their face against granting new trials after acquittals for murder and felony on the ground of misreception of evidence, misdirection, or that the verdict was against the evidence and the same principle has been extended to misdemeanours also [See *Reg.* v. *Duncan* (10)].

It has been further held that acquittals and dismissals cannot be quashed by *certiorari* even though the Justices who tried the cases were disqualified by interest or bias, *Reg.* v. *Galway Justices* (11) and *Reg.* v. *Antrim Justices* (12). The latest case on the point is that of *Reg.* v. *Simpson*; *Ex parte Smithson* (13) in which the doctrine has been stretched to the length of holding that a dismissal of information could not be disturbed even though one of the five Justices who acquitted the accused was disqualified and though the Court might be said, to that extent, not to be a competent tribunal.

In India, however, matters stand upon a different footing. Here appeals against orders of acquittal are allowed by section 417, Criminal Procedure Code, a provision of law which is quite alien to the principles upon which English Courts administer the law against criminals. We have also section 403 which prohibits a second trial for the same offence, provided that the conviction or acquittal at the first trial remains in force.

(3) 2 Weir 457.
(4) 2 Weir 308.
(5) 7 M. 213; 8 Ind. Jur. 247; 2 Weir 477.
(6) A. W. N. (1891) 120.

(7) 17 Q. B. 238; 2 Den. C. C. 281; 20 L. J. M. C. 229; 15 Jur. 607; 5 Cox. C. C. 243; 117 Eng. Rep. 1271.
(8) L. R. 1 P. C. 520; 4 Moore P. C. (N. S.) 460; 36 L. J. P. C. 51; 16 L. T. 752; 16 W. R. 9; 10 Cox. C. C. 618; 16 Eng. Rep. 391.
(9) L. R. 2 P. C. 535; 6 Moore, P. C. (N S.) 177; 38 L. J. P. C. 53; 21 L. T. 598; 17 W. R. 1047; 16 Eng. Rep. 693.
(10) 7 Q. B. D. 198; 50 L. J. M. C. 95; 44 L. T. 521; 30 W. R. 61; 14 Cox. C. C. 571; 45 J. P. 456.
(11) (1906) 2 Ir. R. 449.
(12) (1905) 2 Ir. R. 603.
(13) 58 S. J. 99; 30 T. L. R. 31.

If the conviction or acquittal is set aside by a Court of competent jurisdiction, it follows that the accused cannot successfully plead the original decision in bar of further proceedings.

The safeguard of the subject consists in the fact that no appeal against an acquittal will lie except at the instance of Government and that Government only exercise this power in cases in which there has been in their opinion a substantial failure of justice.

It appears *prima facie* that there was a failure of justice in the present case if the complainant was prevented from presenting his complaint and obtaining the redress that the criminal law allows, owing to a circumstance beyond his control, namely, his wrongful arrest and detention on a false charge, a fact which the Court which tried the case of nuisance found to be true. But this was a circumstance which was not in evidence at the time when the Court passed the order of acquittal under section 247, Criminal Procedure Code, on the complaint of mischief. Of course, he may have his remedy in an action in tort of malicious arrest against the constable, or against the accused if he instigated the constable or he may proceed criminally against them, if so advised, for offences under sections 211 and 341, Indian Penal Code, but he will still have a grievance that his complaint of mischief has not been heard.

Now there is nothing in the language of section 417, Criminal Procedure Code, to limit appeals against acquittals to cases in which Courts have, owing to some error of law or misappreciation of evidence, come to a wrong decision on the evidence before them.

It has been held that the Legislature has allowed by this section an appeal by the Local Government in the widest terms and without any limitation whatever. See *Empress* v. *Judoonath Gangooly* (14) and that there is no distinction in the Code between the right of appeal against an acquittal and the right of appeal against a conviction, both being governed by the same rules and being subject to the same limitations. See the *Queen-Empress* v. *Bibhuti Bhusan Bit* (15) and *Queen-Empress* v. *Prag Dat* (2) and *Emperor* v. *Dhattar Singh* (16).

(14) 2 C. 273; 1 Ind. Jur. 629.
(15) 17 C. 485.
(16) 7 P. R. 1904 Cr.; 97 P. L. R. 1904; 1 Cr. L. J. 781.

Section 428, Criminal Procedure Code, allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions, although cases in which this power is exercised will naturally be rare.

I would, therefore, be prepared to set aside the order of acquittal in this case and order a re-trial, if the matter had come before the Court by way of appeal presented by the Local Government under section 417.

But in revision it has always been regarded as a sound rule of practice not to interfere when there is no error in law on the face of the record [*Emperor* v. *Sakharam* (17); *Keshab Chunder Roy* v. *Akhil Metey* (18) also *Emperor* v. *Tirth Das Kewalram* (19)] and not to interfere in cases of acquittal in which Government might have appealed under section 417, Criminal Procedure Code, but has not done so. See *In the matter of Aurokiam* (20) also *Thandavan* v. *Perianna* (21); *Emperor* v. *Madar Bakhsh* (22) and *Queen-Empress* v. *Miyaji Ahmed* (23). In the former respect the Courts in India conform to the practice of the English Courts when dealing with writs of *certiorari* and the now obsolete writs of error; for the latter practice there is now the authority of clause 5 of section 439, Criminal Procedure Code.

In *Queen-Empress* v. *Hardeo Singh* (5) Straight, J., acting in revision, ordered a new trial upon a reference by the Sessions Judge when the accused had been acquitted under section 247 on a complaint of mischief and assault owing to the complainant's absence through fever, but this is the only reported instance that I have been able to discover of a High Court in exercise of their revisional powers setting aside an order of acquittal upon facts not before the Court that tried the case. Even that instance was prior to the introduction of clause 5 of section 439 by Act V of 1898.

I, therefore, consider that our proper course is to refuse to interfere with the

(17) 4 Bom. L. R. 686.
(18) 22 C. 998.
(19) 17 Ind. Cas. 403; 6 S. L. R. 120; 13 Cr. L. J. 771; (1913) 1 Cr. L. Rev. 15.
(20) 2 M. 38; 2 Weir 566; 2 Ind. Jur. 858.
(21) 14 M. 363; 2 Weir 571.
(22) 25 A. 128; A. W. N. (1902) 200.
(23) 3 B. 150.

RADHA BALLABH v. EMPEROR.

acquittal on the District Magistrate's reference.

Reference not allowed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 990 OF 1913.
January 15, 1914.
Present:—Mr. Justice Rafique.
RADHA BALLABH—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (I of 1900*), s.* 147—*Masonry edging added to* chabutra, *whether material alteration—Conviction.*

The mere addition of a masonry edging to a *chabutra* attached to a house within the Municipality is not a material alteration of it so as to furnish ground for conviction under section 147 of the Municipalities Act.

Criminal revision against an order of the District Magistrate of Aligarh.

Mr. *Satya Chandra Mukerji*, for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This is an application in revision from an order of the learned District Magistrate of Aligarh upholding the conviction of one Radha Bullabh under section 147 of Municipalities Act. It appears that Radha Ballabh is a resident of Hathras and has a house within the Municipality of that town. He had a *kutcha chabutra* in front of his house to which were added a masonry edging and two masonry *payas* on the top without obtaining the sanction of the Municipality. The Municipal Secretary reported against the applicant in respect of the masonry edging of the *chabutra* only, upon which a notice was issued by the Municipal Board to the applicant on the 15th March 1913 under section 87, clause 5, of Act I of 1900, calling upon him to demolish the masonry edging of the *chabutra* within fifteen days of the receipt of the notice. No mention was made by the Secretary in his report and no demand was made by the Municipal Board in the notice of the 15th of March 1913 with regard to the two *payas* built on the *chabutra*. The applicant did not remove the masonry edging of his *chabutra* as required by the Municipal Board in the notice of the 15th of March 1913. The applicant was accordingly prosecuted and put on his trial before the Tahsildar Magistrate of Hathras who convicted him under section 147 of Act I of 1900 and fined him Rs. 10. On appeal the learned District Magistrate upheld the conviction. The applicant has come up in revision to this Court. He challenges his conviction on the ground that he has not infringed any of the bye-laws of the Municipality of Hathras. It should be observed at the outset that both the lower Courts have taken into consideration the erection of the two *payas* on the *chabutra* also on coming to a decision, adverse to the applicant though the notice of the 15th March 1913, contained no mention of the said *payas*. The existence of the said *payas* must, therefore, be left out of consideration in determining the guilt of the applicant. The learned District Magistrate has found that the construction of the masonry edging to the *chabutra* amounts to a material alteration. I am unable to agree with him as to his interpretation of what constitutes a material alteration. There has been no change in the shape or situation of the *chabutra* and I fail to see how the mere addition of masonry edging to the *chabutra* can be described as a material alteration of it. The learned District Magistrate remarks that it may involve an encroachment on the public road or may be the beginning of a superstructure. There is no evidence that any encroachment has been made on the public road or that the applicant has constructed the masonry edging with a view to building something on the *chabutra*. No one can be convicted of a possible offence which he might perhaps commit in future in regard to the Municipal bye-laws. I, therefore, allow the application, set aside the conviction, and sentence of fine and direct that the fine, if realized, be refunded.

Application allowed.

HAKIKAT RAI *v.* RAM SARAN DAS.

among *Brahmans* of the Amritsar District, it was shown that the village proprietors were *Brahmans* devoted to agriculture, though some of them followed other professions such as trade or service, a Division Bench of this Court held that it was for the plaintiff to establish affirmatively that his family, in matters of alienation, were governed by Customary Law.

Again, in *Dhera Singh* v. *Tara Singh* (3), the parties were Bunjahi *Khatris* of the Rawalpindi District following the occupation of *dhobie* and owning no land in the village, it was held that, since agriculture was not the principal occupation of the parties, the onus of proving that the rules of Customary Law prevailed, was on the plaintiff seeking to set aside the alienation.

In *Harnam Singh* v. *Musammat Hardevi* (4), it was held that in the case of *Khatris* the initial presumption is that they follow Hindu Law. Further, as pointed out in that ruling, stress is always laid on the question, whether the claimants form a compact village community or at least a compact and considerable body of land owners in a more or less homogeneous village. In the present case the family to which plaintiff belongs merely possesses some 250 acres of land which has for revenue purposes been measured off into a separate estate and the family stands alone.

Counsel for appellant also points out that, when Daulat Ram died his widow was recorded as holding a share equal to that of each of her brothers-in-law and, that if Hindu Law had been followed, the two brothers of Daulat Ram would have taken his share. We do not think, however, that this incident, easily explainable as it is on the ground of convenience in affording the widow a separate maintenance, can be held to tell in favour of the contention of the learned Counsel. Nor does the fact that in the mortgage-deed impugned, a specific share amounting to 1/6th or 43 acres is mortgaged, show that the parties are not governed by Hindu Law.

We have no hesitation then in concurring with the finding of the learned Divisional Judge in the matter.

(3) 7 Ind. Cas. 527; 88 P. R. 1910; 85 P. W. R. 1910; 175 P. L. R. 1910.

(4) 10 Ind. Cas. 365; 43 P. R. 1911; 86 P. W. R. 1911; 137 P. L. R. 1911.

In view of this decision it is perhaps hardly necessary to enter into the question of necessity. We may, however, state that after hearing Counsel we are satisfied that the mortgage was executed in order to pay just antecedent debts or for the legitimate purposes of trade. As regards the allegation that Pheru Mal was of immoral life, it is not proved that any portion of the mortgage money was raised for, or spent upon, any immoral purpose. The suit is clearly collusive between father and son; the episode in which Pheru Mal was fined for alleged drunkenness after the institution of this suit, appears, as held by the Divisional Judge, to be a childish attempt to manufacture proof of loose conduct for the purposes of this case; and if in 1908 there was some case against him about a woman, that is not enough to say that his general life was immoral. There is, we hold, no satisfactory evidence on the record to show that Pheru Mal was of immoral life. On the contrary, there is evidence to show that he is a competent man of business and that he was selected in 1907 as *Lambardar* of this "*be chiragh*" estate with a chorus of testimony to his good character from his own relatives. An even closer relative than any of the latter now seeks for his own purposes to blacken the character of his father.

We dismiss the appeal with costs.

As regards the cross-appeal relating to costs, we think that the defendant-appellant in the cross-appeal should get his full costs in the lower Court. The suit was a declaratory suit and Pleader's fee is not in such cases assessed on valuation of the subject-matter of the suit. The fee allowed was small and we increase it to Rs. 16. We accept the cross-appeal and grant defendant-appellant, Ram Saran Das, his costs amounting to Rs. 30 with costs in proportion.

Appeal dismissed.

UMRAOSINGH v. SUGANCHAND.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 41-B OF 1912.
July 29, 1913.

Present:—Mr. Mitra, Offg. A. J. C.

UMRAOSINGH—APPLICANT

versus

SUGANCHAND—NON APPLICANT.

Hindu Law—Family business—Attachment of one member's share—Execution—Jurisdiction of Small Cause Court.

The share of an undivided brother in the ancestral family money-lending business cannot be attached in execution of a decree against him personally.

Nga Tha Yah v. *F. N. Burn*, 2 B. L. R. 91 at p. 97; 11 W. R. (F.B.), 8 and *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*, 7 B. L. R. 183; 14 M. I. A. 40 at p. 51, 2 Suth. P. C. J. 434; 2 Sur. P. C. J. 656; 20 Eng. Rep. 701, followed.

A Small Cause Court has no jurisdiction to attach a half share in a joint family property, consisting partly at least of immoveable property.

Application for revision against the order of the Judge, Small Cause Court, Amraoti, dated the 28th February 1912.

Mr. *N. M. Bedarkar*, for the Applicant.

Mr. *G. V. Deshmukh*, for the Non-Applicant.

JUDGMENT.—In execution of a decree for money, the Small Cause Court at Amraoti attached the judgment-debtor's half share out of "the whole estate in the shop of Khushalsingh Buddhusingh". The judgment-debtor and his minor brother were members of a joint undivided Hindu family carrying on an ancestral money-lending business under the name and style above mentioned. The assets consist of money, ornaments, negotiable instruments, bonds and mortgage-deeds. A prohibitory order under section 268 was issued to the judgment-debtor and later on to his brother. In the sale proclamation, the property to be sold was described in similar terms. It was purchased by the respondent Suganchand for Rs. 18 on whose application the lower Court has passed a vesting order under Order XXI, rule 81. The details of what the property was were never at any stage of the proceedings specified. The Pleader for the decree-holder on 15th September 1908, stated that "the property is moveable, the judgment-debtor's interest in which he wishes to attach."

The judgment-debtor has applied for revision under the Berar Small Cause Courts Act. My attention has been drawn to many irregularities in connection with the sale, but I need not notice them. The judgment-debtor, it would seem, was ignorant of the proceedings for sale having been revived in 1909.

It seems to me that the attachment and sale are void on the ground of uncertainty and vagueness. At any rate the Small Cause Court had no jurisdiction to attach a half share in joint family property consisting partly at least of immoveable property. It is admitted that the judgment-debtor was joint with his brother at the date of attachment. His share can only be determined in a general partition and until such a partition is effected, all that can be sold is the equity to obtain a partition of the whole estate, moveable and immoveable. This, in my opinion, cannot be done by the Small Cause Court.

The attachment is also void on the ground of uncertainty. It is impossible to say what property will be allotted to the share of the judgment-debtor in a partition. The law does not contemplate an attachment of something which is unknown and unascertained. As Sir Barnes Peacock in *Nag Tha Yah* v. *F. N Burn* (1) says: "An attachment must specify what is attached..... For instance, it would not do to stick up in the zillah that the creditor attaches all the rights and interests which the debtor possesses in any property in the entire zillah."

In the case of *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (2) their Lordships of the Privy Council observe that "their Lordships feel that it would be a cruel wrong and injustice if under colour of an execution, a thing described as a 'claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to arbitrators, could be put up to judicial sale; a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a description as if it had been all the claims of Ramnath against all his debtors."

I have held that the mortgage-deeds or some at least would represent immoveable property, which the lower Court was not competent to deal with. But even apart from

(1) 2 B. L. R. 91 at p. 97 (F. B); 11 W. R. (F. B.) 8.
(2) 14 M. I. A. 40 at p. 51; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 Eng. Rep. 701.

this, a sale of this vague and uncertain kind can convey no title.

If each item of property had been separately attached, various forms of attachment would have to be resorted to and it is difficult to see how under one form of attachment, properties of various descriptions can be dealt with, as has been attempted in this case.

I, therefore, set aside the vesting order passed by the lower Court and declare the attachment and sale null and void. There has been some delay on the part of the applicant in moving this Court. He will bear his own costs in both Courts. He will also pay the costs of the auction-purchaser in both Courts. I fix the Legal Practitioner's fee at Rs. 15 in each Court. I note that the applicant's learned Pleader has, on behalf of his client, offered to return the money deposited by the auction-purchaser and interest (*damdupat*) thereon.

Order set aside.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 273 OF 1912.

September 15, 1913.

Present:—Mr. McColl, A. J. C.

NGA PO THIN—APPELLANT

versus

U THI HLA—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 9—*Suit relating to monastery between Buddhist layman and monk—Monks may possess property—Monastery not* poggalika *property but* sanghika—Withathagaha *gift defined.*

A suit between a layman and a Buddhist monk in regard to land on which a monastery stands is cognizable by the Civil Courts.

U Te Za v. *U Pyinnya*, U. B. R. (1892—96) 2, 59; *U. Thatdama* v. *U. Meda*, U. B. R. (1897—01) 2, 42, distinguished.

U. Teik Ka v. *Nga Tin Byu*, 10 Ind. Cas. 996; (1910) 1 U. B. R. 78, followed.

Buddhist monks at the present day do and may possess property.

Maung Talok v. *Ma Kun*, (1892—96) 2 U. B. R. 78, dissented from.

A monk can act as owner of a monastery whether dedicated to him personally by the Kyaungtaga or allotted to him by other monks for 12 years at most, but he cannot according to the *vinaya* give away to an individual, either a monk or a layman, a monastery dedicated to him personally. Such a monastery is *sanghika* property and cannot be *poggalika*.

Maung On Gaing v. *U. Pandisa*, P. J. L. B. 614 dissented from.

Poggalika property is such as a monk can dispose of as he thinks fit.

If a monk takes the property of another monk and appropriates it to his own use, the appropriation is valid and is called a *withathagaha* gift, provided (according to the *vinaya*) five conditions are fulfilled, *viz.*, (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property; (4) the owner must be alive when the property is taken and (5) the taker must know that the owner would be pleased at the taking.

Mr. *J. C. Chatterjee*, for the Appellant.

Mr. *San Wa*, for the Respondent.

JUDGMENT.—This is a case of very considerable difficulty, as it involves questions of the Buddhist Ecclesiastical Law.

Section 9 of the Civil Procedure Code lays down that the Civil Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. And in the explanation to that section a suit in which the right to property is contested is declared to be a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

In *U Te Za* v. *U Pyinna* (1), which was a suit between Buddhist monks relating to a *kyaung-taik*, it was held that according to the custom in force before the annexation—such disputes were decided by the Ecclesiastical authorities, that the *Hlutdaw* never interfered with such decisions but, on the contrary, lent its aid to enforce them, that the rights which the Ecclesiastical authorities had acquired remained to them after the annexation and that the Civil Courts should adopt the same practice as the *Hlutdaw* had followed.

In *U Thatdama* v. *U Meda* (2), it was held that not only should the Civil Courts be

(1) U. B. R. (1892—96) 2, 59.
(2) U. B. R. (1897—01) 2, 42.

bound by the decisions of the Ecclesiastical authorities in matters within their competence but they should also abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction. In these two cases all the parties were Buddhist monks.

U Teik Ka v. *Nga Tin Byu* (3) was a case in which a layman had brought a dispute between him and three monks before the Thathanabaing, and having obtained an order in his favour applied to the Civil Court to enforce it. It was contended in that case that as the plaintiff was a layman the Ecclesiastical authorities had no jurisdiction. But it was held that as the Thathanabaing's order was a pronouncement on the religious duties of monks towards the descendants of a *taga* and was directed against subordinate ecclesiastics, it was an order within the Thathanabaing's competence and should be enforced.

This is clearly not an authority for holding, that in a dispute between a layman and a monk, the ordinary jurisdiction of the Civil Courts is ousted and a layman-plaintiff must submit to the jurisdiction of the Ecclesiastical authorities. In the present case, the plaintiff who is a layman did not do so but brought a suit in a Civil Court for trial on the merits, the defendant-respondent who is a monk raised no objection to the jurisdiction of the Civil Courts, and though the property in suit was admittedly at any rate once religious property, I am of opinion that the Township Court had jurisdiction to try the suit on the merits.

The plaintiff-appellant's case is that the land in suit on which a monastery stands was the *poggalika* property of a monk, U Ariza, that a monk, U Pandawa, who was U Ariza's pupil obtained it as a *withathagaha* gift and had subsequently given it to him. He sued for possession.

The defendant-respondent, U Thi Hla, who is living in the monastery standing on the land, raised two inconsistent defences, namely, (1) that he and U Pandawa took the land and *kyaung* as a *withathagaha* gift jointly and that U Pandawa subsequently made a gift of his interest to defendant-respondent and (2) that on the death of U Ariza the property reverted to the original donor who again gave it to the defendant-respondent as his *poggalika* property.

The Township Judge found in plaintiff-appellant's favour and gave him a decree.

The lower Appellate Court found on the authority of *Maung Hmon* v. *U Cho* (4) that a monk can dispose of his *poggalika* property during his life-time, but that if he fails to do so, it reverts to the donor who can select a successor but that if he fails to do so it becomes *thingika* property, but he went on and found that the land in suit had become *thingika* and, therefore, could not be the subject of a gift. He accordingly set aside the decree of the first Court and dismissed the suit.

The learned Additional Judge obviously quoted a ruling without referring to it. The ruling cited by him has no bearing on the point at all. Possibly he referred to Tha Gywe's Treatise on Buddhist Law, page 239, and quoted the ruling he did by mistake for *Maung On Gain* v. *U Pandisa* (5) quoted a few lines lower down on the same page.

The first thing to consider is the principle on which the case should be decided. If the Dhammathats be referred to it will be found that they are hopelessly contradictory and they are also inconsistent with the rules in the Vinaya. Thus in Volume I, U Gaung's Digest, page 464, the compiler says: "The rules laid down in the old Dhammathats are inconsistent with those in the Vinaya, and an attempt has been made in the present treatise to reconcile them, and readers are requested to exercise their own discretion in their application of the rules."

The rule laid down in *Maung On Gain* v. *U Pandisa* (5) referred to by the lower Appellate Court is contained in section 410: "Property (including a monastery) given to a specified *rahan* shall on the death of the original donee revert to the donor who shall be at liberty to again give it away as a charitable gift to whomsoever he likes."

But the rule given in section 405 is diametrically the opposite: "If a deceased *rahan* did not transfer his *poggalika* monastery to any one it shall become *sanghika* property . . . . . .

"The donor has no voice in the selection of a successor to the original donee, the

(3) 10 Ind. Cas. 996; U. B. R. (1910) I, 78.

(4) U. B. R. (1892-96) 2, 397.

(5) P. J. L. B. 614.

LOWER BURMA CHIEF COURT.

CRIMINAL SESSIONS TRIAL No. 30 OF 1909.

March 16, 1910.

Present:—Mr. Justice Hartnoll.

EMPEROR—PROSECUTOR.

versus

J. S. BIRCH AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 289, 292—Documents put into evidence for defence in cross-examination of prosecution witnesses—Right of reply—Practice.

The defence does not lose its right to the last word, that is to say, the prosecutor does not get the right of reply, merely because in the course of the cross-examination of the prosecution witnesses, certain documents are put into evidence on behalf of the defence.

Mr. *Dawson*, for the Crown.

Mr. *DeGlanville*, for the Accused.

JUDGMENT.—DeGlanville claims on behalf of his clients that the prosecutor should not have the right of reply, merely because in the course of the cross-examination of the prosecution witnesses, certain documents have been put in on behalf of the defence and read to the Jury, and that he has the right to the last word. Mr. Dawson contests this claim and argues that, as the law stands, he has the right of reply. In the case of *Emperor* v. *Manuel* (1), under somewhat similar circumstances, I held that the prosecutor was entitled to reply. The correctness of my ruling is questioned and certain cases, that were not available then, have been referred to in support of this contention. It is pointed out that Brett, J., in the case of *Emperor* v. *E. I. Timol* (2), took the opposite view to myself and to the view of Brett, J. which is referred to in the case of *Emperor* v. *Robert Stewart* (3). Two cases of the High Court of Bombay, *Emperor* v. *Bhaskar* (4) and *Emperor* v. *Sharfali Abdulali* (5), have been referred to in which Batty, J., and Beaman, J., have expressed different views. A case of the Judicial Commissioner in Sind has also been referred to. It is printed in reporting the case of *Emperor* v. *Abdulali Sharfali* (5).

When the Criminal Procedure Code was revised and the present Code (V of 1898) superseded the old Code (X of 1882), the wording of section 292 of the Code was altered. In Act X of 1882, the section ran: "If the accused, or any of the accused, has stated, when asked under section 289, that he means to adduce evidence, the prosecutor shall be entitled to reply." In Act V of 1898, the section runs: "If the accused, or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply." Prior to 1898, the Calcutta and Bombay High Courts held diverse views to the Madras and Allahabad High Courts as to how the production of documentary evidence for the defence during the cross-examination of the prosecution-witnesses affected the right of reply of the prosecutor, and to my mind the change of the law in 1898 was meant to finally lay down what the law should be. The judgments which I have quoted above, inclusive of my own, show that there is still diversity of opinion as to what it is. The points for decision to my mind seem to be, as to whether section 292 must be read in connection with the three preceding sections, and as ancillary to them, or whether it is a section independent of the preceding sections, which provide for a contingency that may arise at any stage of the trial. It is argued that the word "any" in section 292 means evidence produced at any stage of the trial; on the other hand, it is also argued that section 292 refers to evidence produced after the accused has been asked whether he means to adduce evidence under section 289. After considering what I believe to be the reason for the change in section 292, the judgments that I have mentioned above and which were not available at the time I passed my order in *Emperor* v. *Manuel* (1), and after consulting my learned colleagues and hearing their views, I am of opinion that it is doubtful as to what meaning should be attached to section 292. It may have been intended that it should stand in a time relation to section 289, in which case the fact that the defence has put into evidence documentary evidence during the cross-examination of the prosecution-witnesses, would not take away the right to the last word of the defence; on the other hand, it may have been intended that, if the accused produced documentary evidence at any stage of the trial, the prosecutor should be entitled to reply. I incline to the latter

(1) 4 L. B. R. 5; 6 Cr. L. J. 115.
(2) 10 C. W. N. cclxvii.
(3) 31 C. 1050; 8 C. W. N. 528; 1 Cr. L. J. 451.
(4) 30 B. 421; 8 Bom. L. R. 421; 4 Cr. L. J. 1.
(5) 1 Ind. Cas. 280; 11 Bom. L. R. 177; 9 Cr. L. J. 284.

view; but I consider the matter doubtful. That being so, I am of opinion that the benefit of the doubt should be given in favour of the accused.

I accordingly rule that in this case, if on being asked under section 289, the accused state that they do not intend to adduce evidence and do not do so, the prosecutor shall not be entitled to reply.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 36 OF 1914.

February 6, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

THE SESSIONS JUDGE OF CUDDAPAH—PETITIONER

versus

KONDETI OBALESU AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), ss. 467 to 471—Forgery committed by person not party to proceedings—Sanction, whether necessary.

No sanction under section 195 of the Code of Criminal Procedure is required, in respect of a forged document, when the person producing it as evidence is not a party to the proceedings.

John Martin Sequeira v. *Laju Bai*, 25 M. 671; 2 Weir 173; *Debi Lal* v. *Dhajadhari Goshami*, 9 Ind. Cas. 557; 15 C. W. N. 565; 12 Cr. L. J. 101, followed.

In re Narayan Dhonddev Risbud, 6 Ind. Cas. 529 12 Bom. L. R 383; 11 Cr. L. J. 368, dissented from.

Petition praying that for the reasons stated in the order of the Sessions Court, dated 12th January 1914, the High Court will be pleased to quash the commitment of the 2nd and 3rd accused in S. C. No. 2 of 1914, on the file of the Sessions Court of Cuddapah.

The *Public Prosecutor*, for the Crown.

Mr. *S. Ranganadha Aiyar*, for the Respondents.

ORDER.—The learned Sessions Judge ought to have followed the law clearly laid down by this Court in *John Martin Sequeira* v. *Laju Bai* (1) that where a person "was not 'a party to the proceedings in the Court' in the case in which the alleged forged Will was produced, no sanction for his prosecution was required." Assuming that Bombay High Court took a different view in *In re Narayan Dhonddev Risbud* (2) (a report which is not available to me) the Sessions Judge was bound by the decision of this Court in *John Martin Sequeira* v. *Laju Bai* (1).

As regards the difference in language between section 469 of the old Criminal Procedure Code of 1872 and section 195 of the present Code, I see no essential difference in meaning and intent. The old section is worded thus: "A complaint of an offence relating to documents described in section 463, 471, 475 or 476 of the Indian Penal Code, when the document has been given in evidence in any proceedings in any Civil or Criminal Court, shall not be entertained *against a party to such proceedings*, except with the sanction etc." The new section 195 (*c*) is "No Court shall take cognizance of any offence described in section 463 or punishable under sections 471, 475 or 476 of the same Code, when such offence has been committed by a *party to any proceeding in any Court* in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, etc."

I think that both sections contemplate the necessity of sanction, only in case the offence which the Criminal Court is asked to entertain has been committed *by a party to the* proceeding in the other Court.

This is also the view taken in *Debilal* v. *Dhajadhari Goshami* (3) which refers with approval to *John Martin Sequeira* v. *Laju Bai* (1). I, therefore, do not accept the reference and direct the Sessions Judge to proceed with the trial of the prisoners committed to his Court.

Reference not accepted.

(1) 25 M. 671; 2 Weir 173.

(2) 6 Ind. Cas. 529; 12 Bom. L. R. 383; 11 Cr. L. J. 368.

(3) 9 Ind. Cas. 557; 15 C. W. N. 565; 12 Cr.L.J. 101.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 197 OF 1913.

December 13, 1913.

Present:—Mr. Hallifax, A. J. C.

BHAGWAN—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Dying declaration, not bearing signature of deceased, whether admissible—Proof, oral testimony of person who may have heard it.

A dying declaration not reduced to writing, must be proved by the oral evidence of any person who heard it.

When a Police Officer is testifying to such a declaration, he can refresh his memory by reference to the notes he may have made or read at the time.

Such notes, to be themselves admissible in evidence as proof of the statement made then by the dying person, must bear the signature of the deponent.

Queen-Empress v. *Thakuria*, 7 C. P. L. R. 14, followed.

Criminal appeal against the order passed by the Additional Sessions Judge, Chhindwara, dated the 27th October 1913.

JUDGMENT.—Before Allu Atar, the murdered man, died, he made a statement describing the attack on *Musammat* Baje and himself, which was recorded in writing by Sub-Inspector Sitaram (P. W. No. 11). The learned Additional Sessions Judge has admitted the document itself in evidence (Exhibit P-2) in proof of the statement then made by the dying man, under the authority of the ruling of *Empress* v. *Thakuria* (1). The *dictum* in that case is too widely stated for general application, though it was doubtless correct in respect of the facts then before the learned Judicial Commissioner. The first of the two published paragraphs is as follows:—"I have to observe that as the dying declaration of the deceased, which was taken down in writing by the Head Constable, was admissible in evidence (section 162, Code of Criminal Procedure) the proper course was to put in the document itself and have it formally proved by that officer, not to allow him to give evidence orally as to its purport."

It is probable that the document containing the record of the dying declaration in that case was signed by the deponent, though I cannot find this mentioned anywhere in the judgment of this Court, to which I have referred. With his signature on it, it became a statement in writing made by him, just as any document or deed written for a man by another but signed by himself is his own deed. It was then a written statement of the kind mentioned at the beginning of section 32 of the Evidence Act, and the correct way to prove it was to put in the document. But in this case the document was not signed by the deponent, and the Police Officer was bound by law to take it down in writing. The proper method, therefore, of proving the oral statement of the dying man was by the oral evidence of any person who heard it, that person being allowed to refresh his memory by reference to the notes he made or read at the time. The Sub-Inspector should have been required to read out, as a part of his deposition, his own record of the statement of the murdered man, and to give any explanations and add any further details, of which he was reminded by his record or had any recollection apart from it.

(1) 7 C. P. L R. 14.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 347-B OF 1913.

February 23, 1914.

Present:—Mr. H. S. Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.

EMPEROR—APPLICANT

versus

A. J. COOKE AND OTHERS—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 11, 34, 294 A—Committee of club—Person—"Keeps," meaning of—Common object—Liability of members—Purpose, double, effect of—Official Acts—Presumption—Government, Collector assessing income-tax, whether—Assessing income-tax, whether tantamount to authorization—'Not authorized,' meaning of—Exception—Onus of proof—Evidence Act (I of 1872), ss. 105, 114—Proposal—Drawing list, whether proposal.

The members of the Committee of a club who exercise full control over club matters, inclusive of the premises, 'keep' the premises of the club within the meaning of that expression as used in section 294A of the Indian Penal Code.

Where a house is kept open for a double purpose, *viz.*, as an honest social club for those who do not desire to play as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery.

Jenks v *Turpin*, (1884) 13 Q. B. D. 505, 53 L. J. M. C. 161; 15 Cox. C. C. 486; 49 J. P. 20; 50 L. T. 808, followed.

EMPEROR *v.* A. J. COOKE.

Where the common object is the keeping of a place for the purpose of drawing a lottery not authorized by Government, all who engage in such an object are individually guilty and can be prosecuted jointly or severally

The presumption is that official acts are regularly performed.

A Collector who is a Revenue Officer is not authorized to sanction a lottery, nor would the mere act of taking income-tax from the club on the profits of the lotteries constitute authorization.

In the matter of Ramanajam Chetti, Dyri's Law of Offences, Vol. I, p. 252, followed.

The words 'not authorized' in section 294A, Indian Penal Code mean no more and no less than 'unless authorized, or not having been authorised or without authority', and are in the nature of an exception or proviso and under section 105 of the Evidence Act, the burden of proof lies on the accused to show that the lottery was authorized by Government.

Apothecaries' Company v. *Warburton*, 2 B. & Ald. 40; 106 Eng. Rep. 578, and *Martin* v. *Banjamin*, (1907) 1 K. B. D. 64; 79 L. J. K. B. 81; 96 L. T. 197; 71 J. P. 30; 23 T. L. R. 53; 51 S. J. 50, followed.

Rex v. *James*, (1902) 1 K. B. D. 540; 71 L. J. K. B. 211; 66 J. P. 217; 50 W. R. 286; 86 L. T. 202; 18 T. L. R. 284; 20 Cox. C. C. 156, distinguished.

A drawing list which set out on the first page the list of the winners drawn on a certain day in the month of May, and on its back contained the description: "The sweep for June is now open. It will close on the 20th June 1913. Settling day 23 June 1913. All tickets must be taken in the name of a member etc.," was *held* to be a proposal within the meaning of section 294A, Indian Penal Code.

ORDER.

HARTNOLL, OFFG. C. J.—This case has been referred to this Court by the District Magistrate of Rangoon under the provisions of section 307 of the Code of Criminal Procedure. The five accused, E. J. Cooke, G. Shead, H. Henderson, F. J. Snow, and T. D'Silva have been tried before the District Magistrate of Rangoon and a Jury under the following charges:

Firstly.—That you, between April 1910 and 22nd June 1913, did keep an office or place for the purpose of drawing a lottery not authorized by Government at 279 Dalhousie Street and thereby committed an offence punishable under section 294 A, (*i*) of the Indian Penal Code and within my cognizance.

Secondly.—That you, on or about the (1) 22nd May 1912, (2) 22nd July 1912, (3) 22nd May 1913, did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of tickets in a lottery not authorized by Government by publishing lists of winners ascertained at drawings held on above dates and thereby committed an offence punishable under section 294 A (*ii*) of the Indian Penal Code and within my cognizance.

The Jury brought in a verdict of not guilty on all the charges; but the District Magistrate differed from them. He considers that all the accused are guilty under the first head of the charges; and that A. J. Cocke and T. D'Silva are guilty under the second head of charge. It is not denied that we have full powers to convict the accused in accordance with the opinion expressed by the District Magistrate, but it is submitted that in any case the verdict of the Jury should not be interfered with. Section 307 (3) of the Code of Criminal Procedure enacts that we may exercise any of the powers which we may exercise on an appeal, and that subject thereto, we shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it. In this case the words "District Magistrate" and Sessions Judge are synonymous—section 451 (6) of the same Code.

It is not denied that a lottery was drawn monthly from April 1910 to June 1913 at No. 279 Dalhousie Street, Rangoon. These premises were tenanted by the Indian Telegraph Association Club at first in part, but subsequently wholly. The lottery started in a very small way but assumed in the end very large proportions. The takings for June 1913 amounted to Rs. 1,82,480. All the accused were members of the Committee of the aforesaid Club; but they submit that they did not keep any office or place for the purpose of drawing the lottery. They assert, that the lotteries were managed by the Club through its Committee, that the premises belonged to the Club, that in any case five members out of a Committee of nineteen members cannot be held to keep the premises, that it was the Club, who kept the premises, that perhaps all the members of the Club might be held to keep the premises, or all the members of the Committee, but certainly

not, only five members out of 19. Certain cases were quoted showing that club servants or members of Club Committees could not be sued civilly for goods supplied to Clubs, and it was urged that the five accused could not have a suit brought against them personally for use and occupation. So, it is said, how can they be held to keep the premises? Such cases do not seem to me to be of assistance in arriving at a conclusion in the present case as to whether the five accused kept the premises within the meaning of section 294A—first part—of the Indian Penal Code. They depend on whether there has been a contract according to which members of a Club or Club Committee become personally liable or not for Club debts. The circumstances must differ in each case and depend on matters, such as the actual terms of contracts—the Club Rules—and so on. Even supposing that members of a Club Committee would not be personally liable for goods supplied to their Club, I consider that in certain circumstances they should be held to keep the premises within the meaning of section 294A—first part—of the Indian Penal Code; and the evidence must be examined to see whether or not the accused should be held to so keep the premises in the present case. The minute book, Exhibit W., shows beyond doubt, that the management of this Club rested with the Committee. At a meeting of the Committee held on the 3rd March 1912, at which Cooke, Henderson, Shead and D'Silva were present, it was agreed that the lower flat of the premises alongside the Club be engaged at a rental of Rs. 40 per mensem as well as two temporary clerks on Rs. 40 each, (tentatively) in order to carry out the writing of money orders, free of cost for the public with the object of gradually stopping cash sales, and encouraging the services of the Post Office, thereby safeguarding the interests of the sweep. At another meeting held on the 5th January 1913, at a meeting at which all the accused except Shead were present, it was proposed by Henderson and seconded by D'Silva that the President enter into negotiations for a lower rental, failing which the sum of Rs. 850 be given on a year's lease. This proposal was made in discussing Misquith's letter. Misquith was then the owner of 279 Dalhousie Street. The above extracts from the Committee book show that the Committee had the power of renting premises and the very premises set out in the charge in the second instance. This power must be taken to have been delegated to them by the general body of members. In Stroud's Judicial Dictionary it is said: "'To keep' a place or thing involves the idea of having over it the immediate control of a character more or less permanent.'" The minute book and the accounts show that the Committee exercised full control over Club matters, inclusive of the premises. I would instance item No. 21 of the meeting of the 6th April 1913. It was ordered that the accounts be audited every month by a Committee member. This shows that the Committee had full control over the accounts. Looking at the accounts for February 1913, it is seen, a carpenter was paid for fixing wood work at the entrance to the Club, that servants are paid and supplied with uniform. It seems needless to multiply instances. The immediate control of the premises was clearly vested in the Committee of which the five accused were members. I would, therefore, hold that for the purposes of section 294A of the Indian Penal Code, the Committee kept the premises, and that the accused cannot be allowed to shift their responsibility on to the general body of members or to the Club, which is an abstract entity or incorporeal body. The next question for consideration is whether it is proved that the premises were kept for the purposes of drawing a lottery. They were clearly also kept for the purpose of a Social Club as well, and this being so, it is argued that they were not kept for the purpose of drawing a lottery—that to incur liability under section 294A of the Indian Penal Code it must be shown that the premises were kept exclusively for such a purpose. In the case of *Jenks* v. *Turpin* (1), where certain persons were convicted of keeping and using premises for the purpose of unlawful gaming and assisting in the management, Hawkins, J., said: "If the house had been kept open for a double purpose, *viz.*, as an honest social club for

(1) (1884) 13 Q. B. D. 505; 53 L. J. M. C. 161; 50 L. T. 808; 15 Cox. C. C. 486, 49 J. P. 20.

those who did not desire to play, as well as for the purpose of gaming for those who did, it would nonetheless be a house opened and kept 'for the purpose of gaming.'" I agree with that view and hold that in the present case it is not necessary to show that the premises were used exclusively for the purpose of drawing a lottery. The evidence shows and it is admitted that a lottery was drawn monthly. *But* it must be shown that the *Committee* kept the premises for such a purpose. The accounts and minute books show this conclusively. I have already referred to the entry concerning the engaging of clerks for sweep purposes. I would quote a few more instances:

* * * * *

It is needless to multiply instances. I hold that the Committee kept the premises for the purpose of drawing a lottery. *But* it is argued that on this finding the accused cannot be convicted—that they are not the Committee and are only a part of it. There seems to me to be no substance in such an argument. It is said by Mr. Mayne in his Criminal Law of India, Second Edition, page 466: "Where several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed, and ignorant of what is actually being done". The principle is that laid down in section 34 of the Indian Penal Code which enacts that "When a criminal act is done by several persons, 'in furtherance of the common intention of all,' each of such persons is liable for that act in the same manner as if it were done by him alone". Here the criminal act alleged is "keeping an office or place for the purpose of drawing a lottery not authorized by Government" and, though learned Counsel lays special stress on the word "keep" and argues that if a body of men is held to keep a place, a portion of that body cannot be said to keep it, I am unable to follow his argument. Whether the common object be the keeping of a place for the purpose of drawing a lottery not authorized by Government or the hiring of a gang of housebreakers to commit thefts, it seems to me that all, who engage in such an object, are each individually guilty and that they can be prosecuted successfully in whole or in part—jointly or severally. Here the five accused are shown to be five of a body of men who united together to draw and control a monthly lottery, and, if that common purpose is illegal, they are all equally and individually guilty.

The next contention raised was, that it has not been proved by the prosecution that the lottery was not authorized by Government. The Assistant Government Advocate allows that the burden of proof lies in the first instance on the Crown to show that it was not so authorized. "Government" is defined in section 17 of the Indian Penal Code as follows: "The word 'Government' denotes the person or persons authorized by law to administer Executive Government in any part of British India". The Commissioner of Police, Mr. Tarleton, deposed, that the sweep had not been authorized by Government and cross-examined said: "I say unauthorised, as result of inquiries. I mean to my knowledge there should be some record of it either in the Club or with me". From such evidence, it is clear that Mr. Tarleton has not expressly authorised it and knows of no such authorization. The fact that the Local Government has sanctioned the prosecution may also, in my opinion, be taken into consideration as tending to show that Local Government has never sanctioned it. It is extremely improbable that the Local Government would have sanctioned the prosecution, if it had ever sanctioned the sweep, and it may be presumed that official acts are regularly performed. In my opinion it would have been an irregular act to have sanctioned this prosecution, one of the essentials of the offence being that the lottery was not authorized by Government, if in fact it had been so authorized by the Local Government itself; and in the ordinary course of business, on the Local Government considering whether this prosecution should be sanctioned or not, it was surely its duty to satisfy itself from its papers or otherwise that no such sanction at any rate by itself existed. To have sanctioned the prosecution after the Local Government had itself authorised it, would, in my opinion, have been an irregular act. I

would also refer to those Exhibits which display a desire for secrecy. I would especially refer to JJ. 12, which is headed: "Private and Confidential" and has at the foot of the note: "Note—this is a private communication and all recipients are earnestly requested not to post them up in any prominent place or public notice board". It is a drawing list for April 1913. There are also those Exhibits that are marked, "For members only, private and confidential". Then, again, there is the minute of the Committee which I have already referred to where it was resolved to consult the Commissioner of Police and obtain sound legal opinion, and the notice of the 8th July 1913, which stops all remuneration. If this lottery had been expressly sanctioned, as it assumed such large proportions and became so widely known, surely this would have been within the knowledge of the Commissioner of Police. If there has ever been any express sanction, it would be the simplest thing in the world for the accused to produce it or quote it. Considering this, I think that the prosecution made out a "*prima facie*" case that the lottery was never expressly authorized and that it is for the accused to show that it was authorized. They do not plead that it was expressly authorized, but rely on Mr. Lucas having visited their premises to settle a dispute with reference to a lottery prize and on the Collector of Rangoon assessing them to income-tax, as proving authorization by Government. I should rather say that they relied on these facts at their trial, for they were not strongly pressed at the hearing of this reference. As regards the first incident, I am unable to say that the intervention of Mr. Lucas ever authorized the sweep. He merely went on a complaint being lodged to settle a dispute. As regards the second, it would not be within the scope of the Collector's authority to sanction a lottery. He is a Revenue Officer. The incident is analogous to the facts of the case of *Ramanajam Chetti* (2). Moreover, the mere act of taking income-tax from the Club on the profits of the lotteries would not authorize them. Although the Assistant Government Advocate allows that in the first instance the burden of proof lies on the Crown to show that the lottery was not authorized, my learned colleague, for reasons given in his judgment, considers that the burden of proof lies on the accused persons to show that the lottery was authorized by Government. The words in the section 'not authorized by Government' are equivalent to meaning 'unless it (the lottery) has been authorized by Government' or 'except in the case where it (the lottery) has been authorized by Government'. It is, a reasonable view, in my opinion, to take that they are in the nature of an exception, and as they appear in the section defining the offence, it is reasonable to hold that section 105 of the Evidence Act applies and that the burden of proof lies on the accused persons, to show that the lottery was authorized by Government. An analogous section in the Indian Penal Code would be section 325 and this is provided as an illustration to section 105 of the Evidence Act. I, therefore, agree in the opinion expressed by my learned colleague.

Though the burden of proof, in our opinion, as regards authorization, was placed wrongly, I am unable to see that the accused were in any way prejudiced in consequence, nor is it suggested that they were. They have, no doubt, brought out all facts on which they rely to prove authorization—at any rate they had full opportunity to do so.

In the result as regards the first head of charge, I am of opinion that the verdict of the Jury was manifestly wrong and that all five accused were proved guilty. As regards the second head of charge, the cases of Cooke and D'Silva only are concerned. It was urged that the drawing lists contain no proposal within the meaning of section 294 A. In my opinion they clearly do. KK5 is the first. On the first page is set out the list of the winners drawn on the 22nd May 1912. Then at the back in English and Burmese is printed amongst other matter: "The sweep for June is now open. It will close on the 20th June 1912. Settling day 23rd June 1912. All tickets must be taken in the name of a member. Your name and address is registered against the number of the ticket sent you. No books are sent out and tickets must be applied for by Postal Money Order addressed to a member." It is unnecessary to go

(2) 1 Weir 252.

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further into what is written. KK5 is clearly a proposal within the meaning of section 294A. KK3 is to the same effect except that it refers to July drawings and the August lottery. OO is to the same effect except that it refers to the lottery drawn on May 22nd, 1913, as regards the winners and to the coming lottery for June 1913. The Sangu Valley Printing Press printed many thousands of these drawing lists on the standing order of Cooke and D'Silva. In May 1912 that press printed 18,000 drawing lists, in July 1912 32,000 and in May 1913 33,000. There is clear evidence that a *Durwan* used to distribute the drawing lists at the entrance to the Club premises indiscriminately to those who wanted them, that drawings were witnessed by people of all nationalities, and that the drawing lists were sent by post to those not being members of the Club who requisitioned for them. The bills for the printing go into the accounts which are kept by D'Silva the sweep Secretary—see Exhibit H. Exhibit R, one of a thousand copies printed in June 1913, says that two of the men to whom money orders should be addressed are Cooke and D'Silva and the letter gives a description of the sweep and says that tickets can only be obtained on application to a member by name through Postal Money Order. The letter bears at the bottom "President I. T. A. Club" and so the intention was for Cooke to sign it, as he is the President of the Club.

Exhibit AA is another form of letter saying to whom application should be made for tickets Cooke and D'Silva are two of those mentioned. The evidence is, in my opinion, ample to convict Cooke and D'Silva. They were at any rate two of those who united together to publish these proposals and they clearly took a leading part in doing so. The question of sentence remains. It is urged that this is a test case, that the lottery has been allowed to run on a long time without action being taken, and that everything has been fair and above-board—that certain undertakings were given in the Court of the District Magistrate with reference to the non-publication of drawing lists and not keeping a place for the purpose of drawing the lottery—that the 20 per cent of the proceeds have been applied to benevolent purposes. I would take such arguments into consideration, except that I think that pending the disposal of this case, the lottery should have been stopped altogether. But I am of opinion that the case is not one for a nominal sentence. The lotteries assumed enormous proportions monthly as shown by the evidence of Mr. Lucas. To take the figures for a few months, showing the gross takings and the 20 per cent. held up and not distributed, but kept for other purposes,

Year.	Month.	Gross takings.	Twenty per cent. held up.
		Rs.	Rs.
1912...	March ...	74,000	14,800
	August ...	1,16,250	23,250
	November ...	1,43,350	26,870
1913...	January ...	1,57,221	31,441
	April ...	1,56,330	31,270
	June ...	1,82,050	36,110

The evidence shows contributors not only in Rangoon, but in the Toungoo District and Moulmein. It is probable that many other tickets were taken from many places in Burma considering the number of drawing lists distributed. I would find Albert John Cooke, George Shead, Henry Henderson, Frank John Snow, and Thomas D'Silva guilty of the offence of keeping a place for the purpose of drawing a lottery not authorized by Government and so of an offence punishable under the first part of section 294A of the Indian Penal Code, and would direct that they each pay a fine of Rs. 1,000 (one thousand) or that in default, they be each rigorously imprisoned for six weeks. I would also find Alfred John Cooke and Thomas D'Silva guilty under the second head of charge namely, that on or about the 22nd May 1912, 22nd July 1912 and 22nd May 1913 they did publish proposals to pay sums on an event or contingency relative or applicable to the drawing of a ticket in a

lottery not authorized by Government by publishing the lists of the winners ascertained at the drawings held on the above dates, and that they thereby committed offences punishable under the second part of section 294A of the Indian Penal Code and I would direct that they do pay a fine of Rs. 5 each for each offence—one on or about the 22nd May 1912, a second on or about the 22nd July 1912 and a third on or about the 22nd May 1913—and that in default of payment of such fines, the imprisonment be seven days simple in respect of each fine.

ORMOND, J.—I agree generaly with the conclusions, arrived at by my learned colleague, the Officiating Chief Judge. There can be no doubt that the Club premises were kept for the purpose of drawing a lottery within the meaning of section 294A of the Indian Penal Code, and the only two questions that then arise, relate (*i*) to the proof of the fact of non-authorization of the lottery by Government and (*ii*) to the liability of the accused who formed part only of the Committee of the Club. Although Mr. Tarleton, the Commissioner of Police, does not say that if the Government had authorized the lottery, he would have known it; I think there was evidence to go to the Jury for a finding that the Government had not authorized the lottery; and I think it would be fair and legitimate inference to draw from the facts proved in the case, that the Government had not authorized the lottery. But we are asked to upset the verdict of Jury and I would prefer to decide the case upon points of law as far as possible. In my opinion under sections 105 and 106, Evidence Act, the onus was on the defence to show that the lottery was authorized. Section 105 of the Evidence Act lays the onus on the accused of proving "the existence of circumstances bringing the case * * * within any special exception or proviso contained * * * * in any law defining the offence." Mr. McDonnell for the defence contends that this section does not apply if the proviso or exception is contained in the body of the section. He refers us to the rule of English Law, which is based upon a technical difference between a proviso and an exception. The rule is stated by Lord Alverstone in *Rex* v. *James* (3) as follows:—"It is not necessary for the prosecution to negative a proviso, even thoughthe proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception". No reference is made in that case to the provisions contained in section 14 of 11 and 12 Vict. Ch. 43. Apparently the rule stated above applies to trials upon indictment and not to summary proceedings before justices. It is unnecessary to decide if under the rule as above stated, the onus would be on the prosecution to prove non-authorization in this case. Section 105 of the Evidence Act must be construed without reference to any technical rule of English Law; and if the words "not authorized by Government" are in effect a "special exception or proviso contained in the law defining the offence", the onus is on the accused to prove authorization. The words "not authorized" in section 294A, Indian Penal Code, mean no "more and no less than "unless authorized" or "not having been authorized" or "without authority"; and they are clearly in the nature of an exception or proviso. Section 105 of the Evidence Act, which applies generally to all criminal trials, is analogous to the last part of section 14 of 11 and 12 Vict. C. 43 which applies to summary proceedings before Magistrates and which runs as follows:—"If the information or complaint in any such case shall negative any exemption, exception, proviso or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same." In prosecutions under the old game laws, which made certain acts offences, unless the accused had certain qualifications, it was not necessary for the prosecution to prove the

(3) (1902) 1 K. B. D. 540 at p. 545; 71 L. J. K. B. 211; 66 J. P. 217; 50 W. R. 286; 86 L. T. 202; 18 T. L. R. 284; 20 Cox. C. C. 156.

absence of such qualifications. So, too, in an action for a penalty under 55 Geo. 3 C. 194, section 20 for practising as an apothecary without having obtained a certificate of qualification, it was held that the onus lay on the defendant to show that he had obtained a certificate and that it was not necessary for the plaintiff to prove the negative. *Apothecaries' Company* v. *Warburton* (4).

Illustration (*b*) to section 106 of the Evidence Act is as follows:—"*A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him." I see no difference in principle between that case and the present one. In my opinion, the onus was on the defence to show that the lottery had been authorized. It is not suggested that the accused were prejudiced in their defence by the prosecution having assumed the burden of proving the absence of authority. It is contended for the defence that the lottery must be taken to have been authorized by Government, because it had been going on for so long and the profits derived by the Club from the lottery had been assessed to income-tax; but this clearly does not amount to authorization.

Then as to the liability of the accused the Club premises were, undoubtedly, "kept" for the purpose of drawing the lottery; the Committee had the control and management of the Club premises; the five accused were active members of the Committee and it was under the directions of all five that the place was kept for the purpose of drawing the lottery. The fact that others may have jointly kept the place with them, would not prevent these accused from being directly liable as principals as to the act of "keeping."

In all other respects I concur with the judgment and proposed order of my learned colleague.

We were told by Mr. Mc Donnell that the lotteries have not been stopped; but that lists are not published and that the lotteries are not drawn in the same place more than once. Reliance apparently is placed upon the judgment of *Martin* v. *Benjamin* (5), which was a case cited by the prosecution. I do not wish it to be understood that I accept this to be good law that a person who habitually holds a lottery does not commit the offence of keeping a place for the purpose of drawing a lottery, simply because he has a different place on each occasion. The above case, in my opinion, is not an authority for such a proposition.

Accused convicted.

(4) 2 B. & Ald. 40; 106 Eng. Rep. 578.
(5) (1907) 1 K. B. D. 64; 76 L. J. K. B. 81; 96 L. T. 197; 71 J. P. 30; 23 T. L. R. 53; 51 S. J. 50.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No 569 OF 1913.

August 15, 1913.

Present:—Mr. Saunders, A J. C,

EMPEROR—PROSECUTOR

versus

NGA NYO AND OTHERS—ACCUSED.

Burma Village Act, 1907, *s.* 19 (1)—*Evidence to be given.*

To justify a conviction under section 19 (1) of the Village Act, 1907, it is necessary to show that the accused had built his house without the permission of the Deputy Commissioner, and later than the year 1908, in which year the Act came into force.

JUDGMENT.—The conviction under section 19 (1) of the Village Act is not justified by the evidence. It was necessary to show that the accused had built their houses without the permission of the Deputy Commissioner and later than the year 1908 in which year the present Village Act came into force The old Village Regulation did not contain any provisions corresponding to the terms of section 18 of the present Village Act. The Magistrate states that the houses have been in existence, he thinks, eight or nine years.

The convictions and sentences are set aside and the fines must be refunded. If the prosecution can prove that an offence has been committed, there may be a new trial, but the accused should be tried separately.

Conviction set aside.

PRAKASH CHANDRA KUNDU *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 5 OF 1914.
February 3, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
PRAKASH CHANDRA KUNDU AND OTHERS —ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Excise Act (V of 1909 *B. C.)*, s. 67—*Excise officers assaulted before they entered any house or made any arrest or search—Rioting—Separate sentence—Penal Code (Act XLV of* 1860*)*, *ss.* 147, 353.

A Deputy Inspector of Excise received information, that he would find certain persons in the act of illicitly distilling liquor, if he went to a certain village. He accordingly went with two Sub-Inspectors and a large number of peons, who actually saw the accused and their men removing the distilling apparatus. But before they had time to enter the house and arrest those persons or to make any search whatever, the accused sallied out and proceeded to beat the peons. The accused were convicted of rioting and using criminal force to deter a public servant from the discharge of his duty:

Held, that the assault upon the officers was wholly unjustifiable and the riot was one of a very serious and lawless nature, that the Excise Officers were acting under section 67 of the Excise Act (V of 1909 B. C.); that before they had time to do anything lawful or unlawful in respect of any search, they were wantonly assaulted by the accused, and that as there was no search, it could not be said that there was a search not in accordance with law.

A separate sentence should not be passed upon people convicted of rioting for the offence which is specifically stated to have been the common object of the assembly, unless a specific charge is laid against the individual members of committing such an offence. Therefore, persons who are shown to have committed a separate offence under section 353, Indian Penal Code, should receive a separate punishment, even although the common object of the riot was to commit that offence.

Rule against the order of the Sub-Deputy Magistrate of Arambagh, dated November 19, 1913, convicting the petitioners under section 147 of the Indian Penal Code, and sentencing them each to undergo rigorous imprisonment for two months, and further convicting the petitioners Nos. 1 and 3 under section 353, Indian Penal Code, and sentencing them each to undergo two months' rigorous imprisonment in addition, which order was confirmed on appeal by the Deputy Magistrate of Hooghly, on December 20th, 1913.

Mr. *Caspersz*, and Babu *Manmatha Nath Mukherji*, for the Petitioners.

Mr. *Orr*, Deputy Legal Remembrancer, and Babu *Srish Chander Chowdhury*, Junior Government Pleader, for the Crown.

JUDGMENT.—This was a Rule calling on the District Magistrate of Hooghly to show cause why the conviction and sentence passed on the petitioners should not be set aside or otherwise modified, as to this Court may seem good on the grounds, *firstly* that there having been no search in accordance with the provisions of the law and the Excise Officers not having observed any of the formalities required by law, the resistance offered to them was not unlawful and the conviction under section 147 is bad in law; and *Secondly*, that the Excise Officers were not acting in the exercise of their duty, and the conviction under section 353, Indian Penal Code, is, therefore, bad in law.

We have had the provisions of both the Excise Act of 1878 and the present Act V of 1909 B. C. laid before us and we find that the provisions of the new Act are substantially the same as that of the old, but are stated with much greater clearness and in much greater detail. We may remark that in one particular, with which we are specially concerned in this case, section 67 gives wider powers to Excise Officers than any powers that were given to them by the Act of 1878. Section 67 says "Any officer of the Excise," which would include a peon, "may, subject to any restrictions prescribed by the Local Government by rules made under section 85, arrest without warrant any person found committing an offence punishable under section 46;" and for the present, we need not concern ourselves with sections 68, 69 and 70 which prescribe a formal procedure upon information to the Collector or Magistrate or to a Collector or Excise Officer not below such rank as the Local Government by Notification may prescribe.

What is stated in this case is, that the Deputy Inspector of Excise had information that he would find certain persons in the act of illicitly distilling liquor if he went to this village. He accordingly went with two Sub Inspectors and a large number of peons, who from the finding, actually saw the appellants and their men removing the distilling apparatus, which the Magistrate found, they probably afterwards destroyed, as no traces of it have been found. But before

they had time to enter the house and arrest these persons or to make any search whatever, the accused sallied out and proceeded to beat the peons. The unlawful assembly was joined by two men of higher rank, Prokash Chandra Kundu and Basanta Bhattacharjee, and the finding is clear that these two men were actually found taking part in the rioting. But as regards the accused, Basanta, the first Court held that inasmuch as he did not take any active part in the assault, he might be absolved from the charge under section 353, which was a separate substantive charge and not raised by implication under section 149.

Taking then the simple facts, it would appear that these officers were acting under section 67 of Act V of 1909, and that before they had time to do anything, lawful or unlawful, they were wantonly assaulted by the Dubys, encouraged and assisted by the other two petitioners, Prokash and Basanta. That being so, the legal questions on which the rule was issued, do not seem to arise. There was no search and, therefore, it cannot be said that there was a search not in accordance with the provisions of the law, and there were no formalities to be observed at the time the assault was committed.

We wish to make it clear what it is that the law requires in the way of formalities. There are two portions of the rules made under section 85 which deal with the duties of officers in this respect. The one is rule 75 at page 69 of the Rules dealing with restrictions of the exercise of powers conferred by sections 66 and 67, and that says, "Officers below the rank of Inspector of Excise may exercise in open places only the power conferred by section 67;" the expression 'open place' in this rule means open in the ordinary sense as opposed to closed, but does not include a dwelling house. Obviously two Sub-Inspectors and a Deputy Inspector being present, there was no restriction on their entering the house for the purposes mentioned in section 67. But, as a matter of fact, as we have seen, they did not enter the house.

Then there are the provisions of Chapter X of the Rules dealing with detection, investigation and trial of offences. Rule 8 of that Chapter lays down that the provisions of the Criminal Procedure Code, especially sections 101, 102 and 103 which apply to searches, must be carefully observed by the officer who makes a search with or without warrant. Every officer who conducts a search will fill up Form No. 126. When a search is made without warrant, the officer conducting the search will record either separately or at the foot of the counter-foil of Form No. 126 the grounds of his belief, that an offence punishable under section 46, 48, 52 or 53 has been committed and the reasons for considering, that it is not advisable to obtain a search warrant. Here again this rule has no application to this case, because no search was made. But supposing that the officer had entered the house under section 67, and tried to arrest without warrant any person found illicitly distilling, or to seize and detain any article which he had reason to believe to be liable to confiscation under the Act, or detain and search any person upon whom, and any vessel raft, vehicle, animal, package, receptacle or covering in or upon which, he may have reasonable cause to suspect any such article to be,—it would not have been necessary for him to record his reasons before acting under section 67. If he was acting under section 70, the letter of the law appears to make it necessary that the ground of his belief should be recorded before he enters to search any place. But the provisions of section 67 are not with regard to the searching of any place. They are with regard to the arrest of any person openly committing an offence whether in a house or in the open; and the officer who is empowered to arrest under section 67 in a house, that is, any officer of the rank of Sub-Inspector or above it, need not fill in the Form No. 126 unless he finds it necessary further to make a search in the house. Then he will fill up the Form for the information of the authorities, and he will record at the foot of the counter-foil of the Form the ground of his belief etc. But here, as we have said, there was no occasion for a formal search. Certain persons were seen committing an offence, and before they could be arrested, the Excise Officers were beaten in the open, and the articles which constituted the evidence of the offence, were removed.

That being the finding, we think it is clear that the assault upon these officers was wholly unjustifiable, and that the riot was one of a very lawless and serious nature, and that the petitioners have been very leniently dealt with.

As regards the separate sentence under section 353, it is clear that persons who are shown to have committed a separate offence under section 353 should receive a separate punishment, even although the common object of the riot is to commit that offence; and the argument of the learned Counsel, that the accused Basanta Bhattacharjee was acquitted, he, therefore, cannot be convicted under section 147 with the common object of committing an offence under section 353 shows to what an *impasse* any doctrine to the contrary would lead us. The rulings of this Court have, for a long series of years, been to the effect that separate sentence should not be passed upon people convicted of rioting for the offence which is specifically stated to have been the common object of the assembly, unless, as has been held in several cases, a specific charge is laid against the individual members of committing such an offence. In this case, it would appear that all the offenders were rightly convicted of rioting and that two of the petitioners were also found to have taken part in the assault; whereas the second petitioner Basanta Bhattacharjee was found to have taken no part in the actual assault. But it is clear that the encouragement of riot of this kind is quite sufficient to bring him within the purview of the law of rioting; it is also clear that those persons who committed separable acts of assault should be more severely punished than those who did not. The question is rather an academical one, inasmuch as the whole of the sentence which is passed could very well have been given under the rioting section, without having recourse to the other section.

For all these reasons, we are of opinion that the Rule must be discharged. The petitioners will surrender to their bail and serve out the remainder of their sentence.

Rule discharged.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 568 OF 1913.

August 15, 1913.

Present:—Mr. Saunders, A. J. C.

EMPEROR—PROSECUTOR

versus

NGA KYAUK LON AND OTHERS—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 133—Inoculating children—Trade or occupation.

Some persons, who inoculated and admitted inoculating their children upon an outbreak of small-pox, were ordered under section 133 of the Criminal Procedure Code to stop the practice:

Held, that the section did not apply, inasmuch as the persons could not be said to be carrying on a trade or to be engaged in an occupation.

JUDGMENT.—The order of the District Magistrate is not a legal order. The respondents were six persons who were reported to have inoculated and admitted inoculating their children upon an outbreak of small-pox. They have been ordered to stop this practice under section 133 of the Code of Criminal Procedure. The only part of section 133 which could possibly apply is that which refers to the prohibition of any trade or occupation which is injurious to health. These persons cannot clearly be said to be carrying on a trade or to be engaged in an occupation. The order is set aside.

In any case the joint proceeding against six persons does not appear to have been justified.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 4 OF 1914.

February 10, 1914.

Present:—Mr. Justice Ryves.

NATHI MAL—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of criminal case—Impartiality of Magistrate not doubted.

N and four other persons were put on their trial, the former under section 411 and the latter under section 381 of the Indian Penal Code. The case of *N* was subsequently separated from that of the other four accused. The Magistrate proceeded first to dispose of the case under section 381 which resulted in conviction. The case under section 411 was then taken up:

ISLAM KHAN *v.* EMPEROR.

Held, that as there was nothing to find that the Magistrate would not try the case with perfect impartiality the case could not be transferred.

Application for transfer of a case from the Court of the Joint Magistrate of Cawnpore.

Mr. *G. W. Dillon* (with him Mr. *Howard*), for the Applicant.

The *Government Advocate*, for the Crown.

JUDGMENT.—This is an application for the transfer of a case now pending in the Court of the Joint Magistrate of Cawnpore against Nathi Mal under section 411, Indian Penal Code. It appears that four persons and Nathi Mal and another person, with whom we are no longer concerned, were put on their trial, the first four under section 381, the latter under section 411. The case began on the 4th September 1913. On the 18th of September, the case of Nathi Mal was separated from that of the other four persons and nine witnesses were called for the Crown. The case was continued on subsequent dates. On the 26th of September, the Magistrate decided to dispose of first the charge under section 381 against the other four persons and to postpone the case against Nathi Mal until that case had been decided. That case was decided on the 11th of December 1913, and ended in a conviction of all the accused. The case against Nathi Mal was then taken up and the 15th and 16th of December were fixed for the cross examination of the prosecution witnesses, a charge having been framed against Nathi Mal, under section 411 on the 11th of December. Nathi Mal then moved the District Magistrate to transfer the case; but he rejected the application and then the present application was made to this Court. The main allegation is that it is practically impossible for Mr. Williamson to approach the defence evidence in this case impartially because he has already held that the other four accused did commit theft. It is suggested that the same evidence will be called by Nathi Mal in his defence as was called and disbelieved in the other case. As to this, I can only say that it would be for the Court to consider that evidence and, of course, if it came to the conclusion that the property was stolen property, it does not necessarily follow that the accused would be guilty under section 411. I call the attention of the learned Magistrate to the case of *Emperor* v. *Har Gobind* (1). It seems to me that the principle underlying that case governs this case and I find it impossible to hold that Mr. Williamson will not try the case with perfect impartiality. I reject the application. Let the record be returned.

Application rejected.

(1) 12 Ind. Cas. 652; 33 A. 583; 12 Cr. L. J. 564.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 80 OF 1914.

February 13, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

ISLAM KHAN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 112—Surety—Restriction to local men—Jurisdiction of Magistrate.

A Magistrate has no jurisdiction to put such a restriction upon the nature of the sureties under section 112 of the Criminal Procedure Code, as to direct that they should be local, for such a restriction is not contemplated by the section. That is a matter which must be decided subsequently if objection is taken to the sureties on that ground by the Police authorities.

Mr. *B. N. Sasmal*, Counsel, and Moulvi *A. K. Fazlul Haq*, Vakil, for the Pititioner.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—Upon hearing the learned Deputy Legal Remembrancer, showing cause against this Rule, and on reading the evidence and hearing the learned Counsel in support of the Rule, we are of opinion that the Rule fails on all the grounds except the last.

The Magistrate appears to us to have no jurisdiction to put such a restriction upon the nature of the sureties as to direct that they should be local. It is quite possible that a subsequent objection might be taken by the Police authorities to the sureties offered; but until such objection is taken, the locate of the sureties to be required should not be restricted. The Magistrate is entitled to lay down the number of sureties, the character of the sureties, that is, they should be men of good character, and the class of sureties, that is, they should be men of sufficient substance to furnish security.

But we do not think that the restriction to local men is in any way contemplated by section 112. That is a matter which must be decided subsequently if objection is taken to the sureties on that ground.

We, therefore, in discharging the Rule on the other grounds direct on the fourth ground that the word "local" be expunged from the record.

Rule discharged.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 79 OF 1914.
February 13, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
PREO NATH DATTA—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 109 (a) and (b), 110—*Taking precaution to conceal presence to commit crime—Failure to give satisfactory account of himself—Giving false name and secretly delivering letters containing incitement to commit crime.*

A person who gives a false name and delivers letters secretly, containing incitement to commit crime or demanding money for the means of committing crime, falls within section 109, clause (*a*), of the Criminal Procedure Code.

A person who secretly delivers letters arranging for the commission of dacoities is a person, who in the interests of public peace should be called upon to give security of good behaviour.

The accused, when charged by *A* with endeavouring to secretly deliver letters to *A*'s brother, asking him to assist in some nocturnal enterprise in which revolvers and guns were to be used, was unable to give *A* any satisfactory account of himself:

Held, that this was sufficient to bring him within the meaning of section 110.

Babu *Atulya Charan Bose* and *Asita Ranjan Chatterji*, for the Petitioner.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Dacca to show cause why the order upon the petitioner to furnish security for good behaviour for one year should not be set aside on the ground that the proceedings do not fall within the meaning of section 109 (*b*) but upon the proceedings themselves, they could have only come under section 110, and proceedings under section 110 would be *ultra vires* and contrary to the principles laid down in the case of *Alep Pramanik* v. *Emperor* (1) and *Kismat Akanda* v. *Emperor* (2).

After hearing the learned Deputy Legal Remembrancer for the Crown and the learned Vakil in support of the Rule, we are of opinion that this Rule must be discharged, *firstly*, because we do not agree with the Magistrate in his finding as regards clause (*a*). The learned Magistrate says, the charge under clause (*a*) can hardly stand because a person who delivers letters secretly is not concealing his presence to commit crime; but a person who gives a false name and delivers letters secretly containing incitement to commit crime or demanding money for the means of committing crimes certainly appears to us to fall within clause (*a*). It is conceivable that the accused might have taken himself out of that clause on proof that he had subsequently given his true name and address. But there is no finding in the judgment that the name now given or the address now given is a true one, and certainly the ground upon which the Magistrate removed him from the purview of clause (*a*) is erroneous.

Then as regards clause (*b*), a person who secretly delivers letters arranging for the commission of dacoities, as the Magistrate says, is essentially a person who in the interests of the public peace should be called upon to give security to be of good behaviour. This is not perhaps happily worded, for the finding should have been in the terms of the section. But it is clear from the findings of fact, that the accused, when charged by Ananda with endeavouring to secretly deliver letter to Ananda's brother, asking him to assist in some nocturnal enterprise in which revolvers and guns were to be used, was unable to give Ananda any satisfactory account of himself, and that is sufficient to bring him within the meaning of the section. The rulings under section 110, therefore, to which we have been referred do not apply, and the learned Vakil who appears in support of the Rule candidly admits that he does not rely upon them. If they had any application, they could be very easily distinguished as the facts in this case were essentially different.

(1) 11 C. W. N. 413; 5 Cr. L. J. 191.
(2) 11 C. W. N. 129; 4 Cr. L. J. 464.

The Rule is discharged and the petitioner must surrender to the District Magistrate and furnish the security required of him, or be imprisoned accordingly for the term of one year.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 88 OF 1914.

CRIMINAL REVISION PETITION No. 77 OF 1914.

February 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re KUTTIALIKUTTI MARAKAR AND OTHERS—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 172—Diary not used to refresh memory, whether evidence—Improper admission of such diary, whether sufficient ground for interference.

A Magistrate should not refer to an entry in a diary, not used by a prosecution witness to refresh his memory as corroborative of his evidence but an error of the kind is not sufficient ground for interference, when the Magistrate has found the accused guilty after considering the other evidence in the case.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint Magistrate of Malapuram, in Criminal Appeal No. 95 of 1913, preferred against the conviction and sentence by the 2nd Class Magistrate of Tirurangudi, in Calendar Case No. 355 of 1913.

Mr. *A. Sundaram*, for the Petitioners.

ORDER.—I am not satisfied, after hearing the prosecution 6th witness' evidence read out, that the prosecution 6th witness used his diary to refresh his memory as regards the names of the accused. Hence, the accused had no right to have it produced as evidence—(section 172, Criminal Procedure Code).

The 2nd class Magistrate ought not to have referred to the entry in the diary as corroborative of prosecution 6th witness' evidence, as he seems to have done. [See section 172 clause (2)] but I do not think that that error on the part of the first Court is a sufficient ground for interfering with the judgment of the Appellate Magistrate, who also found the accused

guilty after considering the evidence in the case.

The petition is rejected.

Petition rejected.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 738 OF 1913.

CRIMINAL REVISION PETITION No. 596 OF 1913

January 23, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re GOVINDARAJULU MUDALI—ACCUSED—PETITIONER

Joint trial of thief and receiver of stolen property, legality of.

A joint trial of two accused, one for theft and the other for receiving stolen property, is illegal.

King-Emperor v. *Sunder Singh*, 2 Cr. L. J. 37, 3 P. R. 1905 Cr.; 21 P. L. R. 1905, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Second Presidency Magistrate, George Town, Madras, dated the 14th of October 1913 in Calendar Case No. 25721 of 1913.

FACTS.—Two accused were charged and tried at one trial one, for committing theft with regard to electric bulbs and the other for receiving stolen property in purchasing them. The Magistrate acquitted the accused who was charged with theft, and convicted the other for receiving stolen property. Hence the revision petition to the High Court by the accused who was convicted.

Mr. *S. Krishnamachariar*, for the Petitioner.

The *Crown Prosecutor*, for the Crown.

ORDER.—The trial of the two accused, one for theft and the other for receiving the stolen property was clearly illegal. *King-Emperor* v. *Sunder Singh* (1).

The conviction of the petitioner is set aside and the fine, if paid, will be refunded without prejudice to the Police (if they consider it desirable) taking fresh action against the petitioner.

Revision accepted.

(1) 2 Cr. L. J. 37, 3 P. R. 1905 Cr.; 21 P. L. R. 1905.

RUDAR PRATAB SINGH *v.* RAGHURAJ GIR.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 250 OF 1912.

November 17, 1913.

Present:—Mr. Lindsay, J. C.

Babu RUDRA PRATAB SINGH—DEFENDANT—APPELLANT

versus

RAGHURAJ GIR—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Application for copy, by whom to be made.

Section 12 of the Limitation Act does not require that an application for copy should be made by the party himself.

Ram Kishan Shastari v. *Kashi Bai*, 29 A. 264, 4 A. L. J. 152; A. W. N. (1907) 67, followed.

Ramamurthi Aiyar v. *Subramania Aiyar*, 12 M. L. J. 385, dissented from.

Appeal against an order of the District Judge, Rai Bareli, dated 21st March 1912 upholding that of the Sub-Judge of Sultanpur, dated 14th October 1911.

Babu *Bisheshwar Nath*, for the Appellant.

Mr. *Mahomed Wasim*, for the Respondent.

JUDGMENT.—The only point for decision in this appeal is one of limitation. The appellant was the defendant in the first Court. A decree was given against him and he brought an appeal in the Court of the District Judge of Rae Bareli, which has been rejected as being beyond time. The point to be determined here is, whether or not this finding of the District Judge was correct. The judgment of the first Court was dated the 14th of October 1911. On the 20th of October 1911, an application for a copy of the judgment and decree was made, not by the defendant himself but by one Gauri Shanker, who was a Pleader's clerk. This copy was in due time prepared and given. On the copy the following dates are endorsed, '7th November 1911, the date of posting the notice and the 11th of November, the date on which the copy was delivered.' It is admitted that if in accordance with the dates endorsed on the copy, allowance be made for the time which was required to obtain it, the appeal was within time. But the learned District Judge decided against the appellant on two grounds. He first of all held, that as the appellant had not himself applied for the copy, he was entitled to no deduction of time under the provisions of section 12 of the Limitation Act. He pointed out that the application had been made by one Gauri Shanker, a Pleader's clerk, and he then went on to point out that the application so made was not in order, according to the rule of the Court because it was not signed by a Pleader. The learned Counsel for the appellant argues that under the provisions of section 12 of the Limitation Act, it is not necessary that the application for a copy should be made by a party himself and this view is supported by the decision of the Allahabad High Court reported as *Ram Kishan Shastari* v. *Kashi Bai* (1). There is, it is true, a judgment of the Madras High Court in the opposite sense [compare *Ramamurthi Aiyar* v. *Subramania Aiyar* (2).] The Allahabad High Court, however, refused to follow this ruling and it appears to me that the view of the law laid down in the Allahabad ruling is the one which should be accepted here. As was pointed out in the judgment, section 12 does not require that the application for copy should be made by any particular person. The learned Judges say: "It would be inconsistent with the language of section 12 to hold that because an appellant left the matter of obtaining a copy to his Vakil and the Vakil left it to his clerk, he should be deprived of the time which he otherwise would have got, if he had signed the application for copy himself and handed it over to his clerk for presentation to the *Munsarim*." So far the judgment of the learned District Judge is, in my opinion, erroneous. Another point was taken by the learned Judge. He refused to accept the entries endorsed on the certified copy and after having made some enquiry from the Subordinate Judge's office, he came to the conclusion that, as a matter of fact, the copy was ready on the 3rd of November and that notice of its being ready was posted on the 4th of November. He seems to have thought that in some way or other, the appellant had colluded with some persons in the copying establishment and had got wrong dates endorsed on the certified copy which he subsequently put into Court. No doubt, there is something suspicious in the entries which were made in the various

(1) 29 A. 264, 4 A. L. J. 152, A. W. N. (1907) 67.
(2) 12 M. L. J. 385.

registers in the copying department, but the learned Counsel for the respondent in this case has been obliged to admit that he cannot support the judgment of the Court below where it suggests that there was any collusion between the appellant and the people in the copying office. It is obvious that there was no good reason why the appellant should have false dates endorsed upon the copy, for even if the notice was posted on the 4th of November and delivery was not taken till the 11th of November, there was still ample time to file the appeal. There is nothing in the appearance of the copy itself which would suggest that any alteration had ever been made in the dates. While it may be true, therefore, that there was some error or malpractice in the copying office, there is no foundation for this suggestion that the appellant here was acting in collusion with the office in order to procure admission of his appeal after limitation had expired. I allow the appeal, set aside the decision of the Court below, and direct that the lower Appellate Court do take up the appeal now and decide it on the merits. The respondent will pay the appellant's costs of appeal in this Court.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2929 OF 1910.

March 10, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice and Mr. Justice Woodroffe.

SADHU CHARAN TEWARI—DEFENDANT—APPELLANT

versus

BAIKUNTHA NATH MADAK AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act XIV of 1882), *s* 373—*Civil Procedure Code (Act V of* 1908), *s.* 10, *O. XXIII, r.* 1—*Withdrawal of suit—Permission of Court—Costs, no time fixed for payment of—Institution of fresh suit—Subsequent payment of costs.*

Where a plaintiff has obtained leave to withdraw a suit upon payment of the defendants' costs, it is his duty to pay the costs at once, for until they are paid, there is no withdrawal with the permission of the Court.

Where leave was granted to a plaintiff to withdraw upon payment of costs, but the order did not limit the time within which the payment should be made:

Held, that the plaintiff could institute a fresh suit and make the payment subsequently.

Abdul Aziz Molla v. *Ebrahim Molla*, 31 C. 965, followed.

A Court, when giving permission to a plaintiff to withdraw, with liberty to bring a fresh suit on payment of the defendants' costs, should limit the time within which the payment should be made, and direct that on failure to pay within that time, the original suit shall stand dismissed with costs.

Appeal from the decree of the Sub-Judge of Manbhoom, dated January 16th, 1911, modifying that of the Munsif of Purulia, dated September 20th, 1910.

Babu *Siva Prasanna Bhattacharya*, for the Appellant.

Babus *Tarakishore Chowdhury* and *Mohini Nath Bose*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand made by the Subordinate Judge of the second Court of Midnapore. A suit had been brought for substantially the same cause of action as the present, and, on the 3rd of April 1908, the following order was made in that suit: "That the suit be allowed to be withdrawn by the plaintiff, with liberty to bring a fresh suit on the same cause of action, if not barred, on condition of paying to defendant No. 1 Rs. 4 as costs and Rs. 2 to defendants Nos. 2 and 3." On the 2nd of April 1909, the present suit was instituted and it was successfuly contended before the Munsif that the suit was barred inasmuch as the costs mentioned in the order of the 3rd of April 1908 had not been paid. The result was that the Munsif dismissed the suit. Thereupon, there was an appeal, and the order of remand, to which I have referred, was made. That order is based on a decision of *Abdul Aziz Molla* v. *Ebrahim Molla* (1). It is contended before us that the order of the Subordinate Judge was erroneous. Though I agree with the result of the ruling of *Abdul Aziz Molla* v. *Ebrahim Molla* (1), I would base my decision in this case on somewhat different though not antagonistic reasons. The withdrawal was under section 373 of the Code of 1882 which provides that "if at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff, that the suit must fail by reason of some formal defect, or that there are sufficient grounds for permitting him to withdraw from the suit, with liberty to bring a fresh suit for the subject-matter

(1) 31 C. 965.

of the suit, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit. If the plaintiff withdraw from the suit without such permission, he shall be liable for such costs as the Court may award and shall be precluded from bringing a fresh suit for the same matter." Here permission was given. Therefore, the last paragraph that I have read has no application, for it cannot be said that the plaintiff withdrew without such permission. He withdrew with the permission and the permission is under the section to withdraw from the suit with liberty to bring a fresh suit, that is to say, a permission with a sequel attached to it. The condition of such permission in this case was the payment of costs. Until the costs were paid, the permission was not operative, and so there was no withdrawal with liberty to bring a fresh suit. The result was that until there was such withdrawal, the former suit was still pending. This appears to me to be the literal meaning of the words of section 373 which is now re-produced in effect under Order XXIII, and is in accordance with the view of the English authorities on a cognate provision, for, in *Edginton* v. *Prondman* (2) it was decided that where the plaintiff instead of paying costs went on with the original suit and obtained a verdict, the Court refused to set aside the verdict. Where a plaintiff has obtained leave to withdraw upon payment of costs, it is his duty to pay the costs at once, for until they are paid, there is no withdrawal with the permission of the Court. In that view when the case came before the Munsif, he was not entitled to dismiss it. All he could do was to regard section 10 as a bar to his proceeding with the trial of the suit. In so far as he dismissed it, he exercised a power that was not vested in him, and I think the Subordinate Judge was right when, on payment of the costs, he set aside the decree of the Munsif and sent back the case in order that the Munsif should proceed with the trial; for on the payment of those costs, there was the withdrawal complete under section 373 of the Code or Order XXIII.

It appears to me important in cases of this kind to have regard to the precise terms of the section, and I think it will be well that Courts, when giving permission to withdraw with liberty to bring a fresh suit, should see that their orders are complete, and the proper order in such circumstances is one which limits the time within which the payment should be made, and which goes on to direct that on failure to pay within that time, the original suit is dismissed with costs.

The only thing that remains for consideration is how the costs should be borne in this case. There can be no doubt that the plaintiff was in fault, so that we direct him to pay the defendants' costs before the Munsif and the Subordinate Judge. On the other hand, the defendant-appellant must pay the respondents' costs of this appeal. The costs, so far as they may be, will be set off. With these directions as to costs, we confirm the order of the Subordinate Judge and dismiss the appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 143 OF 1911.

March 4, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

BUDAL *alias* BADLU—PLAINTIFF—APPELLANT

versus

KIRPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Rohtak District—Onus of proof.

In the Rohtak District, there is no custom empowering an agricultural proprietor to deal with his ancestral property as he likes.

The onus of proving so exceptional a custom lies on those who affirm it.

Second appeal from the decree of the Divisional Judge, Hissar Division, dated the 10th November 1910, reversing that of the District Judge, Rohtak, dated the 7th July 1910, decreeing plaintiff's claim.

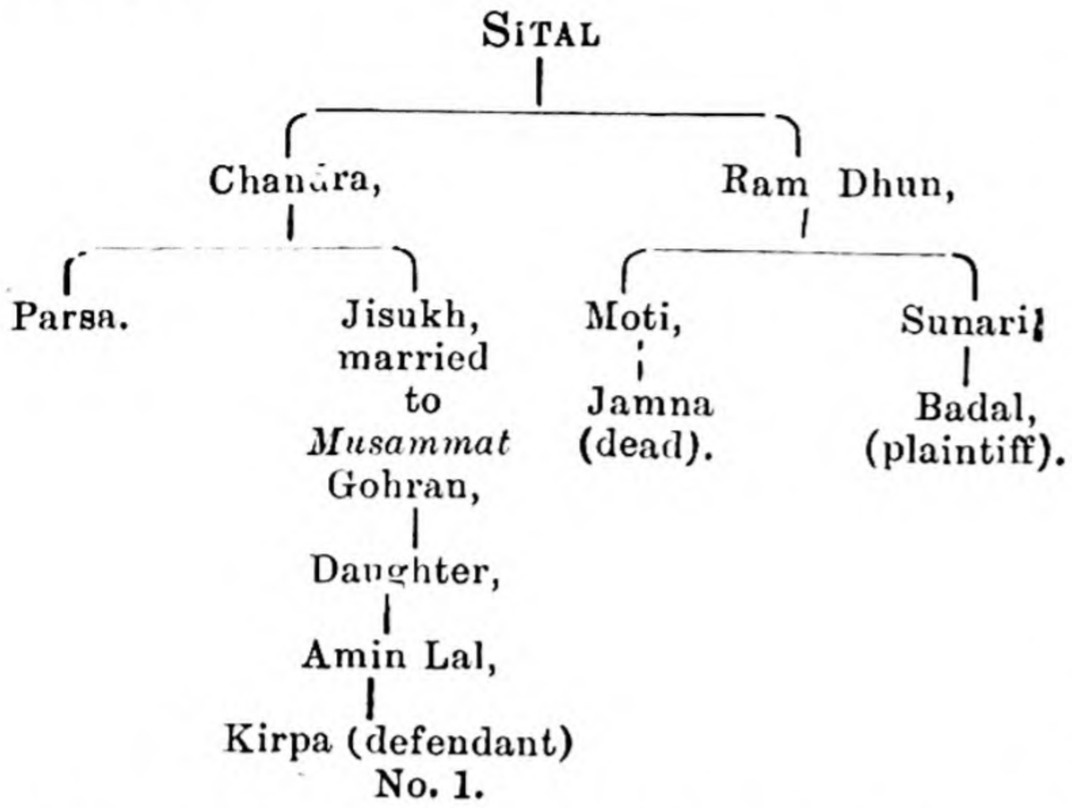
Lala *Lajpat Rai*, for the Appellant.

Mr. *Fazal-i-Ilahi*, Pandit *Ram Bhaj Dat* and Lala *Balwant Rai*, for the Respondents.

(2) 1 Dowl. 152.

BUDAL *v.* KIRPA.

JUDGMENT.—The following pedigree-table will help to an understanding of the facts:—



The property in dispute originally belonged to one Jisukh who died many years ago, leaving a widow, *Musammat* Gohran. Upon the death of the latter, mutation of names took place in favour of Amin Lal, the daughter's son of Jisukh. This was in 1866. An objection was raised by Jamna (since deceased) and present plaintiff, Badal, but their objection was overruled, partly on the ground that they had no *locus standi* in the presence of Jisukh's brother, Parsa, who was alive and consented to the mutation, and partly on the ground that Jisukh and *Musammat* Gohran had, during their lives, practically gifted the property to their daughter's son in return for the services rendered by him to them. Amin Lal died many years ago, and plaintiff Budal alleges that upon his death, he (plaintiff) took possession of the property and has been in adverse possession ever since. This allegation had been found against him by both Courts, but there is no doubt that the plaintiff has been in possession for some four or five years prior to suit. On the 17th of April 1909, Kirpa, defendant No. 1, the son of Amin Lal, sold the property to defendants Nos. 2 to 5 by a registered deed for Rs. 5,000, the whole of which sum is said to have been paid in cash before the Sub-Registrar. Plaintiff sues for a declaration that the sale in question is invalid as against him. The District Judge granted plaintiff the relief sought, but the Divisional Judge on appeal has dismissed the suit on the grounds:—(1) that in the Rohtak District, proprietors have unlimited power of alienation and that plaintiff had failed to prove any custom whereby Kirpa was precluded from making the alienation now impeached and (2) that plaintiff had failed to prove adverse possession for over twelve years.

Plaintiff has appealed to this Court, but we did not think it necessary to call upon his Counsel to address us in the first instance, as we cannot accept the bold proposition laid down, apparently without any authority in support of it, by the Divisional Judge that in the Rohtak District, agricultural proprietors can do as they please with their ancestral land. The onus of proving so exceptional a custom was necessarily upon the defendants, but Mr. Ram Bhaj Dat, on their behalf, was not able to cite any authority in support of the Divisional Judge's statement, except one or two passages from the note by Pandit Maharaj Kishen, printed at page 173 of Tupper's Customary Law, Volume II. This note, according to Mr. Purser who supplied it to the compiler of the volume "cannot be relied upon in doubtful points," and we note that paragraph 24 is not easily reconcilable with paragraph 27. We cannot accept this note as a sufficient authority in support of the wide proposition that Kirpa had, by custom, full power to deal with the property as he pleased. The defendants have not attempted to show, or even indeed to plead, either in the District Court or in their grounds of appeal to the Divisional Judge, that there was any necessity for the sale. All that they urge is that full consideration passed and that the money was duly paid in the presence of the Sub-Registrar. That may have been the case, but we cannot assume without any evidence that Kirpa had any necessity to raise Rs. 5,000 in cash by the sale of the property, which is without doubt ancestral as regards plaintiff, who is a collateral of the original owner, Jisukh, in the third degree. We accordingly accept this appeal with costs throughout and grant plaintiff the decree which he seeks.

Pleader's fee in this Court will be Rs. 32.

Appeal accepted.

RAGHUNATH v. GANPAT.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 272 OF 1912.

August 21, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

RAGHUNATH—APPELLANT

versus

GANPAT—RESPONDENT.

Central Provinces Tenancy Act (IX of 1883*), s.* 38(2) *—Interest, includes re-payments in cash and in grain—Usufructuary mortgages—Notice to landlord.*

The word 'interest' in section 38 (2) of the Tenancy Act, 1883, means a compensation for the use of money or grain, and, therefore, includes a re-payment in cash or in grain.

Bani Parshad v. *Dharam Das Kalar*, 11 C. P. L. R. 17, followed.

It cannot be laid down as a hard and fast rule, that all usufructuary mortgages of occupancy rights require notice to the landlords and give rise to a claim for pre-emption.

Rekchand v. *Krishna*, 11 C. P. L. R. 127, distinguished.

Appeal against the decree of the District Judge, Hoshangabad, dated the 26th February 1912, confirming that of the Subordinate Judge, Hoshangabad, dated the 24th August 1911.

Mr. *J. C. Ghosh*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The plaintiff sues to foreclose on a mortgage of two absolute occupancy holdings in two villages of which defendant No. 3 is the *malguzar*. The latter obtained a surrender of the holdings, subsequent to the mortgage, under a compromise decree against the original tenants, and leased them to the defendant No. 2 in occupancy right. The suit has been contested by defendant No. 2. His plea (amongst other pleas) was that the mortgage was not binding on the *malguzar* or him. The third issue was whether the mortgage-deed will bind defendants Nos. 2 and 3. Both Courts have decided the case with reference to the terms of section 38 of the Tenancy Act, 1883, which was in force at the date of the mortgage, and have held that notice to the landlord was not necessary, having regard to the amount secured and the rent of the holdings. A foreclosure decree for the amount claimed has been passed. The defendant No. 2 has filed this second appeal. It is contended for the respondent that the plea regarding the absence of notice under section 38 of the Tenancy Act has not been properly raised and the point should not be allowed to be argued now. I am of opinion that the parties understood what was meant by the defendant when he questioned the validity of the plaintiff's mortgage as against the *malguzar* and his transferee. Both Courts have understood the defendants' plea in this sense and it is too late now to object to the somewhat imperfect character of the defendants' plea, when no such objection was taken in the Courts below. I have, therefore, to decide whether the absolute occupancy tenant was bound to give notice of his intention to mortgage. The aggregate rent of the two holdings is Rs. 31. The mortgage deed recites that four days ago, the mortgagor took from the mortgagee rupees two hundred, in lieu of which the mortgagor agreed to deliver 20 *manis* of *pisi* wheat by instalments of two *manis* each year, the usufruct of the land being taken at one *mani* and an additional *mani* was to be personally delivered by the mortgagor. In default, the instalments are to carry 50 per cent. per annum compound interest. The plaintiff admits having received the first seven instalments. According to the plaintiff, Rs. 52,081 are still due, out of which he claims one thousand rupees only. Following the ruling of this Court in *Beni Parshad* v. *Dharamdas Kalar* (1) the lower Courts have held that the interest payable in default should not be taken into account, as on compliance with the terms of the bond, this interest may never become chargeable at all. In this view I entirely concur. But the Courts below hold that no interest is provided for by the bond, and the principal alone must be taken into account in determining whether eight years' rent exceeds the principal and interest payable during the five years after the mortgage. This, in my opinion, is unsound. As laid down in the case above cited, "the intention of the Legislature in enacting section 38 (2) of the Tenancy Act was to lay down that a mortgage above a certain value should be treated as equivalent to a sale." It appears to me quite immaterial whether the mortgage is for money lent or grain advanced and whether the re-payment is agreed to be made in grain or in cash. Both are equally

(1) 11 C. P. L. R. 17.

within the mischief aimed at by the section. The word 'interest' in the section was not, in my opinion, intended to be restricted to a repayment in cash. It means a compensation for the use of money or grain. The word 'interest' is not a term of art and we must interpret it in the sense in which it is generally understood in this country. To hold as the lower Courts have done, would, in my opinion, be to frustrate the object of the Legislature. The respondent's learned Counsel argues that as the law favours alienation, I should put a strict construction on section 38, especially in view of the unrestricted right to mortgage, hitherto enjoyed under the supplementary *wajib-ul-arz* by such tenants. But as pointed out by Ismay, J. C., in *Musammat Anandi Bai* v. *Harlal Braham* (2), the Tenancy Act has made considerable changes in the absolute occupancy tenants' power of transfer and I have to give effect to the intention of the Legislature as expressed in section 38. The view which I have adopted is in accordance with an unreported judgment of this Court [*Mohammed Rasoolkhan* v. *Jeonath* (3)] where it was held that the word 'payable' in section 38 should be construed as equivalent to 'receivable by the mortgagee' out of the usufruct. I hold that the mortgage in suit is one which involves the payment of interest, though it is not easy to determine what the rate of interest was.

The appellant relies on the following passage in the judgment of *Mohammed Rasoolkhan* v. *Jeonath* (3) where the usufruct was to be taken in lieu of interest:—"The amount of interest cannot be ascertained, and the principle laid down in *Rekchand* v. *Krishna* (4), therefore, applies." The case was, however, really decided on another ground. In the first Court, a similar finding was recorded and it seems that this finding was not questioned in this Court in *Mohammed Rasoolkhan* v. *Jeonath* (3). In *Rekchand* v. *Krishna* (4) the amount secured by the mortgage included future advances and the principal amount was uncertain. In the case before me, the principal amount is rupees two hundred and there is no question of future advances. To lay down a hard and fast rule, that all usufructuary mortgages require notice to the landlord and give rise to a claim for pre-emption would be to discourage a particular kind of mortgage to which no objection can be taken. I think the lower Courts must ascertain what at the date of the mortgage would be reasonably estimated to be the net profits of the fields for the next ten years. To this must be added the estimated price of one *mani* of wheat each year. Having found the money-value of the instalments, the Court will proceed to determine approximately the rate of interest and then find whether the principal with five years' interest on Rs. 200 exceeds Rs. 248 (that is eight times the rent).

I must notice another argument put forward by the learned Counsel for the respondent. It is said that the transaction was not a loan secured by mortgage but a purchase of future crops. The wording and terms of the document leave no room for such a contention.

The decree of the lower Appellate Court is set aside, and the appeal is remanded to that Court for a fresh decision with reference to the above remarks. It will be necessary to take further evidence in the case. Costs will follow the result.

Decree set aside; Appeal remanded.

(2) 15 C. P. L. R. 1.
(3) Second Appeal No. 130 of 1904.
(4) 11 C. P. L. R. 127.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 763 OF 1912.
February 6, 1914.

Present:—Justice Sir Ashutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

HARADHAN DEB NATH—PLAINTIFF—APPELLANT

versus

BHAGABATI DASI AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 22, cl. (ii)—Specific performance—Vendor and purchaser—Contract for sale of immoveable property—Non-production of essential document of title by vendor—Delay of one month in bringing suit—Hardship—Honest mistake.

On April 22, 1910, the defendant No. 1 entered into an agreement with the plaintiff to transfer to him certain immoveable property and received the earnest money. Under the contract, the transaction was to be completed within three months and the vendor had agreed to satisfy the purchaser that she

HARADHAN DEB NATH *v.* BHAGABATI DASI.

had a valid saleable interest in the property by showing him a copy of the Will of her mother. Neither the original Will nor a certified copy thereof nor the Probate was shown to the purchaser. On August 30, 1910, the defendant No. 1 sold the property to the defendant No. 2 and the plaintiff brought this suit on November 5, 1910, for specific performance of the contract. The defendant No. 2 was aware of the prior contract but, believing that it had ceased to be operative upon the expiry of the time limited for its performance, he spent some money on the improvement of the property after his purchase:

Held, (1) that the plaintiff was entitled to insist upon the production of a certified copy of the Will, as that document constituted a very important and essential element in the investigation of the vendor's title;

(2) that the vendor had not carried out one of the essential terms of the agreement, namely, to satisfy the plaintiff as to her title to the property by productions of the Will of her mother;

(3) that the non-performance of the agreement within the three months prescribed thereby was not attributable to any default on the part of the plaintiff;

(4) that, therefore, on July 22, 1910, that is, at the end of three months from the date of the contract, there was a valid and subsisting contract between the plaintiff and defendant No. 1 which was enforceable at the instance of the plaintiff;

(5) that as the subsequent transferee purchased the property with full knowledge of the prior agreement with the plaintiff, he could not claim to be a *bona fide* purchaser for value without notice, and,

(6) that the plaintiff was entitled to have the contract specificially enforced not only against the vendor but also against the transferee.

A delay of one month in the institution of a suit is not sufficient to justify a refusal of relief by way of specific performance.

Clause (*ii*) of section 22 of the Specific Relief Act contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances. Mere improvidence or inadequacy is no hardship within the meaning of the clause, but the bargain must be so hard as to be unconscionable so that its actual performance would, in the circumstances, be inequitable. But where the hardship has been brought upon a party by himself, the Court will not consider that, as a circumstance in favour of the refusal of specific performance.

A person who entertains a doubt as to the existence, present or future, of a certain fact but deliberately omits to make an inquiry which any prudent man under the circumstances would have made and which could have afforded him protection, cannot be said to be the victim of an honest mistake.

Kandarpa Nath Ghose v. *Jogendra Nath Bose*, 6 Ind. Cas. 141; 12 C. L. J. 391, relied upon.

The defendants, therefore, are not entitled to be re-imbursed for the improvement made on the property.

Appeal from the decree of the District Judge of 24-Pergannas, dated February 2nd, 1912, modifying that of the Sub-Judge of that District, dated July 31st, 1911.

Babus *Mahendra Nath Roy*, *Mohini Mohan Chatterjee* and *Probodh Chandra Dutt* for Babu *Suresh Chandra Das*, for the Appellant.

Dr. *Sarat Chandra Basack* and Babu *Amarendra Nath Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for specific performance of a contract of sale of immoveable property. On the 22nd April 1910, the first defendant entered into an agreement with the plaintiff to transfer to him the disputed property for Rs. 3,000 and received Rs. 500 as earnest money; she subsequently received an additional sum of Rs. 10. Under the contract, the transaction was to be completed within three months. The conveyance, however, was not executed under circumstances which we shall presently state, and on the 30th August 1910, the first defendant, it is alleged, sold the property in suit to the second defendant, who took the conveyance in the name of his wife, the third defendant. The plaintiff thereupon commenced this action on the 5th November 1910. The Court of first instance held that the transferee had taken with notice of the prior contract and that the plaintiff was consequently entitled to a decree for specific performance. Upon appeal, the District Judge has reversed this decision. He has dismissed the claim for specific performance but has directed the first defendant to refund to the plaintiff Rs. 510 paid by him as earnest money. The decree of the District Judge has been assailed in this Court on the ground, that upon the facts found, specific performance should have been decreed. This view has been controverted on behalf of the respondents, and it has been argued that if specific performance is decreed, the defendant is entitled to be re-imbursed on account of the money spent by him for the improvement of the property after his purchase.

The first question for consideration is whether specific performance should be allowed in this case. As already stated, the contract was to be performed within three months from the 22nd April 1910. The second defendant purchased the property after the expiration of the three months and his case is that although, as evidence shows, the transferee was aware of the prior contract, the prior contract had ceased to be operative upon the expiry of the time limited for its performance. To determine whether the contract with the plaintiff was in force on the day when the property was

transferred to the second defendant, we have to consider what had happened between the 22nd April 1910 and the 30th August 1910. Under the contract, the vendor had agreed to satisfy the purchaser that "she had a valid saleable interest in the property by showing him a copy of the order of the Collector about the registration of her name in respect of the property, the Will of her mother Brahmamoyee and other papers relating thereto". On the 15th July 1910, a letter was addressed on behalf of the plaintiff to the first defendant in which it was pointed out that nothing had been done up to that time towards the performance of the contract, and it was stated that as it would be necessary to examine the title to the property and to draft a conveyance, the title-deeds should be sent immediately. A second letter was addressed on behalf of the plaintiff to the first defendant on the 21st July 1910, that is, on the day previous to that fixed as the latest day for the performance of the agreement. In this letter it was stated that the documents relating to the property had not yet been shown, nor had the plaintiff been informed as to whether the vendor had registered her name in the Collectorate, but that the plaintiff was ready with the purchase money and was anxious to examine the documents of title. On the 26th July 1910, Babu Annada Prosad Banerjee, Pleader for the first defendant, wrote a letter to the plaintiff in which he stated that his client had got her name registered in the Collectorate, and that the copy of the order of the Collector and other title-deeds relating to her title had been shown to the plaintiff, but that the plaintiff had delayed to pay the balance of the consideration money and to get a conveyance executed by her. The letter concluded with the statement that, unless within seven days from the date thereof, the balance of the consideration money was paid and a conveyance executed, the land would be transferred at the choice of the vendor and the earnest money would be forfeited. Three days later on the 29th July, a reply was sent to this letter on behalf of the plaintiff in which he alleged that the title-deeds had not been shown to him. There was subsequently a letter dated the 12th August 1910 in which the plaintiff complained that the time for the performance of the contract had already expired and that the vendor had done nothing to complete the transaction, with the result that no other course was left open to the purchaser than to seek the protection of the Court. On the 2nd September 1910, another letter was sent on behalf of the plaintiff to the first defendant in which it was stated that although after repeated demands some of the title-deeds had been produced as also a draft copy of the Will alleged to have been executed by her mother, neither an attested copy of the Will nor the Probate had been shown to him. It is not disputed that the original Will was not shown by the vendor to the purchaser nor was a certified copy thereof produced. It is also conceded that the Probate with copy of the Will annexed was not shown to the purchaser, for the reason explained in this Court, namely, that the Probate had not been actually taken out, though the order for its issue had been made by the Probate Court. It is plain consequently, that the vendor had not carried out one of the essential terms of the agreement, namely, to satisfy the purchaser as to her title to the property by production of the Will of her mother, Brahmamoyee. It was suggested in the Court below that it was impossible for the vendor to carry out literally the terms of the agreement, because the alleged Will which she undertook to produce was in the custody of the Probate Court. This may be accepted as a true statement of the circumstances of the case. But it was plainly practicable for the vendor to do the next best thing, namely, to produce a certified copy of the Will. Consequently it cannot be held that the non-performance of the agreement within the three months prescribed thereby was attributable to any default on the part of the purchaser. The purchaser was entitled to insist upon the production of a certified copy of the Will, as that document constituted a very important and essential element in the investigation of the title. But it has been argued on behalf of the respondents, that the default on the part of the vendor was neither material nor essential, because a copy was produced of a compromise petition between the parties to the Probate proceeding and

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that the plaintiff should have accepted that document in lieu of a certified copy of the Will. In our opinion, there is no force in this contention and the cases to which reference was made on behalf of the respondents namely, *Oxford* v. *Provand* (1) and *Lamare* v. *Dixon* (2), are clearly distinguishable. No doubt, these cases draw a distinction between essential and non-essential terms of a contract. But in the case before us, it is impossible to hold that the production of the Will was a non-essential term of the agreement; nor can we hold that the plaintiff was bound to have the title investigated on the basis of the petition of compromise filed in the Probate proceeding. A question might well arise hereafter as to the validity of that compromise and the plaintiff was entitled to insist upon the production of the original or of a certified copy of the document which the defendant had expressly undertaken to produce. Reference, however, was made to section 55, sub-section 1, clause (*b*), of the Transfer of Property Act to establish the position that the seller is only bound to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power. But it was overlooked that this is subject to the introductory words of the section, namely, "in the absence of a contract to the contrary." The position, therefore, is well established that on the 22nd July 1910, the plaintiff was not in default, that the contract was still enforceable at his instance and that if it remained unperformed, the vendor defendant was responsible for the situation. This view is consistent with the fact that subsequently the vendor defendant did call upon the plaintiff to perform the contract within a period named. There is thus no escape from the position that on the 22nd July 1910, there was a valid and subsisting contract between the plaintiff and the first defendant which was enforceable at the instance of the plaintiff. The subsequent transferee entered into an agreement to purchase the property with full knowledge of this prior agreement. He cannot consequently claim to be a *bona fide* purchaser for value without notice and the plaintiff is entitled to have the contract specifically enforced not only against the vendor but also against the transferee.

But it has been contended that specific performance should be refused on the ground mentioned in section 22 of the Specific Relief Act which provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so; the discretion of the Court, however, is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal. It was argued for the respondents with reference to the principle thus formulated, that there was delay in the institution of the suit, and that as before its commencement, the transferee had spent money for the improvement of the property, the plaintiff should not be allowed a decree for specific performance. We are of opinion that there is no force in this contention. The transfer to the third defendant took place on the 30th August 1910 and the conveyance was registered on the following day. The suit was instituted on the 5th November 1910. The Court in which the suit could be instituted was closed from the 2nd October to the 3rd November. Can we under these circumstances hold that there was such delay in the institution of this suit as disentitled the plaintiff to a decree for specific performance? Our attention has not been drawn to any case in which a delay of one month in the institution of a suit has been held sufficient to justify a refusal of relief by way of specific performance. On the other hand, there are instances in which a delay for a much longer period has not been considered sufficient. For instance in the case of *Marquis of Hertford* v. *Boore* (3) a delay of fourteen months was not considered a bar to the plaintiff's claim. In the case of *Eads* v. *Williams* (4) where the contract was for a lease of a coal mine, a delay of three years and a half was considered fatal. In *Southcomb* v. *Bishop of Exeter* (5) a delay of about eighteen months was held to have the same effect and in *Lord James Stuart* v. *London and North Western Railway Company* (6) a delay

(1) 2 P. C. 135 at p. 156; 5 Moore P. C. (N. S.) 150; 16 Eng. Rep. 472.

(2) 6 H.L. 414 at p. 422; 43 L. J. Ch. 203, 22 W.R. 49.

(3) 5 Ves. 719; 31 Eng. Rep. 823; 5 R. R. 149.

(4) 4 DeG. M. and G. 674; 3 Eq. R. 244; 1 Jur. (N. S.) 193; 3 W. R. 98; 102 R. R. 326; 24 L. J. Ch. 531; 43 Eng. Rep. 671.

(5) 6 Hare 213; 77 R. R. 86; 16 L. J. Ch. 378; 11 Jur. 725; 67 Eng. Rep. 1145.

(6) 1 DeG. M. & G. 721; 21 L. J. Ch. 450; 16 Jur. 531; 42 Eng. Rep. 733; 91 R. R. 272.

of twenty-one months was considered fatal to the bill for specific performance. The shortest period which had been considered fatal is a delay of three months and thirteen days as happened in the case of *Glasbrook* v. *Richardson* (7). We cannot possibly give effect to the contention that the present suit was instituted with undue delay.

It has finally been contended that specific performance should be refused because in the terms of section 22, sub-section 2 of the Specific Relief Act, the performance of the contract would involve hardship on the purchaser defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff. There is clearly no force in this contention. This clause clearly contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances. Instances of cases may be found in the books, where it has been held that mere improvidence or inadequacy is no hardship within the meaning of the rule, but that the bargain must be so hard as to be inconscionable, so that its actual performance would in the circumstances be inequitable. But where the hardship had been brought upon the defendant by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance. On the merits of the case, we consequently hold that the plaintiff is entitled to a decree for specific performance.

The only other question which requires consideration is, whether the defendant is entitled to be re-imbursed for the improvement that he has effected on the property. The case for the defendant is that Rs. 900 has been spent in repairs, and it has been argued that it would be unjust to allow the plaintiff to reap the benefit of this expenditure. In support of this contention, our attention has been invited to a passage from Dart on Vendors, Vol. II, page 944, which, however, is of no assistance to the respondents: "Where a purchaser for value is evicted in equity under a prior title, he will be credited with all money expended by him in necessary repairs or permanent improvement". *Mill* v. *Hill* (8). But this rule does not apply where the improvements have been made after he has discovered the defect in title [*Kenney* v. *Brown* (9), *Clare Hall* v. *Harding* (10) and *Monro* v. *Taylor* (11).] In the case before us, what is the position of the parties? The transferee had notice of the prior agreement; but he alleges that he assumed, that as the three months allowed for its performance had expired, the contract had ceased to be operative. The assumption was obviously erroneous, because even after the expiry of the time prescribed for the performance of an agreement, it may still be enforceable under various circumstances; for instance, if time is not of the essence of the contract, or if the time has been extended, or if the party who is entitled to repudiate the contract by reason of the default of the opposite party, chooses to waive the breach and seeks to enforce the contract. On the other hand, the transferee, if his allegation is assumed to be true, with full knowledge of the prior contract, did not take any steps to communicate with the plaintiff. In this view there was an omission of inquiry which any prudent man under the circumstances would have made. We cannot consequently hold that defendant is the victim of an honest mistake. He has deliberately omitted to make an enquiry which could have afforded him protection. But it is worthy of note that the case for the plaintiff is that the defendant was actually warned by him not to puchase the property. This was found as a fact by the Subordinate Judge who concluded, upon the evidence, that the defendant had been forbidden to purchase the property in view of the previous engagement with the plaintiff. This fact was stated by Babu Annada Prosad Bannerjee, the Pleader for the first defendant, who was examined as a witness by the plaintiff; the statement was made in the examination-in-chief and the witness adhered to it in the cross-examination. The District Judge has not negatived the finding of the Subordinate Judge that the plaintiff had forbidden the defendant to purchase the property. If this be taken to be the true state of facts, what is the position of the defendants? They have entered into the transaction with their eyes open. They have

(7) 23 W. R. Eng. 51.

(8) 3 H. L. C. 828, 12 Ir. Eq. R. 107; 10 Eng. Rep. 330; 88 R. R. 356.

(9) 3 Ridgw. 492 at p. 518.

(10) 6 Hare 273, 17 L. J. Ch. 801; 12 Jur. 511; 67 Eng. Rep. 1169; 77 R. R. 115.

(11) 8 Hare 51 at p. 60; 85 R. R. 194; 68 Eng. Rep. 269; Affirming 3 M. & G. 713; 21 L. J. Ch. 525; 42 Eng. Rep. 434.

acted on the assumption of risk, and a person who entertains a doubt as to the existence, present or future, of a certain fact, cannot be said to be the victim of an honest mistake. The view we have taken is supported by the principles explained by this Court in the case of *Kandarpi Nath Ghose* v. *Jogendra Nath Bose* (12). The position of the defendant who has taken with notice of the prior contract and who has omitted to make an effective inquiry from the plaintiff is no better than that of the vendor herself, and so far as the vendor is concerned, it is clear that if he makes permanent improvements, the purchaser would be entitled to the benefit thereof without further payment. [See *Clare Hill* v. *Harding* (10); *Monro* v. *Taylor* (11)]. The defendants consequently have not established any right to be re-imbursed for the improvement made on the property. They have not shown that the improvement was needed; on the other hand, the fact that the money spent on the improvement was sixty per cent. of the value of the house would tend to throw doubt as to the wisdom of the course adopted by them.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

We are informed that the balance of the purchase-money was deposited by the plaintiff in Court, pursuant to the order of the Court of first instance. The order of that Court with regard to the execution of the conveyance will now be carried out. We further direct, that as soon as the conveyance is executed, the plaintiff be placed in possession of the property as against the defendants in execution of the decree of this Court.

Appeal allowed.

(12) 6 Ind. Cas. 141; 12 C. L. J. 391.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 545 OF 1911.

March 10, 1914.

Present:—Mr. Justice Ayling.

VALLURI BASAVAYYA—DEFENDANT—PETITIONER

versus

PERURI KISTNA BRAHAMAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 16, 17—Absence of defendant—Affixture to door of house, when good service—Due and reasonable diligence.

The amount of "due and reasonable diligence" which a serving officer must exercise, before affixing a notice to the door of the house in which the person to be served resides, is a question to be decided on the facts of each case.

If the person to be served with, has gone to another village, it is not the duty of the serving officer to wait till he returns or to pursue him to that village. In such cases, service by affixture would be "good service".

Sankaralinga Mudali v. *Ratnasabhapati Mudali*, 21 M. 324; 8 M. L. J. 58, *Subramania Pillai* v. *Subramania Ayyar*, 21 M. 419, followed.

Abraham Pillai v *Donald Smith*, 29 M. 324; *Vellayappa Chetty* v. *Veerappa Chetty*, 22 Ind. Cas. 498; (1914) M. W. N. 79; 1 L. W. 1; *Sakina* v. *Gauri Sahai Debia*, 24 A. 302, A. W. N (1902) 68, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Kistna, at Ellore, in Miscellaneous Petition No. 85 of 1911 in Civil Suit No. 926 of 1909, dated 30th March 1911.

Mr. *V. Ramadoss*, for the Petitioner.

Mr. *V. V. Sreenivasa Aiyangar*, for the Respondents.

JUDGMENT.—The 1st respondent in this case is the transferee of a Small Cause decree against the petitioner. He applied for execution under Order XXI, rule 16, of the Code of Civil Procedure. Notice of the application as required by that rule was issued to the petitioner and served by affixture on 26th November 1910, the date of hearing being 5th December 1910. On 5th December 1910, the petition was heard. The original defendant admitted the transfer. The petitioner was absent. The Subordinate Judge apparently held the service of notice on the petitioner to be sufficient and passed an order for attachment in execution

On 12th January 1911, the petitioner presented an application to set aside that order, alleging *inter alia* that he had received no

notice. This was rejected by the Subordinate Judge on 30th March 1911. In paragraph 2 of his order the Subordinate Judge holds that the petitioner had notice, that is, that the service was sufficient. Against that order, the present revision petition is presented under section 25 of Act IX of 1887.

The sole question for disposal is whether the service of the notice by affixture on 26th November 1910, is such as the Subordinate Judge could legally hold to be sufficient.

No other point has been argued.

The facts relating to the service are set forth in the process-server's affidavit and are not traversed.

"Having gone to the said village on 26th November 1913 and made inquiry about this defendant and being told by the women at the house and Kalur Venkayya that he went to Bezwada and that it is not known when he will return I have affixed the duplicate to the house-door. As the village officials were not present I have not brought the report." Bezwada is stated to be about four miles from the petitioner's village.

The law on the subject is contained in Order V, rule 17, of the Code of Civil Procedure; and (omitting surplus verbiage) the point is whether it was open to the Subordinate Judge to hold that the serving officer "after using all due and reasonable diligence" was unable to find the petitioner. If so, he was authorized to serve the notice by affixture and the Court might treat this service as sufficient.

Certain reported cases have been quoted on the petitioner's behalf to show that it was not open to the Subordinate Judge to come to this conclusion. These are *Subramania Pillai* v. *Subramania Ayyar* (1), *Abraham Pillai* v. *Donald Smith* (2), *Vellayappa Chetty* v. *Veerappa Chetty* (3) and *Sikina* v. *Gauri Sahai Debia* (4). I have carefully considered the judgments in these cases; but I do not find therein any rule of law which is binding on me in the present case. They are all cases presenting points of similarity to the present case in which an order of a Subordinate Court treating service by affixture as sufficient was set aside. Both the two last named were regular appeals in which a High Court would interfere if it disagreed with the Subordinate Court's order on its merits. The two earlier cases were, however, cases in which the Court revised the order under section 25 of Act IX of 1887.

It seems to me that the question of whether the serving officer was unable "after using all due and reasonable diligence" to find the defendant is a pure question of fact which must be determined on the merits of each case. So much is clearly laid down in an earlier case [*Sankaralinga Mudali* v. *Ratnasabapati Mudali* (5)] by the very same two learned Judges as decided in *Subramaniam Pillai* v. *Subramania Ayyar* (1) and I think it may be said with some confidence that in view of this expression they did not intend to decide anything more in *Subramaniam Pillai* v. *Subramania Ayyar* (1) than that the service in that case was not proper.

The judgment in *Sankaralinga Mudali* v. *Ratnasabhapati Mudali* (5) not only makes it clear that each question of this nature should be decided on its merits by the Court issuing the summons or notice, but makes illustrative remarks which are at least as pertinent to the present case as those in the cases relied on by the petitioner's Vakil.

I have, therefore, to decide whether on the record before him the Subordinate Judge was not legally justified in coming to the conclusion that the service was sufficient. The record shows that the process-server on arriving at the petitioner's house found him absent and was informed by the women of his family and another man that he had gone to Bezwada and it was not known when he would return. What under these circumstances did "due and reasonable diligence" require? As far as I can see the process-server could have done only one of two things:—

(1) to follow the petitioner to Bezwada in the hope of finding him,

(2) to wait in his village until he should return.

Bezwada is a town of 32,000 inhabitants and it does not appear that the process-server had any indication of where in that town the petitioner was to be found; or, on the other hand, reason to expect his

(1) 21 M. 419.
(2) 29 M. 324.
(3) 22 Ind. Cas. 498; (1914) M. W. N. 79; 1 L. W. 1.
(4) 24 A. 302; A. W. N. (1902) 68.
(5) 21 M. 324; 8 M. L. J. 58.

return within a short period of time. It is difficult to say that it was the duty of the process-server to adopt either course. Certainly I am not prepared to say that the Subordinate Judge could not legitimately come to an opposite conclusion.

I am, therefore, of opinion that there are no sufficient grounds for interference and I dismiss the revision petition with costs.

Petition dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 80 OF 1912.

August 1, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Heaton.

B. A. BRENDON—DEFENDANT—APPELLANT

versus

SHRIMANT SUNDERABAI—PLAINTIFF—RESPONDENT.

Service land—Inalienability—Family custom—Effect—Service land remaining in family for long period of years and descending by rule of primogeniture—Presumption, as to nature of tenure—Last holder, whether can put an end to tenure based upon family custom—Summary Settlement Act (Bom. Act II of 1863)—Settlements—Hereditary Offices Act (III of 1874)—Will—Probate—Findings of Probate Court conclusive—Evidence Act (I of 1872), s. 41.

Settlements which have been effected under, and are within the purview of, Act II of 1863, prevent the *Inam* lands to which they relate, from being subject to the provisions of the Vatan Act of 1874, because the holders of those settlements are no longer hereditary offcers holding for service.

Service land is usually inalienable, and evidence that service land has remained in a family for a long period of years and descended by the rule of primogeniture is more consistent with the fact of its being held for service than with the theory of any special family custom. If the service has come to an end, the last holder, if he have no sons or co-sharers, can put an end to the tenure, if any, based upon family custom.

Rajah Mahendra Singh v. *Jokha Singh*, 19 W. R. 211 at p. 212 and *Matra Mondal* v. *Hari Mohun Mullick*, 17 C. 155, followed.

The *Inams* of the Desais of Navalgund should be treated as the property of an ordinary Hindu landowner, subject to the payment of the agreed quit-rent to Government.

Where in regard to a Will it was contended in a Probate Court that the testator had revoked his Will twenty-four hours before his death and that he had given authority to his widow to adopt but the Probate Court found against the contentions and its decision was affirmed on appeal:

Held, that the decision of the Probate Court on the contentions raised was conclusive and that it was not open to a District Court in a subsequent suit to re-try those issues.

First Appeal from the decision of the first class Subordinate Judge at Belgaum, in Suit No. 50 of 1909.

Messrs. *Jayakar* and *Rudrappa*, (with him Mr. *Mulgaonkar*), for Appellants Nos. 1, 2 and 4.

Messrs. *Jardine* and *Weldon* (with him Mr. *Nilkanth Atmaram*), for the Respondents.

JUDGMENT.—The plaintiff sued for a declaration that the Will and codicil of the deceased Desai of Navalgund was inoperative and the defendants as executors had no rights under it, and that the plaintiff No. 2 was the lawfully adopted son of the deceased, and they prayed for an injunction restraining the defendants from entering into possession of the plaint property. The Desai of Navalgund was the last of a series of Desais whose title came into existence in the time of the Bijapur Monarchs in the 17th century. The Desai was the Chief Revenue Officer of the district under both the Mahomedan Rule and the Maratha Rule which followed it. During the tenure of office of the family, to which the deceased Lingappa belonged, many grants in *inam* of villages had been made to the Desai for the time being. Sometimes they were expressed to be for the Desai and his *karkuns* and sometimes they were grants given to the Desai simply.

After the disturbance and the unsettlement caused by the irruption of Tipoo Sultan into the southern Maratha country, the grants to the Desai family were eventually confined to ten villages.

The services of the Desai as a Revenue Officer were not made use of during the British rule and he was informed in 1848 by the Collector under the provision of section 2 of Bombay Act XI of 1843 that his services as a Revenue official would not be required of him. At that time and for many years afterwards the officials of the British Government in the Southern Maratha country were occupied in investigating and passing decisions and coming to settlements regarding claims to *inam* lands, held whether for service or as reward for past services, and in the course of the proceedings the Desai for the time being

was offered the option of commuting his service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on service-tenure, or by occasional payments in the nature of fines, both which classes of payment were styled "*nazarana.*"

Under the Government Resolution No. 455 of the 6th of February 1862, the request of the Revenue Commissioner for sanction to the treatment of the Navalgund Desai's "*potgee*" as a personal holding continuable to the holder on the terms of the Summary Settlement was sanctioned, and in consequence of that sanction the offer of the settlement was made to the Desai, and that offer was accepted on the terms that the commutation payment should be in the nature of an annual *nazarana* or quit-rent. That was in the year 1862. At that time there was no express legislative provision sanctioning such settlements, although it may well be argued that the commutation of a service, which was no longer wanted, by an agreement to pay a fixed yearly sum was within the competence of the executive authority in the Bombay Presidency. But any doubt as to the validity of the settlement is put an end to by reference to section 12 of Bombay Act II of 1863, which applies to the Districts in which the Navalgund Desai's *Inam* villages lay. It is in the following terms:—

"All notices and orders issued, and all settlements made, in the Districts subject to the operation of Act XI of 1852, previous to the passing of this Act for the purpose of carrying out its objects, shall be as valid and as binding on Government, and on the holders and owners of, and all persons interested in, lands affected by such notices, orders, and settlements as if this Act had been passed before the said notices and orders were issued, and the said settlements made, which shall accordingly be regarded and taken to have been made under this Act, all the provisions of which, as to the future rights, privileges, and duties of the holders and owners of land to be brought under settlement by it shall apply to the holders and owners of land already brought under settlement as aforesaid."

It has not been contended that the Bombay Legislature had not authority to enact that section validating the settlements so made, and the settlement made with the Navalgund Desai must, therefore, be taken to be a settlement valid and binding upon the Government.

What then was the position of the Navalgund Desai after this settlement? He was no longer liable to render any service in respect of the lands held by him, and they were, therefore, no longer held upon a service-tenure. The terms upon which they were held were that a fixed annual quit-rent should be paid for them. It is contended for the plaintiffs that the lands as service lands in the possession of the Desais for the last 200 years were impressed with the character of inalienability. It has been suggested, but faintly, that the inalienability arose by reason of family custom, but no evidence of any importance has been adduced in support of that contention.

The more serious argument is that lands assigned as emoluments of District Revenue Officers were inalienable by custom and by express legislative provision. The first legislative provision on the subject, to which we have been referred, is Regulation XVI of 1827. As regards the argument based on custom we must consider whether the character of inalienability was attached to these lands by law or custom at the time of the passing of that Regulation. The question was discussed by Sir Michael Westropp in *Krishnarav Ganesh* v. *Rangrav* (1). He says:—

"As to civil hereditary offices, and the *inams* (*watan*) annexed to them, the balance of authority seems to incline in favour of the alienability in permanence (*previously to British legislation*) as well of the offices as of the *inams* appendant to them, together or separately.....In the case of some, but not of all, such offices, the assent of the Native Government seems to have been necessary to the validity of the alienation, and also, if the *watan* were undivided, the assent of the co-parceners, if any."

With reference to those last remarks, it is to be observed that after the settlement, which derives its conclusive validity from the legislative provisions of Act II of 1863, there can be no doubt as to the assent of the Government for the time being to the alienability

(1) 4 B. H. C. R. A. C. J. 1 at p. 11.

of the *inams*, and as far as concerns the testator in the present case, there is no question of any co-parceners, unless it be held that the 2nd plaintiff is an adopted son, and in that position entitled to the rights of a co-parcener. Authority, therefore, is in favour of the conclusion that up to the legislation of 1827 these *inams* were not inalienable.

The Regulation XVI of 1827, section 20, prohibited alienation, by any hereditary officer, of his official emoluments, and directed that such official emoluments enjoyed by a co-sharer should not leave the family in which the office was vested. The Regulation of 1827 was superseded by the Vatan Act of 1874. But that Act came into force long after settlement of the *inam* lands in 1862, and settlements which have been effected under, and are within the purview of, Act II of 1863, prevent the *inam* lands, to which they relate, from being subject to the provisions of the Vatan Act, because the holder under the settlement is no longer a hereditary officer holding for service.

Is there then any reason why the *inams* held by the Desai should, subsequent to the settlement, be regarded as impressed by any inalienable character such as does not appertain to the property of an ordinary Hindu landowner? It appears to us that there is not, and that conclusion is supported by the judgment of the Privy Council in *Rajah Mahendra Singh* v. *Jokha Singh* (2) with reference to what was known as "*mafeebirt* tenure." Service was commuted for a quit-rent, and it was held by the Judicial Committee, if the donee's descendants continue to pay the rent, the tenure is altered from service to rent. In the case of service land, which in practice at all events is not usually alienated, it is difficult to establish a family custom, which should have any effect, as distinct from the ordinary incidents of a service-tenure, and evidence that land has remained in a family for a long period of years, and descended by the rule of primogeniture where it is service land, is more consistent with the fact of its being held for service than with the theory of any special family custom. Moreover, when the service has come to an end the last holder, if he have no sons or co-sharers, can put an end to tenure based upon family custom: see *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (3). If then the *inams* of the Desai may be treated as the property of an ordinary Hindu landowner, subject to the payment of the agreed quit-rent to Government, there is no reason why he, in the absence of co-parceners, should not dispose of that property by Will. He has made some provision for his wife, the first plaintiff, providing her with Rs. 100 a month, and a certain retinue, and if he did make a Will as is alleged, it is difficult to see how a subsequently adopted son can defeat the provisions of that Will.

The Will was propounded for Probate in the District Court of Belgaum, a Court competent to try the questions arising in this suit. That Court decided that the Will and codicil, under which the defendants claim, was a testamentary document executed by the testator, and as a consequence the provisions of the testator speak from the time of his death. These testamentary provisions include a provision for charity, based upon the recognition of the fact that he has no natural born son, and upon the assertion that he has not given and will not give the widow authority to adopt any son after his death. The contention, however, on behalf of the second plaintiff is that he is a validly adopted son of the testator. In order to prove that eleven witnesses are produced who speak to words uttered by the testator within twenty-four hours of his death in which he stated that he had revoked his Will and given his widow authority to adopt a son. These allegations were put forward in the Probate Court by the same parties, the first and second plaintiffs, in their contention with the executors, who are the present defendants, who were then propounding the Will and the codicil. Thirteen other witnesses were upon that occasion produced to prove the statements of the testator as to revocation of the Will and authority to adopt, and those thirteen witnesses were disbelieved by the Probate Court. The decision of the Court upon that point was affirmed by the High Court in appeal. The allegation of the plaintiffs involves the destruction of the conclusion arrived by the Probate Court negativing the alleged revocation and affirming the testamentary character of the Will which contains the

(2) 19 W. R. 211 at p. 212.

(3) 1 C. 186 at p. 195, 19 W. R. 8.

statement with reference to authority to adopt. It appears to us that the learned Judge of the lower Court was in error in thinking that it was open to him, after the decision of the District Court in the Will case, to try the question of the authority which was bound up with the question of revocation in the present suit. The issue which was decided by the Probate Court was that the words of clause 9, as part of the Will, formed part of testamentary document speaking from the death of the testator, and that conclusively determined between the parties the question whether or not the testator had revoked his Will twenty-four hours before his death, and whether or not the statement, as to his having given any authority to his widow to adopt, expressed his wishes at the time of his death. Therefore, under section 11 of the Civil Procedure Code, the Subordinate Judge should not have tried the issue, because the District Court which tried the Probate case was competent to try the present suit, although in order to relieve the superior Court of part of its work section 15 of the Code provides that every suit shall be instituted in the Court of the lowest grade competent to try it, and, therefore, this suit was instituted in the Court of the first class Subordinate Judge: see *Nidhi Lal v. Mazhar Husain* (4) and *Matra Mondal v. Hari Mohun Mullick* (5).

We now come to the case of the third plaintiff. He can only be joined in this suit with the other plaintiffs if he makes common cause with them, and claims that he is entitled jointly, severally or in the alternative, upon proof of the allegations contained in the plaint. His case is, he being a man of forty years of age, born subsequent to the Settlement of 1862, that from his own knowledge he can say that his father and grandfather and great-grand father were *karkuns* under the Desai of Navalgund, and that, therefore, they were entitled as beneficiaries, as persons answering a particular description in the *sanads* to share in the revenues of the *inam* villages with the Desai. In so far as there is any contest between the third plaintiff and the first and the second plaintiffs as to their respective rights to the revenues of the *inam* villages, the third plaintiff is not competent to join with them in this suit, but we do not think that any question of misjoinder really arises, because upon the evidence in the case the only *inam*, in which it is clearly shown that the *karkuns*, whom the third plaintiff claims to represent, were interested, was an *inam* of land amounting to twenty acres in Kalapur which is not in question in this suit (see Exhibit 77, clauses 11, 1, and Exhibit 91). The third plaintiff, therefore, in relation to lands in suit stands in no better position than the first and the second plaintiffs. In respect of the lands in suit, other than the *Patilki* and *Kulkarniki Vatans*, in which the first plaintiff, as the widow of the testator, would be interested as *Vatandar:* and which under section 5 of the Vatan Act of 1874 would not be alienable by the Will, the suit must fail. If it is agreed which lands mentioned in the plaint are held upon service-tenure, as *Patilki* or *Kulkarniki Vatans*, they can be excluded from the decree dismissing the suit, and the plaintiff will be entitled to a declaration regarding them. If an agreement cannot be arrived at, there must be a remand to the lower Court to ascertain what those lands are. We think that in this case the costs of both parties in both the Courts should come out of the estate.

Appeal dismissed.

(4) 7 A. 230; A. W. N. (1885) 1.
(5) 17 C. 155.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 307 OF 1910.
July 29, 1913.

Present:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

Thakur JANKI KUNWAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja NARENDRA BAHADUR PAL SINGH, PLAINTIFF, AND DEPUTY COMMISSIONER OF FYZABAD, MANAGER, COURT OF WARDS, DHARWA ESTATE, DISTRICT FYZABAD—DEFENDANT—RESPONDENTS.

Regulation (Bengal) XI of 1825—*Alluvion and diluvion—Riparian owners in Fyzabad District—Custom of* dhar-dhura *(deep stream boundary)*—Iqrar-namas *or declarations filed by riparian owners.*

JANKI KUNWAR *v.* NARENDRA BAHADUR PAL SINGH.

In the year 1866 at the time of the first Regular Settlement of Fyzabad District an inquiry with respect to the rule of alluvion and diluvion was made and it was found that the custom of *dhar-dhura* (deep stream boundary), by which the main channel of the Gogra was treated as the constant boundary between the villages abutting on the opposite sides of the river, prevailed generally in the locality. *Rubkars* or orders were issued that those landholders who accepted the custom should file *iqrarnamas* or declarations acknowledging the custom, while those who disputed it should give proof of the rule of alluvion and diluvion which they set up. The *iqrarnamas* were accordingly filed. They wound up with a declaration that the parties to them of their own free will and accord accepted the usage of *dhar-dhura* and that they and their successors-in-interest would in future act in accordance with it. But no entry relating to such custom was made in the Record of Rights prepared at the time:

Held, that the *iqrarnamas* or declarations were not adequate proof of the custom laid down therein.

Baboo Bissessur Nath v. *Maharaja Mohessur Bux Sing*, 11 B. L. R. 265; 18 W. R. 160; L. R. I. A. Sup. Vol. 34, (P. C.), referred to.

Appeal against an order of the District Judge, Fyzabad, dated 11th April 1910, confirming that of the Sub-Judge, Fyzabad, dated 13th April 1909.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Basdeo Lal*, for Respondent No. 1.

The *Government Pleader*, for Respondent No. 2.

JUDGMENT.—These three appeals have sprung out of three suits brought by Raja Narindar Bahadur Pal, the owner of an estate in the Basti District, against the proprietors of three villages, Maipur, Nasirabad and Prithuripur, situated in the District of Fyzabad. These villages abut on the Gogra river on the south side of it. On the north side and opposite these villages is the village of Mahwapur Khurd, the property of the plaintiff.

The purpose of the three suits was to recover possession of certain blocks of land which, according to the plaintiffs' allegations, had once been included within the boundary of Mahwapur Khurd and which had become detached from that village by sudden change in the course of the Gogra stream in the years 1308 and 1314 *fasli*. The areas in suit, it was claimed, had, as the result of these sudden changes, become attached to the lands of the three villages on the south side of the river, but the plaintiff relied upon the general rule which regulates the relations between riparian owners and which has been embodied in the Alluvion and Diluvion Regulation (Bengal Regulation XI of 1825). His case was that his claims were governed by the second clause of section 4 of the Regulation, a section which must be deemed to apply in the absence of any local usage such as is referred to in section 2. According to the clause just mentioned in cases of avulsion where the river by a sudden change in its course detaches large pieces of land from one estate and joins them to the land of another estate, the owner of the land so detached retains his property in it provided that after such detachment the identity of land is not lost. The defendants in the three suits made a common defence, the pleas raised by them being as follows:

First it was denied that the lands in suit had become suddenly detached as alleged by the plaintiff. It was pleaded that the junction of these lands to their villages had been effected by a process of gradual accretion extending over twenty years before suit, and that if the plaintiff ever was the owner of these lands his proprietary rights had been lost in accordance with the rule contained in the first clause of section 4 of the Regulation.

The defendants next pleaded as an alternative defence that the dispute was governed by the provisions of section 2 and not of section 4, their allegation in this connection being that the relations between themselves and the plaintiff were governed by a local usage by which the main channel of the Gogra was treated as the constant boundary between their respective estates. A plea of limitation based upon adverse possession extending beyond twelve years was also raised in bar of the suit.

Both the Courts below have found in favour of the plaintiff. It was held that the lands in suit had been suddenly detached from the plaintiff's village in the years 1308 and 1314 *fasli*, that the custom put forward by the defendants had not been proved, and that the suits were within time by reason of the finding that the lands had been detached in 1308 *fasli* and 1314 *fasli*, that is, less than twelve years before the suits were filed.

Several grounds of appeal have been taken here by the defendants, but the principal

contest has been with respect to the question of custom: indeed this is practically the only matter in dispute here. In order to understand the nature of the case put forward on behalf of the appellants it is necessary to refer with some detail to certain proceedings which took place in the year 1866 at the time when the first Regular Settlement of the Fyzabad District was being carried through. When the case was first put up for hearing we had before us only certified copies of portions of the record of these proceedings and we thought it advisable to adjourn the case and call for the full record, as also for certain other Settlement Records relating to the *parganas* in which these Fyzabad villages are situated.

With these papers before us we have had the case re-argued at length by Counsel.

The principal record with which we are concerned is entirely in the vernacular. It is styled the River Boundary File of the Fyzabad and Basti Districts of the year 1866, A. D., and is made up of *rubkars* or orders issued by the Settlement Officer together with certain reports made in compliance with those orders. The file also contains a large number of *iqrarnams* or declarations executed by the then proprietors of villages on the banks of the Gogra river both in the Basti and Fyzabad Districts, or their agents.

We have to consider the circumstances in which these declarations came to be made and the legal effect which is to be given to them. The first paper on this record, then, is a *rubkar* issued by Mr. Carnegy, the Settlement Officer of Fyzabad. From this we find that previous to the 17th July 1866, the date on which the order was issued, Mr. Carnegy and the Collector of Basti had made a joint inquiry with respect to the rule of alluvion and diluvion affecting the villages in the Basti and Fyzabad Districts which were situated on the north and south banks of the Gogra. The record of this enquiry is not available to us. We can only gather from the language of the *rubkar* that they found that the custom of *dhar-dhura* (deep stream boundary) prevailed generally in this locality.

It further appears that the result of this joint investigation was submitted to the superior Revenue Authorities, the Board of Revenue of the (then) North-Western Provinces and the Financial Commissioner of Oudh. The *rubkar* goes on to intimate that the Board and the Financial Commissioner had accepted the finding of these two gentlemen, but had suggested the propriety of obtaining declarations from owners on both sides of the stream by way of acknowledgment that such a custom obtained and was binding upon them. Accordingly the Settlement Officer proceeded to set out in the *rubkar* how these declarations were to be procured. It was arranged that a subordinate Settlement Official of the Basti District should meet at an appointed place and should summon the proprietors or their agents to appear and make their statements.

It was intimated that if any of the proprietors declared against the *dhar-dhura* rule and set up any other custom he would be called upon to prove his assertion, for which purpose an opportunity would be afforded to him at a later stage.

Action was taken accordingly. The two officials who were appointed for the purpose carried out the intimations given to them and declarations were obtained from the owners of estates on both sides of the river with respect to 150 or 160 villages. It is not disputed that as regards Mohua Para a declaration was filed by the agent of the then owner who is now represented by the plaintiff, and it is admitted that similar declarations were put in relation to the three villages of the defendants with which we are concerned in these appeals.

These declarations were all made in a stereotyped form which, no doubt, had been framed by the subordinate Revenue Officials who had been appointed to obtain them. A reference was made in them to the joint inquiry previously held by the Settlement Officer and the Collector and to the fact that a report had been submitted to the Board of Revenue and the Financial Commissioner. It was recited that these superior authorities had accepted the finding of the Settlement Officer and the Collector as to the general prevalence of the custom of *dhar-dhura* (deep stream boundary), and that accordingly an order had been issued that those persons who accepted the custom should file declarations acknowledging it, while those who disputed the existence of such a usage should give proof of the rule of alluvion which they set up.

The *iqrarnamas* wound up with a declaration that the parties to them of their own free will and accord accepted the usage of *dhar-dhura* and that they and their successors-in-interest would in future act in accordance with it.

It is the declaration made in this form on behalf of the then proprietor of Mohua Para that the defendants rely upon in proof of the custom set up, and the contention is that the plaintiff in the present suits is bound by that declaration. On behalf of the plaintiff-respondent the argument is that that declaration is not binding so as to estop the plaintiff from denying the existence of the custom. It is also argued that the language of the declaration does not amount to an admission that such a custom really existed. It is said that the declarations were obtained more or less by compulsion so as to support a conclusion which had already been reached by the Settlement Officer of Fyzabad and the Collector of Basti and which had been accepted by the superior Revenue Authorities. In short, it is contended that the *iqrarnamas* do not constitute evidence of a custom already long established as immemorial usage but merely of an undertaking on the part of the various proprietors to observe in future a rule which was being laid down for their guidance.

It can hardly, we think, be said that the declarations were not made voluntarily, for it is obvious enough that the owners of these riverine villages were at liberty to deny the existence of the *dhar-dhura* custom and to assert the existence of any other custom or rule of alluvion if any such custom or rule did apply. But we think there is something to be said in favour of the argument that the language of these declarations does not clearly import an admission that the rule of the deep stream boundary had been sanctioned by immemorial usage. It is not denied that during the course of the Settlement a record of customs was prepared as was done in other districts. The usual course was to embody this record of customs in the *wajib-ul-arz* of each village, but in certain portions of Fyzabad district another practice was followed by which entries relating to custom were collected in a separate volume prepared for each *pargana*. This volume was called the *Fard Riwaj-i-am* and it is a curious fact that no entry relating to this custom of *dhar-dhura* is to be found in the volumes relating to the *parganas* in which the Fyzabad villages in suit are situated. No doubt, the custom of this nature could not prevail universally throughout the *pargana* for it could only affect such of the villages as are situated on the bank of the Gogra. At the same time the number of these villages was considerable. For example, in the Amsin *pargana iqrarnamas* had been drawn up in respect of twenty-one villages, in Tanda *pargana* for twenty villages, and in the Barhar *pargana* for no less than 35 villages. In these circumstances we might have expected to find in the record of customs of these *parganas* some mention of a custom of alluvion which affected so many villages and we are not altogether satisfied with the reply to this argument which has been given by the appellants' learned Counsel that the file which we have now before us was intended to be the sole record of the custom relating to alluvion and diluvion. The practice was certainly to record such customs in the *Wajib-ul-araiz* of villages subject to fluvial action and where the "*fard Riwaj*" took the place of the *Wajib-ul-araiz*, we should naturally expect to find there a record of such a custom. We have now to consider a judgment of this Court in *Mir Bakar Husain* v. *Gulam Bhawani Pal* (1) which was decided in the year 1875. In that case the Judicial Commissioner had to interpret one of the *iqrarnamas* which were obtained in the circumstances just referred to. It is clear that the learned Judicial Commissioner in that case had before him some evidence which is not available here, that is, evidence relating to the proceedings taken in the joint inquiry held by the Settlement Officer of Fyzabad and the Collector of Basti. However, he had before him one of the *iqrarnamas* (which he calls "agreements") and came to the conclusion that the statements or admissions contained in it were no adequate proof of the custom alleged. This opinion was based in part upon a judgment of their Lordships of the Privy Council reported as *Baboo Bissessur Nath* v. *Maharaja Mohessur Bux Sing* (2), a case in which an agreement had been taken from the owners of two estates on opposite side of the Ganges. The agreement was set up in proof of a custom

(1) Select Cases (Oudh) 27.

(2) 11 B. L. R. 265; 18 W. R. 160; L. R. I. A. up. Vol. 34 (P. C.).

but their Lordships refused to accept it as sufficient evidence of a distinct custom. It appears from the judgment that prior to the taking of the agreement (*iqrarnama*) there had been a violent quarrel between these proprietors and that the Government had interposed and induced them to come to terms, the arrangement being ratified by the execution of the *iqrarnama*.

The facts of that case and of the case before the Judicial Commissioner, Mr. Currie, were not altogether analogous, inasmuch as there was nothing to show that in 1866 when these *iqrarnamas* were taken there were any disputes between the lands-owners of the Basti and Fyzabad Districts. But Mr. Currie was of opinion that these proceedings of 1866 might be construed as measures taken by Government Officers with a view to preventing such disputes in future and there is, we think, a good deal to be said in favour of this view. The vagaries of some of the rivers in Oudh, and of the Gogra (or Sarju) in particular, have led to much litigation in many instances in which thousands of rupees have been spent over a few acres of barren sand. The rule of the deep stream boundary (*dhar dhura*) has the merit of convenience and simplicity and much of the futile litigation would have been avoided had it been possible to apply this rule. It is by no means improbable that a sense of the convenience of the rule led to the proceedings of 1866 and that, as Mr. Currie suggests, the taking of these *iqrarnamas* was an attempt on the part of the Revenue Authorities to induce these proprietors to accept for their future guidance a rule which would settle any disputes which might arise thereafter.

We may notice here that the defendants have not been able to cite instances in which the custom set up by them has been followed and we can scarcely believe that the reason for this is, as was suggested by the appellants' learned Counsel, that no similar case had ever happened at any rate as between the parties to these suits. The river Gogra must have changed its course pretty frequently between 1866 and the present time. And bearing in mind that the custom alleged is in the nature of a local usage, and not one confined to the villages in dispute in these suits, we must take notice of the fact that in *Mir Bakar Husain* v. *Gulam Bhawani Pal* (1) where the custom was set up it was found not to be established. There can be no doubt that the villages with which that particular case was concerned are in the same locality as those in which the villages with which we are now dealing are situated.

Taking into consideration all the circumstances to which references have been made we think the correct conclusion is that these declarations or *iqraranamas* are not adequate proof of the custom which the defendants set up, and further we think it by no means unlikely that the interpretation put on the language of these *iqrarnamas* by this Court so far back as the year 1875 has been acted upon ever since by parties who are interested in these villages along either side of the Gogra river and that in consequence we ought to apply the rule of *stare decisis* so as to prevent any disturbance of titles.

This finding disposes of the appeals. The only other point which was discussed before us at the hearing was with respect to the findings of the Courts below that the areas in suit were capable of identification. It was suggested that the findings were wrong, but we are not satisfied that there is any ground of law upon which we could interfere. Having come to the conclusion of fact that the river changed its course suddenly in the years 1308 *falsi* and 1314 *falsi* and that large areas had in consequence been detached *en bloc* from the plaintiff's village it was open to the lower Courts to infer as a fact that these areas did not lose their identity. On the findings of the Courts below the claim is within time. The plaintiff-respondent has amended the plaint to bring it into conformity with the area found by the *amin*, and should be required to pay any additional Court-fee which may be due from him in respect of the extra areas awarded before execution of the several decrees is allowed to be taken out. Subject to the above condition the appeals are dismissed with costs.

Appeals dismissed.

BHADIA *v.* *Musammat* BHAGI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 234-B OF 1912.

August 4, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

BHADIA—PLAINTIFF—APPELLANT

versus

Musammat BHAGI—DEFENDANT—RESPONDENT.

Hindu Law—Mitakshara—*Berar*—*Succession*—*Sister*—*Uncle's son.*

Under the *Mitakshara* Law, as interpreted and followed in Berar, a sister comes after the paternal grandmother, but before the paternal grandfather and, therefore, necessarily before any descendant of the grandfather, *e. g.*, uncle's son.

Venayeck v. *Luxumeebaee*, 9 M. I. A. 520; 19 E. R. 834, *Mulji Purshotum* v. *Cursandas Natha*, 24 B. 563; 2 Bom. L.R. 721; *Thakoorain Sahiba* v. *Mohun Lall*, 11 M. I. A. 386 at pp. 400, 403; 7 W. R. (P. C.) 25; 20 Eng. Rep. 146, followed.

Girjabai v. *Vyankatesh*, (1896) 2 Berar L. J. 135, *Bhagwan* v. *Warubai*, 32 B. 300, 10 Bom. L. R. 389, dissented from.

Appeal against the decree of the Additional District Judge, East Berar, Amraoti, dated 6th March 1912, confirming that of the Munsif, Morsi, dated 29th October 1910.

Sir *Bepin Krishna Bose*, for the Appellants.

Mr. *F. W. Dillon*, for the Respondent.

JUDGMENT.—The point involved in this appeal is whether the sister or the paternal uncle's son is a preferential heir in Berar. The law applicable is the *Mitakshara* as interpreted and followed in Western India [*Ramprasad* v. *Musammat Subu Bai* (1); *Bayana* v. *Dinkar* (2)]. The sister is not an heir under the *Mitakshara* according to the Calcutta and Allahabad High Courts and the same view prevails in the Central Provinces.

The appellant's learned Advocate, however, is not prepared to go so far as to contend that she is not an heir in Berar. Such a contention, if raised, would be untenable, seeing the number of cases in which the rights of collateral females, including the sister not recognised elsewhere, have been for years recognised in Berar. The argument for the appellant is that the sister is not a *sagotra sapinda* and that at any rate she cannot come in before the uncle's son who is expressly named in the *Mitakshara*. It is suggested that she may be regarded as a *bandhu* as held by the Madras High Court. The earlier Bombay rulings, it is urged, proceeded partly on the Mayukha and partly on the interpretation of Nanda Pandit and Ballambhat of the word 'brothers.' And now that it has been held in Bombay that the latter interpretation is unsound and the Mayukha is not a paramount authority outside Gujarat and the Island of Bombay, this Court should re-consider the position of the sister in Berar. For the respondents, reliance is placed on a judgment of Mr. Obbard, Judicial Commissioner of Berar, delivered in 1896 and reported as *Girjabai* v. *Vyankatesh* (3). The recent judgment of *Bhagwan* v. *Warubai* (4) from Sholapur is also relied on by them.

It seems to me that if we were to confine ourselves to the *Mitakshara* and the *Mitakshara* were to be interpreted as a modern Code, the argument for the appellant would be unanswerable. Only the learned Advocate would have to go further than he is prepared to go. The sister is probably not a *gotraja* (literally, one born in the family) in the sense in which Vijnaneshwar understands the term, as synonymous with *sagotra* or *samangotra* (one of the same family), for a woman on her marriage is "born again in the family of her husband." She will not only have to be placed after the uncle's son, but after the "great-grandfather, his sons and their issue" who are named in Chapter II, section V, paragraph 5, just as the uncle's sons are mentioned in the preceding paragraph of the *Mitakshara*. To introduce so near a relation as sister at that stage would be opposed to the spirit of the *Mitakshara*, where propinquity is the rule of succession. Her claim as a *bandhu* has been apparently denied by the Privy Council [*Thakoorain Sahiba* v. *Mohun Lall* (5)], and she has never been recognised as such in Western India. To relegate her now for the first time in this side of India to the position of a *bandhu* would be doing what the Privy Council has condemned. "To alter the law of succession as established by a uniform

(1) 4 N. L. R. 31 at p. 34.
(2) 5 Ind. Cas. 748; 6 N. L. R. 39 at p. 40.
(3) 2 Berar L. J. 135.
(4) 32 B. 300; 10 Bom. L. R. 389.
(5) 11 M. I. A. 386 at pp. 400, 403; 7 W. R. (P. C.) 25; 20 Eng. Rep. 146.

course of decisions, or even by the *dicta* of received Treatises, by some novel interpretations of the vague and often conflicting texts of the Hindu Commentators, would be most dangerous, inasmuch as it would unsettle existing titles" [*Thakoorain Sahiba* v. *Mohun Lall*(5)]. The result would be, as held elsewhere, that the sister is not an heir.

Mr. Obbard in the judgment above cited practically admits that under pure *Mitakshara*, the sister would have no claim. He rests her title as heir on the "law compounded of *Mitakshara*, *Mayukha* and custom." I agree with the learned Judicial Commissioner that the sister's claim was founded on custom, mainly influenced by the *Mayukha*, even in places where Nilkanth's authority is not supreme. The answers of the Shastris in the Ahmednugger and Sholapur cases cited in West and Buhler (3rd Edition, pages 468-69) show that the *Mayukha* was freely cited as apparently not in conflict with the *Mitakshara*, which was treated as silent on the point though a work of paramount authority in those districts. She was certainly not treated as a *bandhu*, for in that case the reference to the *Mayukha* would be unintelligible. If she could be regarded as a *bandhu*, probably as the Madras High Court thinks she would be excluded by her son [*Lakshmanammal* v. *Tiruvengada Mudali* (6)] and this was obviously never the case in Western India. The doctrine that the sister is a *gotraja* within the meaning of the text of Yajnavalkya is too well established there to be now controverted. An attempt has been made by Chandavarkar, J., in *Bhagwan* v. *Warubai* (4) to show that the view of the western school regarding *gotraja sapindas* is not absolutely inconsistent with the *Mitakshara*. It is sufficient for me to say that probably some such reason induced the Pandits on the Bombay side to introduce the sister in the *Mitakshara* country. But as Mr. Mayne says: "it is probable that the whole of this reasoning is a mere contrivance to bring a succession, which was established by immemorial usage, into apparent conformity with Sanskrit Law. . . . The usage itself is established beyond doubt, and has received the sanction of the Privy Council." (Mayne, 7th Edition, page 720). The case referred to by Mr. Mayne is the case of *Venayeck Anundrow* v. *Luxumeebaee* (7).

(6) 5 M. 241.

(7) 9 M. I. A. 520; 19 Eng. Rep. 834.

The argument that the sister, even if a *gotraja sapinda*, should come after all the persons expressly named in section V of Chapter II of the *Mitakshara* has been already noticed by me in an earlier part of this judgment. It seems that paragraph 1 of section V gives the definition of gentiles. "Gentiles are the paternal grandmother and relations connected by funeral oblations of food and libations of water" or, more accurately, relations connected by common particles of body. The rest of the sections seem merely illustrative of the principles governing the order of succession—at any rate this is the view which has apparently found acceptance in the Bombay Presidency, for the sister is placed immediately after the paternal grandmother.

In obedience to custom, the sister has been declared an heir, but it seems to me impossible to ignore that her place in the order of succession is based on the Mayukha. The view of Nanda Pandit and Ballambhat that the word 'brothers' includes sister—a view which would place her in a still more favourable position than the one assigned to her in the Mayukha—has never found general acceptance, as pointed out by Sir Lawrence Jenkins, in *Mulji Purshotum* v. *Cursandas Natha* (8) and also by Chandavarkar, J., in the case above cited. Under the circumstances the *Mayukha* seems to be the only guide for determining her place in the order of succession. She comes then after the paternal grandmother and before the paternal grandfather and, therefore, necessarily before any descendant of the grandfather such as the plaintiff-appellant is.

I note that no attempt has been made to distinguish this case from the one decided by Mr. Obbard, though the learned Judicial Commissioner confined his remarks to the case of Mahratta *Brahmins*. In my opinion such a distinction would be unfounded, for the Bombay law has been since applied indiscriminately to all Hindus in Berar, treating it as the *lex loci*.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(8) 24 B. 563; 2 Bom. L. R. 721.

RAM JIYAWAN *v.* MOHAMMAD ABDUL HASSAN KHAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 77 OF 1912.

July 30, 1913.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Sabonadiere, A. J. C.

RAM JIYAWAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja MOHAMMAD ABDUL HASSAN KHAN—PLAINTIFF—RESPONDENT.

*Declaration, suit for, that defendants are not under-proprietors—Previous decision of Revenue Court holding defendants to be something more than ordinary tenants—Subsequent decision of Revenue Court holding defendants to be under-proprietors—Cause of action, accrual of—Lessee under Settlement Court decree vacating holding for five years and getting it back on new lease not different from terms of decree, effect of—Ouster—*Dahyak *right, when confers under-proprietary right upon holder of former right—Cash* dahyak *right, whether connotes right to possession—Jurisdiction of Civil and Revenue Courts—Transferability of* dahyak *right—Preferential right to lease, whether transferable—Holder of* dahyak *right and of preferential right to lease, whether an under-proprietor—Refusal of Settlement Court to grant sub-settlement to lessee of whole village, effect of—Costs—Court-fee paid on withdrawn part of claim, whether allowable as costs.*

In a suit between the parties the Revenue Court decided that the status of the defendants was not that of ordinary tenants. In the next case between the parties the same Court held that the defendants were under-proprietors. Then the plaintiff brought a suit in the Civil Court for a declaration that the defendants were not under-proprietors:

Held, that the cause of action for the civil suit arose not with the previous decision but with the entry of the defendants' names in the under-proprietary *khewat* under the subsequent order of the same Court.

Where a lessee under a Settlement Court decree vacated his position as such for five years and then had a new lease of the holding granted to him not materially inconsistent with the terms of the Settlement Court decree:

Held, that the rights of the successors-in-interest of the lessee under the Settlement Court decree were not destroyed or diminished, as the ouster did not last long enough to bar their rights by limitation.

A *dahyak* right, *i. e.*, a right to ten per cent. of the rent roll, unless accompanied by possession otherwise than by favour or force, does not necessarily connote that the holder of that right has also an under-proprietary right in the land.

A cash *dahyak* right does not necessarily carry a right to possession.

It may be open to a Civil Court to declare that a tenant holds under a decree of Court, leaving it to the Revenue Courts to decide in detail upon the rights, liabilities and other incidents of that tenancy.

Sabbu v. *Sita Ram*, Select Cases (Oudh) 282, *Deputy Commissioner, Gonda* v. *Bhagwan*, 2 Ind. Cas. 297; 12 O. C. 124; *Parmeshar Dat* v. *Raja Mohammad Abul Hassan Khan*, 13 Ind. Cas. 809; 14 O. C. 335 and *Raja Kishen Datt Ram* v. *Raja Mumtaz Ali Khan*, 5 C. 198 at pp. 206, 207, referred to.

A *dahyak* right is, ordinarily speaking, transferable.

A preferential right to a lease does not become transferable even if coupled with a *dahyak* right.

A *dahyak* right coupled with the right to claim a lease over the total of villages by preference to all comers does not, therefore, confer on the lessee an under-proprietary right.

The refusal of a Settlement Court to grant a sub-settlement to a lessee of the whole village conclusively shows that the lessee is not an under-proprietor.

The Court-fee paid on that part of the claim which is subsequently withdrawn cannot be allowed as costs.

Appeal against an order of the Subordinate Judge, Gonda, dated 30th March 1912.

Pandit *Gokaran Nath Misra*, Babus *Ishwari Dayal* and *Surendro Nath Roy*, for the Appellants.

Mirza *Sami Ullah Beg*, for the Respondent.

JUDGMENT.—This is an appeal against a decree declaring that the defendants appellants have no *pukhtadari* or under-proprietary rights in the villages of Ram Nagra and Tiliani.

The *taluqa* in which the villages in question are situated belonged to Thakurain Sarfraz Kunwar, and she was succeeded by her daughter Thakurain Brij Kunwar. During their time there was a period when the Court of Wards assumed management of the estate. On the death of Thakurain Brij Kunwar her husband Achal Ram took possession of the estate. The real heir seems to have been Ardawan Singh, and he transferred half his rights to the father and predecessor-in-interest of the plaintiff-respondent, and a suit was brought against Achal Ram. Ardawan Singh withdrew his half of the suit, and the father of the respondent obtained a decree for his half. Subsequently Achal Ram's rights in these villages were put to sale in the execution of a decree, and were purchased by the appellants.

The right in dispute in the present case is not this superior right purchased at the sale in execution, but an inferior proprietary right which the appellants allege they own in the villages.

They claim that the right originated in a *birt* grant made some two hundred years ago. They have produced some evidence of a sale of that right to their predecessor-in-interest,

Jaggannath, by Samadhan, the then holder of the right, in 1260 *fasli*, that is in 1852-53.

At the first Regular Settlement Jagannath sued Thakurain Sarfraz Kunwar for under-proprietary right, and though there was a distinct refusal to make a sub-settlement with him he obtained by compromise in respect of Ram Nagra, and by a formal order of the Court in respect of Tiliani, a recognition that he possessed some rights. It is most convenient to leave the discussion of the actual terms of the compromise and the decrees for discussion in a subsequent part of this judgment. His successors, the appellants, claim that what he obtained amounted to a permanent heritable transferable lease. It is also plain, and both sides admit this, that he was acknowledged to have a right of "*dahyak*," that is, a right to ten per cent. of the rent roll in each of the villages.

While the Court of Wards was managing the estate Jagannath vacated his position of lease-holder, at least for the time being, and a lease was granted by the Court of Wards to one Hari Das. But this lasted only for a few years, from 1875-76 to 1880-81. After that Jagannath or his successors returned to the position of lessees. In fact in June 1880 the lease to the predecessor of the appellants was re-granted by the person then in possession of the estate. In 1889 Achal Ram who was then in possession of the estate issued a notice of ejectment against the appellants. They sued to get the notice set aside. The result was that on February 24th, 1890, it was decided that the appellants were not tenants who could be ejected by notice issued under section 52 of the Oudh Rent Act. Then followed litigation under the Land Revenue Act between the present parties between 1902 and 1905, which ended in an order of the Board of Revenue on September 7th, 1906, confirming an order of the Commissioner of the Fyzabad Division holding that the appellants are under-proprietors. The respondent claims that this order gives him his cause of action.

It is contended that the suit is barred by limitation, the argument being that the cause of action arose with the decision of February 24th, 1890, to the effect that the appellants or their predecessors could not be ejected by the ordinary proceedings made available against ordinary tenants by the Oudh Rent Act. Setting aside any question of whether the respondent was represented in that litigation, we have no hesitation in reaching the conclusion that the decree in question did not give rise to the cause of action, because the Court then did not hold that the appellants or their predecessors were under-proprietors. It merely held that they were not tenants of a particular class. It seems to us that the cause of action arose with the entry of the names of the appellants in the under-proprietary *khewat* under the orders of the Commissioner of the Fyzabad Division. We find then that the suit is not barred by limitation.

The next question which comes up for decision is what the result was of the temporary holding of the lease by Hari Das, and the temporary consequent ouster of the predecessor of the appellants. It seems to us that the result was not to destroy or to diminish the rights of the appellants under the decrees made at the first Regular Settlement. The ouster did not last long enough to bar their rights by limitation. And it is not shown that the leases granted at the termination of the ouster to the predecessor-in-title of the appellants contained anything repugnant to the provisions of the decrees made by the Settlement Courts. These leases do contain provisions about the rent payable, but as the decrees of the Settlement Courts left that at the discretion of the *taluqdar* we do not see that these variations of rent are inconsistent with those decrees. We hold then that the lease to Hari Das operated only as a placing in abeyance of the rights of the appellants and their predecessors-in-interest, and that those rights, whatever their nature, revived in full force upon the granting of the new lease to the predecessor-in-interest of the appellants.

It appears to us that the only question now remaining is the nature of the rights conferred upon the predecessors of the appellants by the decrees passed by the Settlement Courts at the first Regular Settlement.

First there is the case of *Mauza* Ram Nagra. It is described as a "*dawa pukhtadari*," that is a suit for sub-settlement. The judgment sets out that the origin of the rights was in a *birt* grant of "*dahyak*" or the right to one-tenth of the rental of the village, and that the holders of it later on habitually obtained a *theka* of the village and collected the rents and paid an

agreed sum to the *taluqdar* after the deduction of their one-tenth. It then recites that on the sale to Jagganath by Samadhan the *taluqdar* granted a *sanad* to the effect that Jaggannath should obtain the "*kachhi pakki haq*" of the village. It also says that the deceased *taluqdaria*, Thakurain Sarfraz Kunwar, had admitted the "*dahyak*" before the Court, but that the right to the *theka* depended on the good will of the *taluqdar*. Then it says that the rights do not come under those dealt with by the Oudh Sub-Settlement Act of 1865, and that the plaintiff, that is, the predecessor of the present appellants, had wisely come to an agreement with the *taluqdar*, that the *taluqdar* had admitted the right to the ten per cent. of the rental, and that this condition too is entered in the deed of agreement, "that the defendant will regularly give to the plaintiff and the heirs of the plaintiff a *theka* of the village on this condition that the plaintiff and his heirs will pay the rent fixed, and that alterations in the rent payable shall under all circumstances be liable to be made at the discretion of the defendant." The Court made a decree embodying that agreement.

Then there is the case of Tiliani. The judgment sets out the early history of the relations between the *birt* holders and the *taluqdar* in substantially the same terms as was done in the case of Ram Nagra. The Court sets forth that the *mukhtar* of the *taluqdar* denied even the "*dahyak*" right, but that the *taluqdar's* predecessor-in-title had admitted it to the Commissioner, so there could be no dispute about it. But the Court added, "A decree for under-proprietary rights cannot be given to such a person." The Court then proceeded to give its reasons for holding that the plaintiff before it was not entitled to a sub-settlement. It remarked that some *birtiyas* had been able to obtain a sub-settlement, but that on the plaintiff's own showing he had no title to a permanent lease of the village. It held, however, that the plaintiff before it was entitled to "*dahyak*" and that it had jurisdiction to decree that, and it, therefore, dismissed the suit for a sub-settlement and ordered that in another proceeding the plaintiff should be given a decree for "*dahyak*" to the extent of one-tenth of the rental of the village "and that the manner of the realisation of that '*dahyak*' shall remain the same as it has been hitherto".

These judgments are dated the 18th of November 1869 and the 31st of October 1870 respectively.

A very large number of rulings have been cited to us. Many of them are connected only most remotely with the matter in hand and the bringing of them up has been merely a waste of the time of the Court. To us it seems that the following reported cases are really apposite, that is to say, *Sabbu* v. *Sita Ram* (1); *Deputy Commissioner, Gonda* v. *Bhagwan* (2), *Parmeshar Dat* v. *Raja Mohammad Abul Hassan Khan* (3) and *Raja Kishen Datt Ram* v. *Raja Mumtaz Ali Khan* (4).

The facts which are above set out are beyond dispute. In fact they are scarcely disputed. In face of them it does not seem to us that there is any ground for going into evidence. All that the evidence could prove in addition to the above facts is that the appellants have been behaving as under-proprietors. But it is not their claim that having originally no such rights they obtained them by setting them up adversely to the respondent and his predecessors-in-interest, and by exercising them against his will and in despite of his authority. That is not their case in their pleadings, and it would be impossible to let them raise it now, in fact no attempt to do so has been made. Therefore, the evidence on that point is immaterial. The appellants rely solely upon the judicial decisions in their favour, and the evidence seems to have been intended as explanatory of those decisions, or of their effect.

Upon consideration of the cases above set forth we find *first*, that a "*dahyak*" right unless accompanied by possession otherwise than by favour or force does not necessarily connote that the holder of that right has also an under-proprietary right in the land, and *secondly*, that a cash "*dahyak*" right does not necessarily carry a right to possession and *thirdly*, that it may be open to a Civil Court to declare that a tenant holds under a decree of Court, leaving it to the Revenue Courts to decide in detail upon the rights, liabilities and other incidents of that tenancy.

(1) Select Cases (Oudh) 282.
(2) 2 Ind. Cas. 297; 12 O. C. 124.
(3) 13 Ind. Cas. 809; 14 O. C. 335.
(4) 5 C. 198 at pp. 206, 207.

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A right of "*dahyak*" is, ordinarily speaking, transferable and we do not think that there is ground for holding that any other rule applies to the "*dahyak*" taken by itself in the present case. But coupled with it here we find the right to a lease by preference over all comers, and that lease to be one of the total of the villages. It is true that the decree about Tiliani differs in this from the decree about Ram Nagra in that it does not mention the lease in explicit terms. But it provides for the realization of the "*dahyak*" as hitherto, and the judgment does recite that it had been realised by means of the lease. Hence it is a proper inference that the decree intended that the right to get the lease should continue. And in the lower Court it is plain that no attempt was made by either side to differentiate between the cases of the two villages. The question is whether the preferential right to the lease becomes transferable because it is joined to the right to "*dahyak*". We think that it does not. The decrees do not say so. On the other hand, while one of the decree says that there was nothing to show that the ancestors of the appellants were always entitled to claim a lease, the other states that they and their heirs shall have only a preferential right to claim it. And we note that upon the sale of the "*dahyak*" to Jagganath he found it best to obtain a new *sanad* for the lease from the *taluqdar*. We think that the lease was granted largely to allow of the easy realization of the "*dahyak*" and only to that extent as incidental to it, and that the right to the lease was not transferable. The definition of an under-proprietor shows that unless he has a transferable right in land a man is not an under-proprietor. The definition is to be found in the Oudh Rent Act and in the United Provinces Land Revenue Act.

Then it seems to us that the refusal to grant a sub-settlement is under the circumstances of the case conclusive that the right decreed was not under-proprietary. The right decreed extended over whole and complete villages. An under-proprietary right extending over a whole village must, in our opinion, carry with it a right to sub-settlement. We cannot conceive of an under-proprietary right extending over a whole village which did not require a sub-settlement. It is possible that the Courts in 1869 and 1870 ought, instead of what they did, to have decreed certain specific plots to the predecessor-in-title of the appellants in under-proprietary right. But rightly or wrongly this was not done and another course was pursued. The result, in our opinion, is that what was decreed was the "*dahyak*" coupled with a heritable non-transferable tenure.

We think that the decree of the lower Court is perhaps too sweeping in its terms. It may give rise to the idea that the appellants are tenants without any rights at all, and it is plainly beyond the jurisdiction of the Civil Courts to determine anything of the sort. Guiding ourselves by the precedent set in *Sabhu* v. *Sita Ram*(1) we modify the decree of the learned Subordinate Judge. Instead of the declaration ordered therein we make a declaration to the effect that the relations between the plaintiff and the defendants so far as regards half the villages of Ram Nagra and Tiliani are those arising out of the decrees of the Settlement Courts dated November 18th, 1869, and October 31st, 1870, and that those decrees do not confer upon the predecessor of the defendants, or upon the defendants themselves, any rights as *pukhtadars* or under-proprietors. It seems to us that this meets the case. It does not trespass upon the jurisdiction of the Revenue Courts, but it does set those Courts upon inquiry at the source of the tenure of the appellants in order to determine the incidents of that tenure.

We do not think that this modification need affect our order as to costs. Except as stated above the appeal is dismissed. The appellants will bear costs of the respondent.

There is also an appeal about costs. It is merely a matter of calculation. The suit for possession was withdrawn. The Court-fee on any part of that should, therefore, not be allowed to the respondent. He can only get the Court-fee on that part of the suit for a declaration which has succeeded. If the Court-fee upon the suit for possession or any part thereof has been allowed in the decree of the lower Court to the respondent, then we direct that it be removed from the sums so allowed, and that the decree of the lower Court be amended accordingly.

Decree modified.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 145 OF 1913.

January 7, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

LINGAM KRISHNA BHOOPATHI DEO GARU—DEFENDANT—APPELLANT

versus

THE HON'BLE SRI MIRZA SRI PASUPATHI VIZIARAMA GAJAPATHIRAJA MAHARAJA MANYA SULTAN BAHADUR GARU RAJAH OF VIZAYANAGARAM AND ANOTHER, PLAINTIFF TRANSFEREE DECREE-HOLDER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 37, 38, 42, 50 cl. (1), O. XXI, r. 16, O. XLV, r. 15—Transmission of decree for execution to District Court—Application by transferee of decree for recognition of transfer—Jurisdiction of District Court to recognize transfer—Power-of-attorney, construction of.

Where the Privy Council transmits its decree to the High Court, the High Court in receiving and filing it does purely a ministerial act. The District Court whose decision was appealed against does not thereby cease to be a Court "*which passed the decree*", for the purpose of recognizing the transferee decree-holder and ordering execution at his instance.

Swaminatha Ayyar v. *Vaidyanatha Sastri*, 28 M. 466; 15 M. L. J. 116, *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi*, 9 C. 482; 12 C. L. R. 511; 10 I. A. 4; *Premlal Mullick* v. *Sumbhoonath Roy*, 22 C. 960, followed.

Where a power-of-attorney executed in favour of an agent contains the following terms "to conduct and manage all other, the estate property, moneys, affairs and concerns of the *zemindari*.....and in all respects as fully and absolutely as the principal himself is empowered to do, and (subject so aforesaid), to do, perform and carry out all such acts and deeds whatever as may be considered requisite for the above purposes as amply and effectually as the principal could do in his own proper person if these presents had not been executed", the words are wide enough to give the agent power to assign a decree to another person *even for less than the decree amount.*

Palaniappa Chettiar v. *Arunachellam Chettiar*, 17 Ind. Cas. 139; 12 M. L. T. 528; (1912) M. W. N. 1204; 23 M. L. J. 595, *Venkatarama Aiyar* v. *Narasinga Row*, 18 Ind. Cas. 135; 13 M. L. T. 114; 24 M. L. J. 180; (1913) M. W. N. 72, followed.

Appeal against the order of the District Court of Vizagapatam, dated 26th March 1913, in Execution Petition No. 3 of 1913, in Original Suit No. 7 of 1899.

FACTS.—The Maharaja of Vizayanagaram obtained a decree against Lingam Bhupathi for a sum of Rs. 1,30,000, and that decree, was, on appeal, confirmed by the Privy Council in 1909. The decree was then transmitted to the High Court. In the meanwhile Mr. Fowler, the agent of the Maharaja acting under the power-of-attorney given by the Maharaja, had assigned the decree to one Baswa Reddi for a sum of Rs. 1,10,000 and odd, *i.e.*, Rs. 20,000 less than the decree amount. The transferee decree-holder then applied for recognition of the transfer to the High Court. The High Court transmitted the same for execution to the District Court. The transferee then put in an application for the recognition of the transfer to the District Court and for execution of the decree. The application was granted. Against that order the judgment-debtor appealed to the High Court on the ground that it is the High Court alone that must recognize the transfer, and not the District Court.

Mr. *T. Rangachariar*, for the Appellant.—The scheme of the Code is to allow all matters to be dealt with in execution by the High Court and for the purpose of a Privy Council decree, the High Court is the executing Court.

Section 38 of the Code of Civil Procedure deals with transfer of decrees, and also section 42 of the Code.

Section 39 gives all power to an executing Court. In *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1), the question was what Court has power to proceed with execution under section 50. An order under section 50 is not made in exercise of the powers "in executing a decree."

Order XXI, rule 30, deals with modes of execution. The recognition of the "transfer" is a judicial act and it is not open to the High Court to delegate such function to a subordinate Court.

[SADASIVA AIYAR, J.—The words "give such directions" in Order XLV, rule 15 (2), mean only general directions and not that the High Court should convert itself into an executing Court.]

Mr. *T. Rangachariar.*—In *Joy Narain Giree* v. *Goluck Chunder Mytee* (2) it was held that when applications for execution are made directly to the District Court they are altogether invalid.

Garurdhujj Prasad Singh v. *Meju Mal* (3).

(1) 28 M. 466; 15 M. L. J. 116.
(2) 22 W. R. 102
(3) 28 A. 337; A. W. N. (1906) 43; 3 A. L. J. 110.

In *Hurrish Chander Chowdhry* v. *Kali Sunderi Debi* (4), it was held that it is the High Court that must decide all questions relating to the execution of the Privy Council decree.

The decree is for Rs. 1,30,000 and the assignment is for Rs. 1,10,000, *i.e.*, the agent has given up more than Rs. 20,000 and in doing so has acted beyond his powers. *Palaniappa Chettiar* v. *Arunachellam Chettiar* (5).

[SADASIVA AIYAR, J.—There is a clause in the deed to give up.

Mr. *T. Rangachariar*.—In *In re Dowson and Jenkin's Contract* (6), it is held thatthe power to sell does not include power to mortgage.

Mr. *P. Narayanamurthi*.—The case of *Premlall Mullick* v. *Sumbhoonath Roy* (7) clearly defines the power of the High Court in regard to the execution of the decree of Privy Council.

The case of *Swaminatha Aiyar* v. *Vaidyanatha Aiyar* (1) gives the right to recognize the transfer only to the Court which passed the decree, and in this case the Court which passed the decree is the District Court.

Order XXI, rule 16, is clear on this point.

Mr. *T. Rangachariar* (for Mr. *R. Srinivasa Aiyanger* with him Messrs. *V. Ramesam* and *B. Narasimha Rao*), for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.

SADASIVA AIYER, J.—I entirely agree with the judgment just now pronounced by my learned brother. The appellant's Vakil relied on the close similarity between the terms of Order XLV, rule 16, and the terms of the last sentence of section 42 of the Civil Procedure Code. Order XLV, rule 16, says that orders in execution made by the Court which executes the order of His Majesty in Council "shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees." The last sentence of section 42 of the Civil Procedure Code states that "the orders of a Court executing a decree sent to it for execution by another Court shall be subject to the same rules in respect of appeal as if the decrees had been passed by itself." On this similarity of wording it was argued that just as a Court to which the decree of another Court is sent for execution cannot entertain applications under Order XXI, rule 16, or section 50 clause (1), so even the Court of first instance whose decision ultimately went to the Privy Council could not entertain such applications because His Majesty's order had to be sent to it for execution by the High Court. I do not think that this argument is sound as it ignores, as pointed out by my learned brother, the principle underlying section 37 of the Code which defines the expression "the Court which passed the decree" as including the Court of first instance so far as the powers of that Court relating to execution of the decrees passed by the Appellate Courts are concerned.

As regards the construction of the power-of-attorney, Exhibit A, I think that the power to manage a big *zemindari* estate must include the power to transfer for a reasonable consideration a decree amount due to the estate. Clause 24 of the power-of-attorney, Exhibit A, confers, in my opinion, on the manager the power to execute deeds and conveyances necessary for the purpose of effectuating such transfers as are incidental to the business of estate management.

Again, as regards the decision of *Palaniappa Chettiar* v. *Arunachellam Chettiar* (5) the principal himself in that case repudiated the act of his agent as beyond the scope of his authority, whereas in the present case the principal by his conduct ratified the act of his agent (See paragraph 10 of the lower Court's judgment) and, in fact, it was not denied that the principal had received the purchase-money for the transfer from his agent's transferee and consented to the transferee executing the decree.

I, therefore, concur in dismissing the appeal with costs.

SPENCER, J.—Two grounds of appeal are pressed. It is contended (1) that the order of the District Court recognising the transfer of the decree by the manager and agent of the estate of the Maharaja of Vizaya-

(4) 9 C. 482; 12 C. L. R. 511; 10 I. A. 4.

(5) 17 Ind. Cas. 139; 12 M. L. T. 528; 23 M. L. J. 595; (1912) M. W. N. 1204.

(6) (1904) 2 Ch. D. 219; 73 L J. Ch. 684; 91 L. T. 121.

(7) 22 C. 960 at p. 917.

nagaram in favour of the 2nd respondent and allowing the latter to execute the decree was an order made without jurisdiction, the proper Court which should pass such an order in a case, which had gone up to the Privy Council in appeal from a decree of the High Court which confirmed the original decree of the District Court, being the High Court;

(2) that Mr. Fowler as attorney of the Maharaja was not expressly authorised under the power, which is Exhibit A, to transfer decrees obtained by his principal for less or indeed for any amounts.

No direct authority has been quoted in support of the first proposition. It is sought to be inferred from the language of Order XLV, rules 15 and 16, read along with sections 38, 39 and 42, Civil Procedure Code. Reference has also been made in the argument to the decision of *Swaminatha Aiyer* v. *Vaidyanatha Sastri* (1) in which it was held that an application under section 234 of the Code of 1882 (corresponding to section 50 of the present Code) to execute a decree against the legal representatives of a deceased judgment-debtor must be made to the Court which passed the decree and not to the Court to which it has been transferred for execution; and the decision in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (4) is cited as an instance of the High Court disposing of a similar question arising in the execution of an order of Her Majesty in Council. But, in my opinion, the position of an original Court, which itself passed a decree against which appeals have been carried out to the Privy Council, when it receives the order of His Majesty in Council, transmitted to it by the High Court, is not to be compared with the position of a Court to which the decree of another Court has been transferred for execution. They are totally different positions.

Order XXI, rule 16, permits a transferee of a decree to apply for execution of the decree to the Court which passed it. Section 38 permits a decree to be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 37 defines the expression "Court which passed a decree" as including the Court of first instance where there has been an appeal. Similar words are used in Order XLV, rule 15, where it is provided that the Court from which an appeal to His Majesty has been preferred shall transmit the order of His Majesty in Council to the *Court which passed the first decree* appealed from. The act of the High Court in receiving and filing an order of the Privy Council is a purely ministerial function [*vide* observation in *Premlall Mullick* v. *Sunbhoonath Roy* (7).] It is so provided that the High Court should act as an intermediary for carrying out the orders of His Majesty in Council because the Privy Council does not deal direct with subordinate Courts.

In the present instance the petition of the transferee decree-holder to transmit the order of the Privy Council with a prayer for a direction to bring him on record in that capacity came before a Bench of this Court and the learned Judges who disposed of his application (the Chief Justice being one of the Bench) expressly refused to make any directions. Without treating him as having no *locus standi* to make the application they transmitted the order, without prejudice to his right to take, and the original decree-holder's right to give, an assignment of the decree in question.

In *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (4) the question was not one of recognizing a transfer of a decree whether one of two co-plaintiffs ought to be permitted to execute a decree without the concurrence of the other plaintiff. Their Lordships of the Privy Council refrained from deciding whether the learned High Court Judge usurped a jurisdiction which did not belong to him, although they were inclined to think he had not done so. His order was set aside on other grounds, namely, that it was erroneous to suppose that a decree can only be executed as a whole and not partly by one of the plaintiffs.

I, therefore, find nothing irregular or contrary to law in the action of the District Court in permitting the transferee to execute the decree, nor has the original decree-holder raised any objection to his doing so.

In support of the second contention we have been referred to the case of *Palaniappa Chettiar* v. *Arunachallam Chettiar* (5) and

contra to the case of *Venkataramana Aiyar* v. *Narasinga Row* (8).

Every document must be construed with reference to its particular terms and differently worded documents afford but little assistance for correctly construing the document concerned in this case. We have referred to the power-of-attorney concerned in *Pallaniappa Chettiar* v. *Arunachallam Chettiar* (5) and we find that the scope of the agent's power was far more limited than that of the powers conferred under Exhibit A. The learned Judges who decided that case observed that there was no clause of a comprehensive character which would show that the principal intended to confer plenary powers on his attorney, to deal with all the properties, and rights belonging to him. While it is true, as laid down in that case, that established law requires a power-of-attorney to be construed strictly, it is also correct to hold that when an agent has a general power-of-attorney to act in some business or series of transactions he may be assumed to have all usual powers.

I feel no doubt that the words in Exhibit A "to conduct and manage all other, the estate property, moneys, affairs and concerns of the *zemindari*.....in all respects as fully and absolutely as the principal himself is empowered to do and (subject to aforesaid) to do, perform and carry out all such acts and deeds and things whatsoever as may be considered requisite for the above purposes as amply and effectually as the principal could do in his own proper person if these presents had not been executed," do confer on the Maharajah's manager such plenary powers as would include the transfer for a proper purpose to another person of decrees obtained in the name of the Maharaja himself apart from other words which occur later in the same document.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed.

(8) 18 Ind. Cas. 135; 13 M. L. T. 114; 24 M. L. J. 180; (1913) M. W. N. 72.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 229 OF 1913.

November 20, 1913.

Present:—Mr. Hallifax, A. J. C.

KEKRA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SADHU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 105—Interpretation.

Section 105 of the Civil Procedure Code is only one of the many rules that come under the heading of *res judicata*. If an order is passed against which an appeal is allowed but no appeal is lodged in time, that order is binding and also all the findings and decisions which form an essential part of the basis of that order, but not those which are only incidental thereto. Section 105 (1) sets out a group of exceptions to this rule and section 105 (2) states one exception to that group of exceptions, bringing that particular case back under the primary rule.

It is an ordinary canon of interpretation that a word keeps the same meaning at least throughout any one Act.

Appeal against the decree of the Divisional Judge, Chhattisgarh Division, dated 23rd January 1913, modifying that of the Subordinate Judge, Bilaspur, dated 31st August 1912.

Mr. *M. B. Dadabhoy*, for the Appellants.

Sir *Bipin Krishna Bose*, for the Respondent.

JUDGMENT.—One Mukhiram with his son Sakharam and his brother Raghunath executed a mortgage in 1895 in favour of Mohanlal and Piarelal, the first two defendants in the suit out of which this appeal arises. They sued on the mortgage in 1899 impleading all the original mortgagors but omitting to implead Sadhu and Kanhai, two younger sons of Mukhiram, who were not parties to the mortgage, being not more than ten and three years of age respectively when it was executed. A decree for foreclosure was given in that suit and the mortgagees subsequently obtained possession of the property. In July 1909 Sadhu and Kanhai, the two sons of Mukhiram who were not joined in the mortgage suit, instituted the suit out of which this appeal has arisen, claiming a right to redeem the property from the mortgagees and their transferees, Kekra and Bisnath. These transferees, who are the third and fourth defendants, are the only defendants who really

contested the claim. They are the appellants in this Court.

In the first Court it was found that the mortgagees had no notice, at the time they filed their suit for foreclosure, of the interest of the plaintiffs in the property, and the suit was dismissed in June 1910. The plaintiffs appealed to the Court of the Divisional Judge, who held that the mortgagees had constructive notice of the plaintiffs' existence and interest in the property and that even without such notice the plaintiffs still had a right to redeem solely on the ground that they were not parties to the foreclosure suit. The case was, therefore, remanded to the first Court in January 1911 for trial of the remaining issues that arose in the case, and in June 1911 that Court issued a preliminary decree for redemption on payment of Rs. 3,120-13-4. The two contesting defendants appealed, and the case was again remanded in September 1911 for a proper calculation of the price of redemption, the finding that the plaintiffs had a right to redeem being discussed and re-affirmed in the order of remand. The first Court then, on the 31st of August 1912, gave a decree fixing the price of redemption at Rs. 5,981-4-3. The plaintiffs appealed again, solely in respect of the amount payable, which was reduced to Rs. 3,600 by a judgment of the Court of the Divisional Judge delivered on the 23rd of January 1912.

This second appeal is against that judgment and decree and the appellants are Kekra and Bisnath who are in possession of the property as purchasers from the original mortgagees. A great part of the appeal is taken up with the contention that the price of redemption should be what is found to be due on the mortgage, without any reference to the price paid for the property by the appellants to the mortgagees, which is the basis taken by the lower Appellate Court. This as an abstract proposition is admittedly quite sound. But the ground taken is abandoned on the learned Counsel for the appellants realising that on a proper examination of the mortgage accounts, which must include consideration of the profits received by them, they would be found entitled to less than the sum that has been fixed in the lower Appellate Court.

The substance of the appeal is, however, an effort to avoid the decision that the plaintiffs had any right of redemption and were not bound by the foreclosure decree passed against their father Mukhiram. If that plea is still open to the appellants and they are not debarred from taking it by the Divisional Judge's judgment of January 1911, it is bound to succeed, according to the unquestionably sound view of the law enunciated by Batten, A. J. C., in *Gore* v. *Kashi Ram* (1). But that judgment was delivered in October 1912 and published in February 1913, and till then the accepted view of the law in these Provinces was that taken by the Divisional Judge in his two orders of remand in January and September 1911. But right or wrong, the appellants are bound by that decision unless it is still open to them to appeal against it and it seems clear that they are precluded from doing this by the provisions of section 105 (2) of the Civil Procedure Code.

Their learned Counsel urges that by the words of section 105 (2) he is precluded from questioning only the 'correctness' of the order of remand itself, that is to say, he cannot now say that the case ought not to have been remanded and that all the proceedings following the remand ought to be left out of consideration, but he can say that any incidental findings or decisions in the order of remand are wrong. But in this case the order of remand is based solely and entirely on the decision that the plaintiffs still had the right to redeem. If the opposite view had been taken there could not possibly have been any remand. To question the correctness of this decision is, therefore, nothing more or less than questioning the correctness of the order of remand.

Section 105 of the Civil Procedure Code is only one of the many rules that come under the heading of *res judicata*. If an order is passed against which an appeal is allowed and you do not appeal in time, that order is binding upon you and also all the findings and decisions which form an essential part of the basis of that order.

(1) 18 Ind. Cas. 848; 9 N. L. R. 1.

SHEKAMBARI v. RAM KUMAR DAS.

Section 105 (1) sets out a group of exceptions to that rule, and section 105 (2) states one exception to that group of exceptions, bringing that particular case back under the primary rule. We have then to apply, in that specified case, the ordinary principles of the rule of *res judicata*, and one of the main principles, as I have already said, is that, when an order has become final and binding upon you, you can still question all those incidental findings and decisions which do not form an essential part of the basis of the order, but not those which do. Here the decision that the plaintiffs still had a right to redeem was not only an essential part of the basis of the order of remand of January 1911 but was the whole of it.

If there could be any doubt on this point it would be set at rest by the fact that the word 'correctness' is also used in section 97 of the Civil Procedure Code. It is admitted that by the use of that word section 97 precludes the questioning of all material decisions in the judgment equally with the questioning of the decree itself, and it is an ordinary canon of interpretation that a word keeps the same meaning at least throughout any one Act. The appeal is for these reasons dismissed, and the appellants must pay the costs of the respondents.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3089 OF 1911.
March 4, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
SHEKAMBARI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
RAM KUMAR DAS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Limitation Act (IX of 1908), ss. 5, 18—Suit to set aside revenue sale—Compromise that defendant should execute kobala *within three months—After more than three years suit for declaration of title, whether maintainable.*

Certain land belonging to the plaintiff was sold for arrears of Government revenue and purchased by the defendant's father. The plaintiffs sued to have the revenue sale set aside on the ground of fraud, and during the pendency of that suit, which was decreed, a *solehnamah* was entered into between the parties by which the defendant agreed to execute a *kobala* on receipt of Rs. 60 within three months, in default the plaintiffs were to get the *kobala* executed in their favour by the Court. More than three years after this, the plaintiffs brought a suit for declaration of their title to the land which was the subject-matter of the previous suit, and for possession thereof, and also for getting a *kobala* executed by the defendant:

Held, that the suit was not maintainable; that the plaintiffs either must sue again to have the sale set aside on the ground of fraud, a suit which is clearly barred,—or they must execute the original decree on the *solehnamah* which is also barred.

Neither section 5 nor section 18 of the Limitation Act has any application to cases under section 47 of the Code of Civil Procedure.

Appeal from the decree of the Sub-Judge of Chittagong, dated August 3rd, 1911, reversing that of the Munsif of South Raojan, dated 5th December 1910.

Babu *Rshitish Chandra Sen*, for the Appellants.

Babu *Ram Dayal De*, for the Respondent.

JUDGMENT.—This second appeal arises upon a suit for declaration of the plaintiff's title to the plaint lands and for possession thereof and also for getting a *kobala* duly executed by the defendant and registered. The learned Munsif decreed the suit. The learned Subordinate Judge has dismissed it holding that it is not maintainable.

A simple statement of the position in plain language will serve to show that the learned Subordinate Judge's decision is correct. It apears that certain land belonging to the plaintiff was sold for arrears of Government revenue and it was purchased by the defendant's father. The plaintiff sued to have this revenue sale set aside on the ground of fraud, and during the pendency of that suit which was decreed on the 7th July 1906 a *solehnama* was entered into between the parties by which the defendant agreed to execute a *kobala* on receipt of Rs. 60 within three months, in default the plaintiffs should get the *kobala* executed in their favour by the Court.

Now this suit for setting aside the revenue sale can only be brought within three years of that sale and obviously could not be brought now. The title of the defendant's father is clearly stated by the terms of the *solehnama*. The allegation of fraud is

dropped and it is stated that the land can only pass back into the possession of the plaintiff by transfer by means of a sale for monetary consideration, Rs. 10 in excess of what the defendant's father gave for it. This is clear admission of the defendant's title, and the plaintiff had no title to possession except that which he obtained by the contract evidenced by the *solehnama* and which he could have enforced and ought to have enforced within three years of the decree. He cannot possibly now bring another suit for the same relief under the terms of the compromise petition filed in that suit, and this is what the learned Subordinate Judge finds.

The plaintiff in appeal when his difficulties are pointed out to him frankly admits that there are these difficulties, but urges that the case should be remanded in order to see whether he had any excuse for his delay, and whether section 5 or section 18 of the Limitation Act could not be made to apply. Unfortunately neither section 5 nor section 18 of the Limitation Act has any application to section 47 of the Code of Civil Procedure, and it is only under that section that any question of limitation arises. The Judge in the Court below did not deal with the question from the point of view of limitation. He dealt with it from the point of view of *res judicata*; and it is only because the appellant in this Court has urged the provisions of section 47 clause (2) that we are obliged to point out not only that the Court is precluded by the law of limitation from treating the proceeding under that section as a suit, but also on the score of jurisdiction, as this is a suit brought before the Munsif of Raojan and not before the second Court of the Sudder Chittagong before whom alone the proceeding under section 47 could have been taken. It is, therefore, quite impossible for the plaintiff to plead the provisions of section 47, and he is in this position, either he must sue again to have the sale set aside on the ground of fraud, a suit which is clearly barred, or he must execute the original decree on the *solehnama* which is also clearly barred; for he has no title left in himself that title having passed to the defendant's father by the revenue sale.

The appeal, therefore, must be dismissed. Under the circumstances both parties will bear their own costs in all the Courts.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 12 OF 1913.

November 13, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

UTHAMI CHETTIAR AND ANOTHER—APPELLANTS

versus

JUTTU NAGASWAMI IYER—RESPONDENT.

Madras Civil Rules of Practice, r. 279, cl. (6)—Execution—No process issued—Money paid into Court by judgment-debtor, whether money realized by the application—Civil Procedure Code (Act XIV of 1882), s. 295.

Payment into Court by a judgment-debtor of the decree-money, without any process having been issued on the execution application, is money "realized by the application" within the meaning of rule 279, clause 6, of the Civil Rules of Practice, though it may not come within the terms of section 295 of the Code of Civil Procedure, 1882.

Vibudhapriya Thirthaswami v. *Yusuf Sahib*, 23 M. 380; 15 M. L. J. 202, distinguished.

Kanappa Chetty v. *Annamalai Chetty*, 20 Ind. Cas. 919; (1913) M. W. N. 649, followed.

Appeal against the order of the District Court of Madura, in Appeal Suit No. 4 of 1912, preferred against that of the Court of the Principal District Munsif of Madura, in Execution Petition No. 442 of 1911, in Original Suit No. 244 of 1910.

Mr. *R. Rangaswami Aiyangar*, for the Appellants.

JUDGMENT.—The decision in the case of *Vibudhapriya Thirthaswami* v. *Yusuf Sahib* (1) quoted by the learned District Judge turned upon the wording of section 298 of the old Civil Procedure Code. The words of that section were: "Whenever assets are realized *by sale or otherwise* in execution of a decree;" whereas the wording of rule 279, clause (6), of the Civil Rules of Practice, 1905, is "realized by the application." Money may be realized "by the application," that is, by the judgment-debtor paying the amount in Court in consequence of an application having

(1) 23 M. 380; 15 M. L. J. 202.

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been made without any process having been issued; though such payment may not come within the terms of section 295 of the old Civil Procedure Code, because it was not realized "by sale or otherwise in execution"; that is, by a process issued and effectively carried out in execution. Further the money was realized in the case of *Vibudhapriya Thirthaswami* v. *Yusuf Sahib* (1), from a person who was under no obligation at all to pay it into Court.

We think that it is not equitable that the decree-holder after incurring the expenses of engaging a Vakil to put in an execution application through the default of the judgment-debtor in not having obeyed the decree at once should be put to loss through any narrow interpretation of rule 279, clause (6), of the Civil Rules of Practice, 1905.

Following the ruling of *Kanappa Chetty* v. *Annamalai Chetty* (2) on the file of this Court, we set aside the order of the learned District Judge and restore that of the District Munsif with costs in all Courts.

Order set aside.

(2) 20 Ind. Cas. 919; (1913) M. W. N. 649.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 29 OF 1913.

March 12, 1914.

Present:—Mr. H. S. Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

TUVURIAMMAL—APPELLANT

versus

SANTIAGO—RESPONDENT.

Divorce Act (IV of 1869), ss. 7, 45—'Principles and Rules', meaning of—Civil Procedure Code (Act V of 1908), O. XVIII, r. 1—Restitution of conjugal rights, suit for—Marriage ceremony, admitted—Coercion and non-consent, pleaded—Right to begin.

The words "principles and rules" used in section 7* of the Indian Divorce Act refer to rules of *quasi*-substantive rather than of mere adjective law.

A *v.* B, 22 B. 612, followed.

Where in a suit for the restitution of conjugal rights by a husband the wife admitted the marriage ceremony but pleaded coercion and non-consent:

Held, that having regard to the words "principles and rules" in section 7 of the Indian Divorce Act and to section 45 of the same Act, and Order XVIII, rule 1, of the Code of Civil Procedure, the right party to begin the case was the defendant.

Burroughs v. *Burroughs*, 2 S. W. and Tr. 544; 31 L.J. Mat. 56; 5 L. T. 771, followed.

Mr. *Robertson*, for the Appellant.

Mr. *S. N. Sen*, for the Respondent.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The respondent sued appellant for a decree for restitution of conjugal rights and has obtained a decree for the relief asked for. Respondent's case is that he and the appellant were married according to Christian rites on the 28th July 1902 and since then cohabited together, but that since the month of July 1910 appellant, without any lawful cause, has withdrawn herself and still does withdraw herself from bed, board and mutual cohabitation with him and has refused and still does refuse to render to him conjugal rights although requested by him to do so. Appellant's defence is that at no time was there celebrated a valid or legal marriage between her and the respondent, that the marriage alleged by the respondent was brought about by force and intimidation. She at the same time does not deny that a marriage ceremony took place between them at a Roman Catholic Church. She alleges that after the said marriage respondent forcibly took her away to Danidaw and kept her in a house under confinement for a fortnight and that in or about the month of August 1902, as he found that she was unwilling to cohabit with him, he allowed her to go to her mother's residence at Pazardaung at which place she resided till the suit was brought. She submits that she was never legally married to respondent and that such marriage was null and void and of no effect. She also says that since August 1902 till the institution of the suit respondent has never called on her to return to him and render him marital duties.

The first ground of appeal is that the learned Judge on the original side erred in ruling that the appellant had to begin the case as such ruling prejudiced her in substantiating her defence. The learned Judge seems to have called on appellant to begin and at the hearing of this appeal her learned Counsel allowed that he never

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*"Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

objected to her beginning. So the learned Judge does not seem to have been asked to rule on who should begin. Section 99 of the Civil Procedure Code lays down that no decree is to be reversed or substantially varied nor shall any case be remanded in appeal on account of any error or irregularity in any proceedings in the suit not affecting the merits of the case, and section 45 of the Indian Divorce Act enacts: "Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure." Section 7 of the same Act enacts: "Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." Reliance is placed on the case of *Burroughs* v. *Burroughs* (1), where in a case of the present nature the Judge ordinarily ruled that the petitioner had the right to begin though the substantive issue may be raised on the husband's (in the case respondent's) answer. The first ground of appeal is based on a point which is purely one of procedure and in my opinion the words "principles and rules" used in section 7 of the Indian Divorce Act should not be held to include such a point of procedure. The meaning to be attached to such words was considered in the case of *A v. B* (2), when Farran, C. J., said: "The principles and rules here referred to, (*i.e.*, in section 7 of the Indian Divorce Act), are not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent sections (45 and 55) of the Act, but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief—rules of *quasi*-substantive rather than mere adjective law" I think that that view is right. Even, therefore, if it was for the respondent to have begun, I think that section 99 of the Civil Procedure Code must be considered in determining whether the decree of the learned Judge on the original side should be interfered with, and taking that section into consideration, I am of opinion that even if it was for the respondent to have begun the appellant has not been prejudiced thereby. She admits that the marriage ceremony took place and that she signed the register; but she pleads that she was forced and coerced into a marriage against her will. It was for her to prove this affirmatively, and it seems to me that, this being the case, it was immaterial to her who began. But I consider that she was the right party to begin. Holding as I do that the words "principles and rules" in section 7 of the Indian Divorce Act do not include mere rules of procedure and having regard to section 45 of the same Act and Order XVIII, rule 1, of the Code of Civil Procedure, I think that it was for appellant to begin. She admits the ceremony but pleads coercion and non-consent. Unless she can prove such, the marriage was valid and binding on her.

The next ground of appeal is that appellant did not consent to the marriage with the respondent and that there was no marriage between them legally enforceable. She has most certainly not proved her allegations. Three children have been born to her, one before the marriage and two after it, one in 1903 and the other in 1906. The father of each of them was registered as Santiago Servai. The child born in 1906 was born some four years after the marriage. She endeavours to make out that another Santiago Servai, which is respondent's name, is the father; but there is no evidence of any worth that such is the case. If she was forced and coerced as she says, surely she should have taken proceedings at the time. There is no good evidence to show that she was forced and coerced. The ground must, in my opinion, fail.

The next ground is that respondent has failed to prove his case. Appellant having admitted the marriage ceremony and having failed to prove her case, this ground has no substance in it. The fourth ground I have already dealt with. I have no doubt that respondent was father of her children.

The fifth ground is that the suit should have been dismissed as there was no demand as required by law before the institution of the suit. This ground refers to an English

(1) (1862) 2 Sw. and Tr. 544; 31 L. J. Mat. 56; 5 L. T. 771.

(2) 22 B. 612.

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rule of procedure which is dealt with in the case of *Field* v. *Field* (3). Being a mere rule of procedure I do not think that it is included in the words "principles and rules" as used in section 7 of the Indian Divorce Act. Moreover, having regard to the words of section 33 of the Indian Divorce Act and the beginning words of section 7, absence of notice cannot be pleaded as a defence to an action of this nature. Appellant does not wish to return to her husband and asks that his suit be dismissed. She in her evidence says that her father asked her to return to respondent and she refused.

The sixth ground was not argued. As regards the seventh ground it would appear that the parties have been separated for some years. During three years the respondent has taken no action. He says that he does so now as his wife is intimate with another man. It does not appear that she is possessed of any means. I think the ground should be allowed.

In the result I would confirm the decree of the learned Judge on the original side except that I would order that each party do pay their own costs.

TWOMEY, J.—I agree.

Appeal dismissed.

(3) (1889) 14 P. D. 26; 58 L. J. P. 21; 59 L. T. 880; 37 W. R. 134.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 45 OF 1912.

March 11, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

NADER ALI HOWLADAR—PLAINTIFF—APPELLANT

versus

ASIMADDI SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 103B cl. (5), 104J—Presumption—Rate and amount of rent—Relationship of landlord and tenant.

The presumption which arises out of section 104J of the Bengal Tenancy Act merely refers to the rate and amount of rent. That rent may be payable by one person at one time and by another person at another time, but the mere fact that a certain rate of rent was found to be payable by the defendant's father to the plaintiff gives rise to no presumption that the sons are the plaintiff's tenants.

Where the defendants were recorded as under-*raiyats* of the plaintiff in the Settlement Record:

Held, that there was a presumption under section 103B, clause (5), that the relationship of landlord and tenant existed between the parties, but that the presumption could be rebutted.

Appeal from the decree of the Second Sub-Judge of Backergunge, dated August 26th, 1911, reversing that of the Fourth Munsif of Barisal, dated May 22nd, 1911.

Babu *Brojendra Nath Chatterjee*, for the Appellant.

Babus *Basanta Kumar Bose* and *Prokash Chandra Sarkar*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff to eject the defendants from a certain holding on the ground that the tenancy of their father had expired by his death. The first Court held that the tenancy had expired, that the defendants were holding on without any right and that they could not claim any notice as they failed to establish the relationship of landlord and tenant, and further that the plaintiff was entitled to mesne profits at the rate of rent with cess and damages that he would have obtained for the three years during which the defendants' father had possession of the land. The learned Subordinate Judge in appeal has reversed the finding of the Munsif and has held that the presumption raised by section 104J conclusively precludes the plaintiff from saying that the defendants are not his tenants. He has not noticed the claim of the plaintiff to receive rent due to him even if they are his tenants and has denied the plaintiff any mesne profits. The plaintiff appeals.

As regards the first point it seems to us that the Subordinate Judge is wrong in extending the presumption which arises out of section 104J. That presumption merely refers to the rate of rent and the amount of rent. Obviously that rent may be payable by one person at one time and by another person at another time; and because that rate of rent was found to be payable by the defendants' father that would raise no presumption that the sons were the plaintiff's tenants. But what does raise that presumption is the fact that after the *kabuliat* expired in 1313 these defendants were recorded as under-*raiyats* in the Settlement Record. That raises the presumption under section 103B, clause (5), as numbered in the

law applicable to Eastern Bengal from which this case comes. But that presumption can be rebutted, and the learned Subordinate Judge does not tell us whether there was any evidence offered to rebut it, or whether in his opinion it was correct. He proceeded on a presumption under a wrong section and, therefore, we cannot be satisfied that he directed his attention to the presumption which actually arises under section 103B.

As the case is to be remanded for a finding of the rent the plaintiff is entitled to in any case for the three years during which the defendants have been in occupation of the land, we must also remand the whole appeal and direct the Subordinate Judge to come to a fresh decision as to the status of the defendants after considering the presumption under section 103B and finding whether it has or has not been rebutted by any evidence on the record.

The costs will abide the result.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 583 OF 1913.
December 4, 1913.
Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.
JAHANGIRA—PLAINTIFF—APPELLANT
versus
AMIR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Custom—Wajib-ul-arz, *whether custom*—Wajib-ul-arz *entry ambiguous, effect of.*

The record in the *Wajib-ul-arz* is not the custom. It is a mere record of the custom; and if its language is ambiguous, it may, when unsupported by other evidence, be insufficient either to prove the custom as a whole or any particular incident of that custom.

Second appeal from the decision of the Additional Judge of Meerut, dated the 20th of February 1913.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—This and the connected Appeal No. 582 of 1913 arise out of a suit for pre emption. The dispute is between rival pre-emptors. Apparently the sole evidence of the existence of the custom of pre-emption was an entry in the *wajib-ul-arz* of 1295 *Fasli*. The entry is as follows:—"*Jab koi hissedar hakiat apni muntakil karna chahta hai to awal badast biradar hakiki badhu rishtedar karibi badhu baidi jo sharik milkiat hon uske bad digar hissedaran ke hath kimat munasib par muntakil karta hai*". Neither of the parties to the present appeal were in any way interested in denying the existence of a custom of pre-emption. They both relied upon the entry in the *wajib-ul-arz* as proving that there was such a custom. They are, however, at issue upon what are the incidents of the custom. The plaintiff Jahangira contends that the first two categories of pre-emptors have their rights altogether irrespective of whether they are co-sharers or not. The respondent, on the other hand, contends that the words "*jo sharik milkiyat hon*" qualified all that precedes, that relatives have no right unless they are also co-sharers. The document seems capable of being read in either way. The learned Munsif has read it as Jahangira would like, whilst the District Judge, who is a Muhammadan, has read it according to the defendant-respondent's contention. We do not think that any reported case can be of the least assistance in this matter. The record in the *wajib-ul-arz* is not the custom. It is a mere record of the custom; and if its language is ambiguous, it may when unsupported by other evidence be insufficient either to prove the custom as a whole or any particular incident of that custom. In the present case the plaintiffs apparently were unable to adduce in evidence a single case in which a near relation, who was not a co-sharer, asserted or enforced the right claimed by him in the present suit. We think under these circumstances that the plaintiff failed to prove his case and that his suit was rightly dismissed. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

UMAKANTA SAHA *v.* KASHIRAM BANIA.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 453 OF 1912.
March 4, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
UMAKANTA SAHA—DEFENDANT—APPELLANT
versus
KASHIRAM BANIA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 2 (c), 108 (j)—Homestead land—Transferability—Tenancy created before Transfer of Property Act.

Section 108 (*j*) of the Transfer of Property Act has no application to a tenancy created before the passing of that Act.

Therefore, when at the time the parties entered into contractual relations for the lease of certain land for dwelling purposes, there was no right of transferability, that right could not be acquired by the operation of section 108 (*j*) of the Transfer of Property Act.

Appeal from the decree of the Sub-Judge of Dacca, dated November, 20th 1911, affirming that of the First Munsif of Narainganj, dated April 10th 1911.

Babus *Mahendra Nath Roy* and *Manmatha Nath Roy*, for the Appellant.

Babu *Upendra Lal Roy*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for ejectment of the principal defendants Nos. 1 to 3 upon notice to quit and against their transferee, defendant No. 4, who purchased their interest in execution sale in 1908, on the ground that he was really a trespasser. The plaintiff is the Mirasdar or immediate superior landlord of the defendants and he obtained a decree for ejectment in the lower Court. The defendant No. 4 alone defended the case. He appealed before the Subordinate Judge and his appeal was dismissed and he has come to us upon second appeal, and the ground of his second appeal is that the defendants Nos. 1 to 3 had a transferable interest by reason of the alleged common law which existed prior to the passing of the Transfer of Property Act and which has been incorporated in section 108 (*j*) of that Act.

It appears that the land was settled upon the defendants Nos. 1 to 3's ancestors by the superior landlord as homestead land for dwelling purposes and that they lived there father and son for over 50 years. The plaintiff dealt with this as a tenancy terminable on notice to quit. It does not appear that there were substantial structures on the land. The structures which the Munsif ordered to be removed are described as huts. The Subordinate Judge held that section 108 (*j*) had no application because the tenancy was created before the passing of the Transfer of Property Act, and it has been urged before us that the dictum of Sir Barnes Peacock in *Banee Madhub Banerjee* v. *Joy Krishna Mookerjee* (1) and the doubt expressed by Mr. Justice Rampini in the case of *Hari Nath Karmakar* v. *Raj Chandra Karmakar* (2) lend colour to the contention that the law before the passing of the Transfer of Property Act with respect to homestead was the same as it is since that Act was enacted.

Now, it is only necessary to rebut this contention to refer to section 2 (*c*) of the Transfer of Property Act. That clearly says that any right or liability arising out of a legal relation constituted before this Act comes into force is not affected by anything in the Act. The doubt which is, therefore, expressed by Mr. Justice Rampini in *Hari Nath Karmakar's* case (2) does not really exist, and the learned Judge himself in two subsequent cases [*Madhab Chandra Pal* v. *Beejoy Chand Mahatab* (3) and *Ram Charan Naskar* v. *Hari Charan Guha* (4)] has clearly laid down that section 2 (*c*) of the Transfer of Property Act makes it impossible to say that homestead land was transferable before the Transfer of Property Act came into operation. It is argued that the finding of this Court in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (5) is not on all fours with the present case and that the dictum of Sir Barnes Peacock ought to apply to the present case. But what was held in that case is precisely what has been held in The later cases which we have just cited, that the incident of non-transferability was common to tenancies from year to year of homestead lands created before the passing

(1) 12 W. R. 495.
(2) 2 C. W. N. 122.
(3) 4 C. W. N. 574.
(4) 7 C. L. J. 107.
(5) 32 C. 1023; 9 C. W. N. 895.

HABIBULLAH *v.* ABDULLA.

of the Transfer of Property Act was clearly held upon authority. The party alleging transferability has to prove a custom to that effect and the learned Chief Justice in delivering the judgment said that the dictum of Sir Barnes Peacock in the case of *Banee Madhub Banerjee* v. *Joy Krishna Mookerjee* (1) did not touch the question, because in that case there was a custom that tenure leased for building purposes was transferable, assignable as well as heritable. The observations of Chief Justice Peacock in that case which would give support to the present appellant's contention were unnecessary for the decision of the case, and he doubted whether they accurately stated the law as now understood in Bengal. Since then four learned Judges have considered this question and clearly laid down that that dictum does not represent the law as now understood in Bengal. It is clear that at the time that the parties entered into contractual relations for the lease of this land for dwelling purposes there was no right of transferability and that right cannot have been acquired by any provisions of the Transfer of Property Act, inasmuch as it was a right arising out of legal relations constituted between parties before the Act came into force. The Madras Court appears to have taken the same view as Sir Barnes Peacock in an old case in the year 1870, *Venkatasamy Naick* v. *Srimutu Muthuvijia Rangunada Rani* (6), and they there stated that there was no Indian authority on the subject whatever and they relied on English Common Law. Here in Bengal the land law has been regulated by statutes for very many years, and it cannot be said that we can have recourse to the Common Law of England or to any derived doctrine of law such as Peacock, C. J., refers to as existing in Bengal.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(6) 5 M. H. C. R. 227.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 771 OF 1913.

February 23, 1914.

Present:—Mr. Justice Piggott.

HABIBULLAH—JUDGMENT-DEBTOR—APPELLANT

versus

ABDULLA—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 32—Injunction—Perpetual injunction to keep door closed—Door closed but re-opened—Remedy of decree-holder—Suit or execution.

A decree directed the judgment-debtor to close a certain door and to keep it permanently closed. Having formally complied with the decree by closing the door, the judgment-debtor shortly afterwards re-opened it :

Held, that the decree-holder had a remedy under his decree *i.e.*, in execution and was not bound to bring a fresh suit.

Second appeal from the decision of the Additional Judge of Moradabad, dated the 24th June 1913.

FACTS.—One Abdullah obtained a decree against Habibullah and others on the 17th June 1908, which was modified by the first Appellate Court and the modified decree was confirmed on the 5th March 1910 by the High Court. The decree ordered the judgment-debtors to permanently close the door in dispute. The decree-holder applied for execution of the decree praying that the judgment-debtors should be ordered to close the door and should not pass over the decree-holder's land, failing which steps should be taken under Order XXI, rule 32. The judgment-debtors objected saying that they had obeyed the decree by closing the door and had re-opened the door for which a fresh suit should be brought. They also contended that no injunction had been granted and so Order XXI, rule 32, did not apply. Later, they also put in an application on 17th February 1912 saying that they had opened the door at another place. The Munsif overruled the objection. The District Judge upheld the Munsif's order. The judgment-debtors appealed.

Mr. *Jang Bahadur Lal* (for the Hon'ble Mr. *Gokul Prashad*), for the Appellant, submitted that the decree having been obeyed, the remedy of the decree-holders was by a fresh suit. The appellants having closed the door and opened another, a fresh cause of action accrued and another suit should have been brought. The mere fact that the word "permanently" is

entered in the decree, does not mean that the decree-holders obtained a perpetual injunction against the judgment-debtor from entering upon the land. Order XXI, rule 32, applies only when injunction has been granted by the decree. The ordinary rule of law is that when a relief is claimed in the plaint and is not specifically granted, it will be deemed to have been refused. In this case, the decree-holder prayed for an injunction and it was not specially granted in the decree. He also submitted that in any event the application of the appellant, dated 17th February 1913, ought to have been considered by the Court.

Mr. *Gulzari Lal* (for Babu *Durga Charan Banerjee*), for the Respondents, was not called upon to reply.

JUDGMENT.—This is a judgment-debtor's appeal in an execution case. The decree in question directed the judgment-debtor permanently (*hamesha ke waste*) to close a certain door. The decree-holder says that, having formally complied with the decree by closing the door, the judgment-debtor shortly afterwards re-opened it. He claims relief under his decree, and if necessary by the application of the provisions of Order XXI, rule 32, Civil Procedure Code. The judgment-debtor says in effect, as he also said in the Courts below, that the decree-holder has no remedy except by way of a fresh suit. It seems to me that a perpetual injunction was in fact granted by the words *hamesha ke waste*. Unless this meaning is given to them they have no meaning whatever. A perpetual injunction somewhat differently worded had been asked for in the plaint, and in determining the suit, the Court, while not granting an injunction in the precise terms asked for, nevertheless did not content itself with ordering the defendant to close the door in suit, but added to this a direction that he should keep it permanently closed. If the judgment-debtor has transgressed this direction I have no doubt that the decree-holder has a remedy under his decree and is not bound to bring a fresh suit.

In the second place it is contended that the judgment-debtor was not allowed a reasonable opportunity of proving the defence subsequently set up by him, to the effect that he had opened a new door in a different place and had not simply re-opened the door which he had been directed to close. I agree with the lower Appellate Court that upon any reasonable interpretation of the petition of objection filed by the judgment-debtor on the 5th of October 1912, this point is concluded against him. He nowhere says that he has opened a door in a new place. The only point taken by him is that the decree-holder has no remedy under his decree even though the door temporarily closed in compliance with the decree may have been re-opened. In any case, when the point was subsequently raised, evidence was allowed to be offered, and the lower Appellate Court is of opinion that the point should be decided against the appellant on the evidence as well as on the pleadings. I certainly do not think that the Courts below were bound to issue a commission, or to allow further evidence to be taken in the manner desired by the judgment-debtor. I dismiss this appeal with costs.

Let the application for stay of execution stand dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 637 OF 1912.
December 12, 1913.
Present:—Mr. Justice Miller and Mr. Justice Oldfield.
SAVUMIAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
NARAYANAN CHETTIAR—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Father's debt—Liability of sons—Illegal debt—Enquiry by creditor—Necessity—Burden of proof, whether burden on creditor to prove that he made enquiries and bona fide *believed that the debt was for necessary purpose.*

In order that the sons of a Hindu father may claim exemption from liability to a mortgage-debt contracted by their father, on the ground that it was illegal, *viz.*, contracted to redeem jewels pledged to pay a fine imposed upon the father when convicted of a criminal offence, it is not necessary for sons to prove that the creditor also had notice of the illegality of the debt. It is for the creditor to establish that he made inquiries and *bona fide* believed that the debt was required for a purpose binding on the family. Where such inquiry was confined only to ascertaining that the debt was required to redeem jewels pledged to obtain money for payment of fine imposed upon the father, and did not proceed further, *viz.*, to ascertain the nature of the offence of which

he was convicted, the enquiry is not sufficient, and the creditor is not protected.

Suraj Bunsi Koer v. *Sheo Persad Singh*, 5 C. 148; 4 C. L. R. 226; 6 I. A. 88; *Nanomi Babuasin* v. *Modhun Mohun*, 13 I. A. 1 at pp. 17, 18; 13 C. 21; *Babu Singh* v. *Bihari Lal*, 30 A. 156; 5 A. L. J. 175; A. W. N. (1908) 61, distinguished.

Second appeal against the decree of the District Court of Ramnad at Madura, in Appeal Suit No. 45 of 1911, preferred against that of the District Munsif of Sivaganga, in Original Suit No. 329 of 1908.

Mr. *S. Varadachariar* for Mr. *K. Sreenivasa Aiyangar*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondents.

The second appeal coming on for hearing on the 21st April 1913, the Court delivered the following

JUDGMENT.—We think the evidence adduced on behalf of the plaintiff is insufficient to support the finding that the purpose for which the money was borrowed was such as would bind the interest of the 8th defendant, who did not join the mortgage. There was no evidence of any family necessity which pressed on the 8th defendant. We find no evidence that he was convicted in the case in which the fines were levied. And there is no evidence that he or the family was benefited by the payment of the fines, for there is nothing to show the nature of the criminal case, or that the jewellery, which, it is said, was pledged to raise the money for the payment of the fine, was jewellery in which he had any interest.

We, therefore, hold that his interest and those of his sons are not bound by the mortgage.

As regards the 3rd and 4th defendants, the sons of the 1st defendant, who died pending this suit, it is contended that they are not bound to pay their father's fine. This proposition so put is not disputed, but it is argued on behalf of the 1st respondent that the mortgage was really effected to redeem jewellery which had been pledged to raise money for the fine, and the plaintiff did not know that the money was to pay the fine. The facts on this point have not been investigated, because the plaintiff did not divulge his case as to the purpose of the loan, until after the settlement of issues, and the document did not show the purpose. So there was no issue, and the point was not examined before either of the lower Courts.

In these circumstances, we think it necessary to frame an issue and ask the District Judge to record a finding thereon, taking fresh evidence, if any is adduced.

"Whether the plaintiff made reasonable inquiry before lending the money to ascertain the purposes for which it was required, and, if so, with what result?"

The finding should be submitted within two months after the re-opening of the District Court of Ramnad after the summer recess. Seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Ramnad submitted the following

FINDING.—I am asked to submit a finding on the following issue:—

"Whether the plaintiff made reasonable inquiry before lending the money to ascertain the purposes for which it was required and, if so, with what result?"

2. The only evidence before me in addition to what was placed before the District Munsif consists of a further deposition by the plaintiff himself. The plaintiff's case is that he was told by the executants that they wished to redeem family jewels pledged to meet litigation expenses. He admits that he made no further inquiries. He did not ask what jewels had been pledged. He did not ask to whom the jewels had been pledged. He did not ask whether the litigation in question was civil or criminal. A faint suggestion is thrown out that the plaintiff's partner might have made further inquiries but the plaintiff does not even say that the result of any such inquiry was communicated to him. There were special circumstances which ought to have placed the plaintiff on inquiry. The document was not signed by Velluran, the most senior member. The document itself did not state the purpose for which the money was being borrowed. Its very urgency invited inquiry as to its purpose. A very slight inquiry would probably have disclosed the fact that the money or a large portion of it was going to be used for paying off fines imposed by a Criminal Court, for the convictions were very recent.

3. It is urged before me that the borrowers were respectable people and that further

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inquiries were, therefore, unnecessary. There might be some force in this contention if the borrowers had been thoroughly examined and if the document had declared a purpose binding on the family, but I cannot understand how a money-lender can assume that a respectable person who borrows money from him must necessarily do so for family purposes. That the executants ever said that the money was required for any family purpose is rendered unlikely by the absence of any clause to that effect in Exhibit C.

4. I, therefore, find that the plaintiff did not make reasonable inquiry before lending money to ascertain the purpose for which it was required.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—In this case the sons have established the fact that the original debt of their father was contracted to pay a fine in a criminal case, and it is conceded that that is not a debt which they are bound to pay. But this debt was secured by a pledge of jewellery and to redeem the jewellery the father executed the hypothecation in suit. The finding is that the creditor ascertained that the money was wanted to redeem jewellery pledged for litigation expenses but went no further, and did not take the trouble to ascertain the nature of the litigation or whether or not the pledge was to secure a debt binding on the sons as he ought to have done.

The objection is taken that it lies on the sons to show that the creditor had notice that the antecedent debt was of a nature to make it irrecoverable from the sons and reliance is placed on *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), but we do not think that in that case their Lordships had in view the nature of the duty cast upon the lender of the money. Their Lordships say that it lay on the sons to show that the *purchaser* had notice and were not dealing with the case of the creditor himself. The later case in *Nanomi Babuasin* v. *Modhun Mohun* (2), which is also relied on does not touch this point, nor do the cases in the Allahabad High Court to which we were referred and which are referred to in *Babu Singh* v. *Bihari Lal* (3).

In the present case accepting the finding that the creditor made no sufficient inquiry to ascertain the nature of the debt for which the pledge was made, and it being shown that that was not a debt binding on the sons, we must hold that the sons are not liable to pay it.

We allow the appeal and exonerate from liability under the mortgage the shares of the 3rd and 4th defendants, being ⅔rds of the share belonging to the 1st defendant's branch of the family, and exonerate also the interests of the defendants Nos. 8 to 12 in the mortgaged property.

There will be no personal decree.

The defendants Nos. 3, 4 and 8 to 12 should pay their own costs, and the plaintiff should not receive costs from them in any of the Courts.

Appeal allowed.

(1) 5 C. 148; 4 C. L. R. 226; 6 I. A. 88.
(2) 13 I. A. 1 at pp. 17, 18; 13 C. 21.
(3) 30 A. 156; 5 A. L. J. 175; A. W. N. (1908) 61.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 450 OF 1913.
February 26, 1914.
Present:—Mr. Justice Ryves.

MUSAI KURMI—DEFENDANT—APPELLANT
versus
SUB KARAN KURMI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Immoveable property—Kolhu *fastened to the ground.*

A *kolhu* (*i. e.* an iron sugar-cane press) fastened to the ground is immoveable property.

Second appeal from the decision of the District Judge of Jaunpur, dated 15th January 1913.

Mr. *Sawhny*, for the Appellant.

Mr. *Pearey Lal Banerji*, for the Respondents.

JUDGMENT.—The only point raised in this appeal is as to whether a *kolhu*, *i.e.*, an iron sugar-cane press, is or is not "immoveable property." The lower Appellate Court has held that it is immoveable property. On appeal it is argued that it is moveable property. A *kolhu*, I understand, is not a very large or very heavy iron-mill.

This one in particular is valued at Rs. 15. It appears that this *kolhu* was purchased by the father of the parties and set into position at any rate before 1905, which was the year in which he died. It was then fastened to the ground and was presumably meant to be permanently fastened. It is still *in situ* and has been used ever since. Under the circumstances it seems to me that the *kolhu* could not be used effectively until it was fastened to the earth; under the circumstance it must be held to be immoveable property. I, therefore, dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 7 OF 1913.

January 29, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

SAMANDAN KARKAT EDATHIL RAYARAPPAN NAMBIAR——PETITIONER—APPELLANT

versus

MALIKANDI AKETH MAYAN—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 90 *—Execution—Judgment-debtor's death—Representatives not brought on record—Decree-holder, also purchaser with notice of judgment-debtor's death—Sale, whether irregular—Limitation Act (IX of* 1908), *Sch. I,* 166*—Application to set aside sale.*

Where a decree-holder, who had notice of the death of the judgment-debtor, purchased his property sold in execution of the decree, without bringing the representatives of the judgment-debtor on the record:

Held, that the omission to bring the representatives of the deceased judgment-debtor on record was not a mere irregularity and that consequently the sale was a nullity as against them.

Ramasami v. *Bagirathi*, 6 M. 180, *Groves* v. *Administrator-General of Madras*, 22 M. 119; 8 M. L. J. 288, and *Khiarajmal* v. *Daim*, 32 C. 296; 32 I. A. 23; 1 C. L. J. 584; 9 C. W. N. 201; 7 Bom. L. R. 1; 2 A. L. J. 71, followed.

Malkarjun v. *Narhari*, 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 27 I. A. 216; 10 M. L. J. 368, distinguished.

Held, also, that as the sale was a nullity, Article 166 of the Limitation Act did not apply.

Appeal from the order of the District Court of North Malabar, in Civil Miscellaneous Petition No. 13 of 1912, preferred against that of the District Munsif of Taliparamba, in Civil Miscellaneous Petition No. 432 of 1912.

Mr. *K. Govinda Marar*, for the Appellant.

Mr. *V. Ryru Nambiar*, for the Respondent.

JUDGMENT.—The plaintiff in Original Suit No. 590 of 1903 obtained a decree on his hypothecation deed for the sale of the properties mortgaged against the mortgagor and the appellant's predecessor-in-title who was a puisne mortgagee. The puisne mortgagee purchased the mortgagor's interest in a judicial sale in execution of a decree obtained by him to which the plaintiff was a party. The mortgagee-judgment-debtor in Original Suit No. 590 of 1903 died and without bringing his representatives on record the plaintiff got the properties sold in execution of his decree. The appellant now applies in effect to be made a party and to set aside the sale on payment to the plaintiff of the amount due to him under the decree. He also alleged fraud. The lower Courts hold that the application is barred by limitation. If the sale is a nullity so far as he is concerned, then the application is clearly not barred. According to the decisions of this Court, *Ramasami Ayyangar* v. *Bagirathi Ammal* (1), *Krishnayya* v. *Unnissa Begam* (2) and *Groves* v. *Administrator-General of Madras* (3) the omission to bring the representatives on record is not a mere irregularity. It renders the sale a nullity against the representatives of the judgment-debtor. But it is contended that these decisions have been overruled by the Privy Council, See *Malkarjun* v. *Narhari* (4). In that case, however, there was an order passed by the Court executing the decree directing a person to be brought on record as the representative of the deceased judgment-debtor. The fact that the decision was afterwards found to be erroneous and the true representatives were not brought on record was held not to be sufficient to set aside the sale against a *bona fide* purchaser. See *Khiarajmal* v. *Daim* (5). In this case it may also be pointed out that the decree-holder was the purchaser and he had notice of the death of his judgment-

(1) 6 M. 180.

(2) 15 M. 399.

(3) 22 M. 119; 8 M. L. J. 288.

(4) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).

(5) 32 C. 296 at p. 315; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23 (P. C.).

debtor. We are, therefore, unable to hold that the Madras cases are no longer of any authority.

The appellant, therefore, will be placed on record as the representative of his Karnavan and on payment of the amount due to the decree-holder, the sale will be set aside. The appellant is entitled to the costs in this and the lower Appellate Court. The costs in the first Court will be provided for in the final order.

Appeal allowed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 92 OF 1912.
December 16, 1913.
Present:—Mr. Justice Tudball and Mr. Justice Rafique.
RAM MANOHAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
DILRAJI KUNWARI—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Widow in possession—Dispute as to nature of her possession—Declaration.

Where the possession of the defendant, a widow, was admitted by the plaintiff and a declaration was sought to the effect that she was in possession of the property, not as heir of a separated Hindu, but as a widow of a deceased member of a joint Hindu family in lieu of maintenance, and as such not entitled to obtain partition of the property:

Held, that the real dispute between the parties being as to the nature of the possession of the lady and the plaintiff not being entitled to an immediate possession of the property, section 42 of the Specific Relief Act was no bar to the suit.

First appeal from the decision of the Second Additional Judge of Gorakhpur, dated 22nd December 1911.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, (with him Mr. *Iswar Saran*), for the Respondent.

JUDGMENT.—The plaintiffs-appellants brought a suit in the Court below for a declaration in the following circumstances. The defendant, *Musammat* Dilraji Kunwari, is the widow of one Shohrat Singh. The plaintiff's case is that Babu Shohrat Singh and they themselves were members of a joint Hindu family, that Shohrat Singh died while he was joint, that his widow Dilraji Kunwari applied for mutation of names in her own favour in respect to that property which stood in the name of Shohrat Singh, that her application was contested, that the parties came to a compromise, dated the 19th of May 1905 which was duly registered under which Dilraji Kunwari's name was recorded in the place of that of her husband, and that on an application for partition having been made by a co-sharer in one of the villages, *Musammat* Dilraji Kunwari also applied for partition of the share which stood in her name. The plaintiffs objected to her application on the ground that she was not entitled to partition and the Revenue Court referred them to the Civil Court to obtain a declaration on the point. Hence the present suit. In paragraphs 2, 3, 4 and 5 of their plaint the plaintiffs while setting out the above facts also alleged that they were in actual possession of the share and that the defendant was not in possession of it, although they relied on the document of the 19th May 1905 mentioned above, in which it was set forth that she was to remain in possession. However, in their relief they asked for a declaration that Babu Shohrat Singh died while living jointly with themselves, that the defendant did not get possession of the property as the heir of her husband nor was she in possession as such, and that her name was recorded in the *khewat* in accordance with the agreement of the 19th of May 1905 and that she had no right to obtain a partition. The case for the defendant was that Shohrat Singh was separate from the plaintiffs, that he was owner of the property which stood in his name, and that the defendant was in possession as the widow of a separated Hindu, that the plaintiffs were not in possession at all, and that no suit for a declaration could lie in view of the provisions of section 42 of the Specific Relief Act. The Court below went solely into the question of the actual possession. It found in favour of the defendant and held that she was in possession, and that the suit, therefore, failed by reason of the terms of section 42 of the Specific Relief Act. The memorandum of appeal contains two grounds: (1) that the plaintiffs have proved that they are in possession of the property in suit; (2) that the suit is not barred by section 42 of Act I of 1877. Dr. Sunder Lal on behalf of his clients does not

press the first ground of appeal and admits that it may be taken for granted that the defendant is in actual possession of the property in suit. But he still maintains that the suit is not barred by section 42 of the Specific Relief Act, for this reason that the real dispute between the parties is one as to the nature of the possession of the widow; because this suit has arisen out of partition proceedings and the sole object of the plaintiffs is to have it declared that the widow was in possession of the property, not as heir of a separated Hindu, but as a widow of a deceased member of a joint Hindu family in lieu of maintenance, and as such she was not entitled to obtain partition of the property. In our opinion the possession of the defendant being clearly admitted the real dispute between the parties is as to the nature of the possession of the lady. The lower Court has not gone into the merits of the case. The plaintiffs, no doubt, have merely themselves to thank for the decision arrived at by the Court below, because although they took their stand on the compromise, dated 19th May 1905, which distinctly awarded possession to the lady they thought it advisable to state that she was not in possession. In these circumstances it is clear that the Court below must go into the merits of the case as the suit is not barred by the provisions of section 42 of the Specific Relief Act. The plaintiffs are not at present entitled to possession and are not bound to sue for possession. We, therefore, allow the appeal, set aside the decree of the Court below, and remand the case to that Court with directions to re-admit it on its original number in the file and proceed to hear and decide it according to law. The costs of this appeal will abide the result and will include fees on the higher scale.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 377 OF 1912.

February 23, 1914.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

KHURSHED HUSSAIN—DEFENDANT—APPELLANT

versus

FAIYAZ HUSSAIN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Muhammadan Law—Shia school—Gift made in maraz-ul-maut—*Possession delivered to donee—Gift valid to one-third of donor's estate—More than one year's illness, whether* maraz-ul-maut—*Burden of proof of character of disease—Evidence.*

Where a gift made by a Shia Mussalman is impugned as having been made in *maraz-ul-maut* (death-illness), the onus of proving the character of the disease lies upon the person who contests the gift.

Under the Shia Law if a person dies of a disease of more than one year's duration, such disease is not considered a death illness. But there is this condition attached to it that if the illness increases to such an extent as to give, or another supervenes which gives, an apprehension of death in the mind of the donor, the increase or the new disease is a death illness.

Under the Shia Law a gift made in *maraz-ul-maut* (death-illness) holds good to the extent of only one-third of the donor's estate in spite of the delivery of possession prior to his death.

First appeal from the decision of the Subordinate Judge of Meerut, dated 31st of July 1912.

Mr. *B. E. O'Conor* (with him Mr. *Muhammad Ishaq*), for the Appellant.

Mr. *A. Haider* (with him Mr. *Ghulam Muitaba*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Syed Faiyaz Husain, the plaintiff respondent No. 1, to recover his legal share in the estate left by his elder brother, Syed Tajammul Hussain.

It appears that Tajammul Hussain was the eldest of four brothers and one sister. One of the brothers, *viz.*, Riazuddin, died in the life-time of Tajammul Hussain leaving him surviving a son called Nasir-ud-din. The other two brothers and the sister, *viz.*, Faiyaz Hussain, Khurshed Hussain and *Musammat* Fizza, are still alive.

On the 4th of July 1911, Tajammul Hussain executed a deed in respect of his whole property in favour of Khurshed Hussain. The document was written out as a deed of gift but was prior to its execution altered and described as a sale-

deed, the consideration of which was remitted by the executant. Immediately after the execution of the document an application for mutation of names was made by Khurshed Hussain and the next day on the 5th July 1911, Tajammul Hussain was examined on commission and admitted the application of Khurshed Hussain. Tajammul Hussain died four days after on the 8th of July 1911.

On the 22nd of July 1911, Faiyaz Hussain instituted the suit out of which this appeal has arisen in the Court of the Subordinate Judge of Meerut for the recovery of his legal share, *i.e.*, 2/5ths, in the estate left by Tajammul Hussain by cancellation of the deed of the 4th of July 1911. The suit was brought against Khurshed Hussain and *Musammat* Fizza. Faiyaz Hussain challenged the deed of 4th July 1911, which he described as a deed of gift on various grounds. He said that Tajammul Hussain was at the time in his dotage and had been ill for about two months prior to his death and because of old age and disease was incapable of transacting or understanding the nature of any business. Four days prior to his death, Khurshed Hussain, who was on bad terms with the plaintiff (Faiyaz Hussain), taking advantage of the "latter's" absence from Mawana, the village where the parties reside, by the exercise of undue influence and pressure on Tajammul Hussain, at a time when he was in a weak state of mind and body and in terror of impending death and incapable of appreciating the consequences of his act, with no one by him to give him independent advice, got him to execute a deed of gift under the colour of a sale-deed and had it registered in collusion with the Sub-Registrar of Mawana. There were thus four grounds upon which the deed of July 4th, 1911, was impeached, *viz.*, fraud, undue influence, unsoundness of Tajammul Hussain's mind and the execution of the deed in contemplation of death. Khurshed Hussain alone resisted the suit, *Musammat* Fizza being a *pro forma* defendant. He denied the allegations made in the plaint on the strength of which the deed of July 4th, 1911, was questioned. He said that some years prior to the death of Tajammul Hussain, Nasir-ud-din had fallen out with the latter and that the feeling between the two ran high. Faiyaz Hussain had taken the part of Nasir-ud-din while he, Khurshed Hussain, had supported Tajammul Hussain. The latter was naturally displeased with Faiyaz Hussain, and in order to show his displeasure and also to benefit Khurshed Hussain who had a large family and a small income while Faiyaz Hussain had a good income and had only a daughter who was well provided for being married well, Tajammul Hussain executed a sale-deed of all his property on the 4th July 1911 in his (Khurshed Hussain's) favour, the sale price of which Tajammul Hussain remitted. The latter had made up his mind a year or more prior to his death to transfer all his property to Khurshed Hussain though the actual transfer was made on the 4th July 1911. Tajammul Hussain had been suffering from asthma for several years prior to his death and had no other illness at the time of the execution of the deed. He had an unexpected attack of asthma in a severe form on the 8th July 1911 and died suddenly, never expecting himself and no one else expecting his death. It was further pleaded in defence that even if Tajammul Hussain be said to have executed the deed in question in *maraz-ul-maut* (death-illness) it is not invalid partially or wholly under the Shia Law by which the parties, being Shias, are governed, as possession had been delivered by the donor prior to his death. The learned Subordinate Judge, after a careful consideration of the evidence in the case, found the allegations of fraud, undue influence and unsoundness of Tajammul Hussain's mind baseless. He, however, held that the deed executed by Tajammul Hussain was a deed of gift and that it was executed in *marae-ul-maut* (death illness). He further held that under the law, the deed was operative only to the extent of one-third of the donor's estate. A decree for 2/5ths out of 2/3rds of the estate of Tajammul Hussain was accordingly passed in favour of the plaintiff, Faiyaz Hussain. Khurshed Hussain has come up in appeal to this Court. The character of the deed is not disputed before us. The argument for the defendant-appellant has proceeded on the admission that it is a deed of gift. He challenges the decree of the lower Court on two grounds, one of fact and the other of law. He denies that

the deed of July 4th, 1911, was executed during *maraz-ul-maut* (death illness) or if it was executed during *maraz-ul-maut* it is invalid partially under the Shia Law. He contends that the onus of proving the character of the disease of Tajammul Hussain which would according to the plaintiff-respondent vitiate the deed, in part, lay upon the latter which has not been discharged. On the contrary, the evidence for the defendant-appellant proves that Tajammul Hussain died of a long-standing complaint, more than a year old, by a sudden and unexpected attack of it; and under the Shia Law a disease more than a year old is not considered *maraz-ul-maut*. The case of *Fatima Bibee* v. *Sheikh Ahmed Bakhsh* (1) is relied upon in support of the contention that a disease that lasts more than a year cannot be described as *maraz-ul-maut* (death illness).

The defendant-appellant relies upon passages from nineteen writers on Shia Law in support of his said contention that a deed of gift executed during *maraz ul-maut* is valid with regard to the whole of the property of the donor provided possession is given by the latter prior to his death.

We take up the question of fact first. But before considering the evidence on the point, it may be conceded that the onus of proving the character of the disease lay upon the plaintiff-respondent. It may also be conceded that under the Shia Law if a person dies of a disease of more than one year's duration such disease is not considered a death-illness. But there is this condition attached to it that if the illness increases to such an extent as to give, or another supervenes which gives, an apprehension of death in the mind of the donor the increase or the new disease is a death-illness. The plaintiff-respondent examined eight witnesses and went into the witness-box himself. Of the eight witnesses three are relations, two are the *lambardar* and the *patwari* of the village, one is a Municipal Board clerk and two are medical men, namely, a compounder and a *Hakim*. All of them, with the exception of Abdul Aziz, the *Hakim*, and Kanti Prasad, the compounder, say with the plaintiff-respondent that Tajammul Hussain was not suffering from any disease until two or two and-a-half months prior to his death. He suffered during that period from fever, constipation and headache which grew worse day by day and he lost appetite and despaired of his life a few days before his death. According to Faiyaz Hussain, plaintiff-respondent, diarrhœa set in in the end which weakened an already enfeebled constitution of an old man and carried him off. Kanti Prasad and Abdul Aziz also say that he suffered from fever and constipation and that he lost his appetite and despaired of his life some days before he died. Abdul Aziz further says that Tajammul Hussain suffered from asthma also. The witness began to treat him from the month of May and had no hope of the patient's recovery from the beginning. Kanti Prasad was not asked any question about asthma. It seems he was called in occasionally from about one and-a-half months before Tajammul's death to give him enema to relieve him of constipation. The objection to this evidence on behalf of the defendant-appellant is that the witnesses including the plaintiff-respondent have deposed falsely on other points as found by the lower Court. They have stated that Tajammul Hussain was unconscious and that his intellect was impaired some days prior to the execution of the deed of July 4th, 1911. Besides Ghulam Hussain, one of the relatives, is manifestly a partizan witness. It was he who kept Faiyaz Hussain informed of the condition of Tajammul Hussain, for Faiyaz Hussain was away from Mawana. We think that the criticism of Ghulam Hussain's evidence is well founded and that his evidence may be left out of account. But the objection as to other witnesses that they have deposed falsely as to the weakness of the intellect and the unconsciousness of Tajammul Hussain does not necessarily vitiate their evidence as to the character of his illness. Moreover, the objection does not hold good in the case of Abdul Aziz and not to its full extent against Kanti Prasad. Abdul Aziz appears to us to be an independent witness against whom nothing has been shown to discredit his evidence. He is not a resident of Mawana and is in no way connected with either party. It so happened that he came to pay a visit to

(1) 31 C. 319.

the Tahsildar in Mawana and advantage was taken of his presence and he was called in to treat Tajammul Hussain. Abdul Aziz has given evidence in a straightforward manner and his evidence has the ring of truth about it. The same remarks apply to Kanti Prasad though perhaps in a less degree. The allegation for the plaintiff-respondent that Tajammul Hussain fell ill about two months prior to his death from which he never recovered is borne out by a witness for the appellant also, *viz.*, Amir Hussain Khan, who says that Tajammul Hussain fell ill one or one and a-half months before his death of bowel complaints.

To turn now to the evidence for the defendant-appellant. He examined eight witnesses including himself. All of them say that Tajammul Hussain suffered from asthma more than a year prior to his death. The evidence of one of them, *viz.*, Liaqat Hussain, does not help the defendant-appellant as the witness did not see Tajammul Hussain for some months prior to the latter's death. Some of the witnesses go the length of saying that he walked and went about his ordinary work up to the day of his death, while others say that for at least ten days prior to his death he could not leave his bed. The evidence of two witnesses, *viz.*, of Sayed Ali Faiyaz, the Sub-Registrar and of Ghamandi Lal, the Naib Tehsildar, is particularly pressed on us as the evidence of independent men. We do not think that Ali Faiyaz can be said to be an independent witness. He admits that he went to the house of Tajammul to register the deed within ten minutes of the making of the application by the defendant appellant. If the condition of Tajammul was not critical where was the occasion for such a hurry? And yet Ali Faiyaz says that Tajammul Hussain was not suffering from any illness at the time except his old complaint of asthma which was not worse than usual. Ali Faiyaz admits that the ladies of the defendant-appellant are on visiting terms with his, but not those of the plaintiff-respondent. And as to Ghamandi Lal all that he says is that Tajammul Hussain did not appear to him to be ill on July 5th, 1911. But the witness admits that he had not seen him almost for a year or more prior to his death. Both Ali Faiyaz and Ghamandi Lal admit that Tajammul Hussain was old and weak. Ghamandi Lal is a man who was degraded from the post of a permanent Tahsildar, though he does not disclose the reason of his reduction. The evidence for the defendant-appellant, in our opinion, is unsatisfactory. It gives the impression that the witnesses are concealing something and not telling the whole truth. We think that, on the whole, the evidence for the plaintiff-respondent is more reliable, though some of the witnesses exaggerate the illness of Tajammul Hussain and suppress the fact of his suffering from asthma. The case for the latter is also borne out by the circumstances attending the execution of the deed. If Tajammul Husain was suffering only from an old complaint of asthma which had not grown worse on or about the 4th of July 1911 and was able to attend to ordinary avocations up to his death, why did he not go to the Sub-Registrar's office and the Tahsil for registration of the deed and the mutation proceedings, considering that both the Tahsil and the Sub-Registrar's office were within a few furlongs of his house? If he could not walk, though some of the witnesses for the defendant-appellant say that he could, he could have surely gone in a conveyance. Moreover, where was the occasion for the haste with which the registration was obtained and the application for mutation of names filed? It is admitted that the Sub-Registrar came within ten minutes of the making of the application to him and that the application for mutation of names was made within an hour or two of the registration of the deed. Another application was made at the same time asking for the issue of a commission for the examination of Tajammul Hussain. It was granted, but no one could be spared that day to go and execute the commission. Tajammul Hussain was examined the next day. If he was not seriously ill and unable to leave his bed where was the occasion for his examination on commission? We think that the conclusion that the learned Subordinate Judge came to on the evidence for the parties was a correct one. There is no doubt that Tajammul Hussain was

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suffering from asthma for some time but a few months before his death other ailments supervened, *viz.*, fever and constipation. He was an old man and the new complaints broke up an already enfeebled constitution and when he felt that he was dying he executed the deed in suit.

We, therefore, hold that the gift in favour of the defendant-appellant was made by Tajammul Hussain in *maraz-ul-maut* (death-illness).

One more argument remains to be considered in connection with this point. It is urged on behalf of the defendant-appellant that he has proved both by oral and documentary evidence that Tajammul Hussain had intended from a year or more prior to his death to give all his property to the former. It was merely an accident that the gift was made by him during his death-illness. The argument assumes that a gift made during *maraz-ul-maut* is not invalid if the donor intended to make it or thought about it before his last illness. The argument does not relate so much to the question of fact under discussion, *viz.*, the character of Tajammul Hussain's disease, as to a question of law, *viz.*, the validity of a gift made during death-illness which the donor had thought of making from before such illness. No authority has been cited in support of this contention. Besides, it appears that it was not so much to benefit the defendant-appellant as to show his resentment to the plaintiff-respondent, that Tajammul Hussain wanted to give away all his property to the defendant-appellant. And he was not going to, and did not, part with his property in his life-time and place himself at the mercy of his brother. He made up his mind and carried out his intention when he was in his last illness and despaired of his life. Under such circumstances whatever intention he had prior to his death-illness would not affect the character of the gift. It would still remain a gift made during *maraz-ul-maut* (death illness).

We now proceed to consider the second point raised in this appeal, *viz.*, whether a gift made in *maraz-ul-maut* (death-illness) is valid with regard to the whole of the property of the donor in case of the delivery of possession to the donee prior to the donor's death. The question raised by the defendant-appellant is not free from difficulty. The difficulty is due, not to the absence of any definite opinion on the point, but to the diversity of opinion among the Shia jurists. One group of eminent Shia doctors would maintain the gift in respect of the whole of the donor's estate while the other equally high in learning and authority would have it that a gift made in *maraz-ul-maut* is valid to the extent of one-third only of the estate of the donor in spite of the delivery of possession prior to his death. The different opinions and the reasons in support of each will appear from the passages relied upon by the parties which will be referred to presently. The defendant-appellant has cited nineteen authorities in support of his contention. They are as follows :—

1. Kifayet-ul-Ahkam.
2. Ar-Rauz-ul-Ariz.
3. Majma-ul-Masail.
4. Maqna.
5. Minhaj-ul-Adiya.
6. Hadaik-i-Nazira.
7. Nihaya.
8. Khilaf-ush-Shaikh (of Tusi).
9. Nikat-un-Nihaya.
10. Sharh-i Luma.
11. Jawahir-ul-Kalam.
12. Khilaf-ush-Shaikh (of Suduq).
13. Riaz-ul Masail.
14. Burhan-i Qati.
15. Maqna Mufid.
16. Hadaiq-i-Bahrani.
17. Jam'a-ush-Shitat.
18. Intisar.
19. Ghunia.

Of these the first four are said to have been written within the last twenty-five years, Nos. 1, 3, and 4 being by Persian authors. The author of Ar-Rauz-ul-Ariz was Saiyed Allan Sahib, a member of one of the Mujtahid families of Lucknow. The authority of these four books is disputed by the plaintiff-respondent and there is nothing to show what weight is to be attached to them. In any case they cannot rank as high as the other authorities cited by the appellant or those relied upon by the respondent. We will not, therefore, discuss them. We would, however, remark

that the author of Majama-ul-Masail is against the contention of the defendant-appellant, but a marginal note by one Saiyed Kazim who is said to be a Mujtahid in Najaf at present is to the effect that the stronger opinion is in favour of the gift, holding good in respect of the whole of the donor's estate. The author of Ar-Rauz-ul-Ariz after giving the two opinions on the point and accepting the view contended for by the defendant-appellant, however, remarks that "it is safer that the gift should receive effect to the extent of one-third according to the traditions and the better views." The appellant is unable to say who was the author of Minhaj-ul-Adiya. We cannot, therefore, say what weight it carried among the Shias and we, therefore, leave it out of account. As to Hadaik-i-Nazira the passage relied upon is not quite explicit and we, therefore, do not discuss it. Of the remaining thirteen books Sharh-i-Luma and Jawahir-ul-Kalam do not support the case of the defendant-appellant. Indeed on the contrary they are against him. Those passages have been cited by the defendant-appellant from Sharhi Luma and Jawahir-ul-Kalam where opinions of other writers are given. The authors of Sharh-i-Luma and Jawahir-ul-Kalam uphold the gift in respect of only one-third of the donor's estate as will be shown later in the judgment. It is, therefore, unnecessary to re-produce the passages referred to by the defendant-appellant. The Nihaya and the Khilaf-ush-Shaikh of Abu Jafar Tusi and the Nikat-un-Nihaya of Abul Kasim, the famous author of the Sharaya need not also be referred to as both Tusi and Abul Kasim in their later books, the Mabsut and the Sharaya retracted their first opinion and gave the Fatwa that a gift made in *maraz-ul-maut* held good to the extent of one-third only of the donor's estate in spite of the delivery of possession to the donee by the donor prior to his death. Both the Mabsut and the Sharaya will be referred to presently.

There now remain eight books, *viz*:—

1. Maqna Mufid of Sheikh Mufid.
2. Khilaf-ush-Shaikh of Suduq.
3. Hadaiq-i-Bahrani.
4. Intisar.
5. Ghunia.
6. Burhan-i-Qati.
7. Jam'a-ush-Shitat.
8. Raizul Masail.

Some of these books are, undoubtedly, of great authority having been composed by some of the most eminent Shia jurists chief among them being the author of Maqna *viz.*, Shaikh Mohammad Ibn Mohommad Ibn an-Naumani Abu Abdullah surnamed 'Al-mufid' because of his numerous pupils. He says in Maqna that "if a gift is made during illness or a Sadaqa is made, it is valid to the extent of the whole of the property and no one has a right to interfere with it. Sale in illness is valid like gift and Sadaqa if a man is of sound mind and is capable of forming his own opinion, but if the illness has affected his reasoning faculty and interfered with his judgment only those acts which are for the sake of virtue and piety are valid and all other acts are invalid." It will be seen that this passage merely gives the opinion of the author and gives no reasons in support of it. Suduq in Khilaf-ush-Shaikh, on the other hand, admits that there are two opinions among the Shia lawyers and accepts the view that a gift is valid in respect of the whole of the donor's estate. He says as follows:—"The lawyers are unanimous that dispositions by a sick person exceeding one-third of his property is invalid if this disposition is not to have immediate operation. If the act is to have immediate operation as manumission, gift and connivance at loss in contracts of exchange, there are among us two opinions, one of which is that it is valid and the other that it is invalid. The latter is the view of Shafai and all the jurists (Sunnis). They do not mention any difference of opinion. Our arguments for the first opinion, are the traditions prevalent according to the narration of our Ulemas which we have mentioned in our book (Kitab-ul-Kabir). It should be observed here that Suduq held the contrary view at one time as is mentioned by other writers, but it is not quite clear which was his latest dictum.

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The learned author of Hadaiq-i-Bahrani in addition to admitting the diversity of opinion on the point admits that the question is not free from doubt and difficulty but he upholds the gift in respect of the whole of the donor's estate.

Shaikh Syed Murtaza, surnamed Al-Huda, a pupil of Shaikh Mufid and Ibni Zuhra, the authors of Intisar and Ghunia, are also of the same opinion. Ibni Zuhra bases his opinion on the Ijma or the consensus of opinion of the doctors and Al-Huda on the Ijma or consensus of opinion and on the principle that a sane man has a right to dispose of his property as he chooses. The relevant passages from Intisar and Ghunia are as follows:—

"The Imamia jurists are divided with regard to the doctrine that if a man makes the gift of a thing during his death-illness while of sound mind and capable of forming a rational judgment, it is valid and covers not one-third but the whole of his property; while other non-Imamia jurists differ on this point. They say that a gift made during death-illness applies to one-third of the property. The arguments of the Imamias are Ijma and the fact that the appropriation of his property by a man of sound mind is valid and the heirs have nothing to do with his property so long as he is alive. Hence the gift made by him is valid and for this very reason it is lawful for him to spend all he possesses in maintaining himself and there is no difference of opinion of the jurists (on this point)" (Intisar).

"A gift made in death-illness will apply to the whole and not to one-third of the property on the ground of Ijma, such a gift will not be tantamount to a Will. A gift made (by a person) in death-illness is enforceable and during his life-time his heirs have nothing to do with his property. A Will takes effect after the death of a person and the heirs acquire right in the property after his death and so a Will is applicable to one-third". (Ghunia).

Jam'a-ush-Shitat also supports the view advanced by the defendant-appellant. No reasons in support of the opinion enunciated in the book are given. The book is a collection of dicta and decisions of the leading Mujtahids of Teheran in Persia within the last century. The passages relied upon by the defendant-appellant are given at length in Mr. Ameer Ali's book on Muhammadan Law, Vol. I. pages 54 to 56. They need not be re-produced here. The author of Burhan-i-Qati is also in favour of upholding the gift in respect of the whole of the donor's estate. He says that the contrary opinion is ascribed to the later generation of Ulemas and was held by Allama Hilli and the author of Sharaya. He mentions the names of the lawyers who are in favour of the doctrine of the whole, but admits that consensus of opinion cannot be claimed for either view. He uses the word Mutraddad about the consensus of opinion, which means that it cannot be said with certainty that the consensus of opinion is one way or the other. The passage dealing with the point under discussion is as follows:—

"At all events, the opinion that such a gift will take effect against one-third is ascribed to the general opinion of the later generation of (Ulemas). If this ascription be true it is due to the dicta of the two Fazils (Allama Hilli and Sahib-i-Sharaya) and of those who followed them, inspite of the fact that two of them have either dissented from or hesitated in this dictum at places in the books Sharaya-i-Irshad, Ghayat-ul-Murad and Masalik. The other opinion is apparent from the views of Kulaini in Kafi, Saduq in Faqih, Mofid in Maqna, Sayed in Intisar, Shaikh in Tahzib, Istibsar, Nihaya and Khilaf at different places. This is also apparent from Sarair Mohazzab, Wasila, Ghunya, Jame-ush-Sharaya, Kashfur-Rumooz Majma-ul-Burhan Wasail, Kifaya, Wafi and Riyaz. And this is the general opinion of the early generation of Ulemas, as has been stated by many and it has been supported by the fact that it has been followed. In Intisar the consensus of opinion is claimed for this view. He says: 'The doctrine, that if any person of sound mind and judgment makes a gift in death-bed illness, such gift will be valid and will take effect not only against one-third but against the whole of his property, is exclusively held by Imamia (jurists). All the other jurists (Sunnis) have differed and have gone to hold, that a gift in death-bed illness takes effect against one-third. Our view is that this consensus of opinion is doubtful.'"

KHURSHED HUSSAIN v. FAIYAZ HUSSAIN.

But the best exposition of the view that a gift holds good in respect of the whole of the donor's estate is perhaps to be found in Riaz ul-Masail. We give the relevant passages below:—

"The dispositions of a sick person if contingent upon death, which are considered as a Will, take effect against a third even though the heirs do not consent as has been narrated and its reasons have been hinted. If those dispositions are prompt and are not contingent upon it (the death), and in them are the sale at a lower or purchase at a higher price than the actual value, pure gift, Wakf, manumission or Sadaqa then there are two opinions. Among the later generation of Ulemas the more current and the better of the two is that they take effect against a third which is in agreement with the view of Iskafi and as is said with one opinion of Saduq. Perhaps he (Saduq) has taken this view in his work other than Fakih as will appear from his adopting the other view in it (Fakih). And it has been said that this view is apparent from Khilaf and is expressly stated in Mabsut. But the passage of Mabsut quoted in Sarair does not support this. For he (the author of Mabsut) has said that manumission in dangerous illness according to some of our doctors takes effect against the whole; and according to the others against one-third which is the view of our opponents (Sunnis); then he (the author of Mabsut) says that if this view be established and some be liberated it will be seen what he has said at the end. And this (passage) as you will see is not explicit in showing that he has adopted this view, rather this is not even inferred from it. Rather on many occasions he (the author of Mabsut) has shown hesitation on account of the well-known traditions which are between express and evident in their significance in which are authentic and trustworthy and other traditions; some of which fall short on account of their authenticity while others on account of their import, which shortcoming is made good by the repute in the later generation.

"But this view is against Nihaya, Maqna, Qazi and Saduq in Fakih and Kulaini in Kafi, for they (the two last mentioned) have said that the owner of property has the best right to it as long as he is alive and then have mentioned the traditions relating to it specifically and have not mentioned other traditions relating to the other view. All this is express as to their view on this point. Hilli, Murtaza and Ibn-i-Zuhra have given effect to it as against the whole and, as is apparent, and this had repute in early Ulemas; rather there is no doubt about its being so. The two Syeds have claimed in their discussion of the gift that the consensus of Imamias is on this view and in Sarair it is mentioned as the most evident view of the Imamia sect on account of its repute nonetheless on account of other well-known traditions amongst which are authentic and trustworthy and others which also are between express and evident in their import. The point is a difficult and doubtful one on account of the conflict of traditions and because the best of them accept the interpretation which can be used in favour of the other views, the points of preference and reliable arguments being on both sides. But the preference is for the latter tradition (*viz.*, of the whole) on account of their being supported by the established principle and the repute in early Ulemas which is preferable to the repute among later Ulemas on account of there being a conflict between the two (opinions) as in the question relating to Ijma'at (consensus of opinion) which are narrated, and because of most of them not accepting the interpretation which can be used in favour of the former view (of the one-third) and their being opposed to common people (Sunnis). The opinion which is in conformity with the first traditions is the opinion of all their jurists as is apparent from Intisar Mabsut, Sarair, Ghunia and Tazkira. So adopting the other view (*viz.*, that it takes effect as against the whole is more reliable).

"The rest say that (it will take effect) against one-third. And this is the view adopted by the opponents (Sunnis). This view which is in harmony with the first traditions, is the general view of their jurists as appears from the clear wordings of Intisar, Mabsut, Sarair, Ghunia and Tazkira. These traditions should be treated and based upon *Takayya* as is supported by the views of Iskafi which thou hast learnt more than once."

Now it is evident from this passage that the learned author of Riaz admits that there are two opinions on the point under discussion, that the point is not free from difficulty and doubt, that there are good and

reliable traditions in favour of both the views and that the better opinion among the later generation of Ulemas is in favour of the gift holding good in respect of one-third only of the donor's estates. But he favours the opposite view on the grounds that it was the view of the earlier lawyers, that the traditions in support of it are on the whole more preferable and that the common people *i. e.*, the Sunnis, hold the contrary view. He appreciated the necessity of explaining the dicta of some of the early and most eminent Shia doctors who had pronounced in favour of the doctrine of one-third. He gets over the difficulty by saying that they gave the dicta under *Takayya* (*i.e*, under mental reservation) to avoid prosecution at the hands of the Sunnis who were in power then). Briefly put, the reasons to be gathered from the authorities quoted above in support of the validity of a gift in respect of the whole of the donor's estate, appear to us to be these: Ijma or consensus of opinion of the doctors; right of a sane man to dispose of his property as he choses; early Ulemas in favour of this view; more preferable traditions in support of it and the common people, *i.e.*, the Sunnis, oppose it.

Now we will refer to other Shia jurists of equal eminence who have directly contraverted all those reasons except those based on sectarian ground—which they have met by implication. Shaikh Muhammad Husain-an-Najafi, the learned author of Jawahir-ul-Kalam, contradicts the statement made in Riaz-ul-Masail that those early Ulemas who gave their decision in favour of one-third did so under *Takayya*. He says that "the most curious thing is to ascribe these numerous texts (or explicit dictums) to *Takayya* the non-existence of which, in addition to the fact that some of those dictums are incapable of it, may be believed in respect of the texts like these, among the relators of which are confidential personages. Nay, those who are conversant with the traditional sayings of the doctors (may God bless them) know that it is customary with them (the doctors) in the passages based on *Takayya*, to hint at it (*Takayya*) by using the word *nas* (people) or some similar expression. Further, the non-existence of *Takayya* is believed as certain in this particular place. For if this doctrine of ours were contrary to the view of the Aamma (the Sunnis), there would have been in these texts a hint at the dissension from them, at the exposition of the invalidity of their views and at their being against the Kitab and Sunnat as is the custom of our doctors (to throw such hints). Nay, this (their being based on *Takayya*) would have been well-known among their disciples as in the case of other weighty doctrines of general use. Besides these there are other reasons which show that the texts are not based on *Takayya*. Shaikh Mohammmad Hassan further says that the early Ulemas and the best traditions as also the consensus of opinion are in favour of validating the gift in respect of one-third only and not in respect of the whole, as stated in Riaz. The relevant passage is as follows:—

"But despite all this, the best opinion is that there is prohibition against a gratuity exceeding the third. So it will not operate against the heirs, except by their permission. This is the unanimous opinion of Fazil, Shahidain, Kurkhi and what has been related from Saduq, Abi Ali and Shaikh in Mabsut and what has been related from others. Nay many persons have attributed this opinion to the modern jurists in general and in Masalik it has even been attributed to the majority of the jurists and all the moderns. Again what has been repeatedly related by Shaikh in the chapter on emancipation shows that this is the opinion widely known among us. In Mafatih it is given that the traditions about it are most numerous and wide-spread. It is given in Jame-ul-Makasid that it is supported by the best traditional authority. And in another place in the same book it is mentioned that explicit dictums of public and universal notoriety support the opinion. And this amounts to a consensus of opinion."

It is thus clear that three of the reasons advanced by the writers quoted on behalf of the defendant-appellant in support of the view that the gift holds good in respect of the whole of the donor's estate, *viz*:—Ijma or consensus of opinion, earlier Ulemas favouring that view and better traditions supporting it, are disputed. Both sides claim consensus of opinion and the authority of early writers and traditions in support of their respective views. The fact seems to be that traditions of equal weight can be found in support of either view and that the earlier lawyers are divided

on the point just as the modern are. Even the learned author of Riaz admits that there is doubt as to th Ijma or consensus of opinion. The explanation of the author of the Riaz that some of the early writers who favour the contrary Fatwa did so under *Takayya* has also been shown to be unfounded by the author of Jawahir-ul-Kalam. There remain then two reasons, *viz.*, the principle that a sane man has a right to dispose of his property as he chooses "as long as soul is in his body" and *secondly*, the sectarian reason, that is, that the Sunnis uphold the gift in respect of one-third of the donor's estate. The obvious reply to both the reasons is, "why is a bequest held to be valid in respect of one-third only of the estate of the testator? The Sunnis hold the same doctrine. And when a man makes a gift in his last moments and delivers possession he has no more interest left in the property and cannot enjoy it any more. His act really amounts to a bequest. The delivery of possession by the donor shortly before his death does not make any difference; for the object in both the case of such a gift and that of a bequest is to defeat the heirs without in any way affecting the donor or the testator. The principle that a sane man has absolute right over his property and can dispose of it as he chooses must be qualified in the case of a gift made in *maraz-ul-maut* in respect of the whole of the donor's estate though attended with possession, by the same consideration as a bequest is qualified in respect of the whole of the testator's property. It was on this consideration that Shahid-i-Sani, Shaikh Muhammad Hussain-an-Najafi, Shaikh Najmuddin, Abul Kasim Jafar, Ali Abu Yahya, surnamed "Al Muhakkik" the learned and the widely known author of the Sharaya and Sheikh Mohammad Al Hassan Ibn Ali Abu Jafar Tusi surnamed the "Shaikh of the Imamite faith" in their books and other jurists pronounced in favour of the view that a gift made in *maraz-ul-maut* held good to the extent of one-third only of the donor's estate inspite of the delivery of possession in his life-time. We quote some of them below. Tusi in 'Mabsut' the most important and most erudite of all his books (according to Mr. Ameer Ali, Vol. 1, page 30), says as follows:—

"I have already mentioned that a gratuitous act is of two kinds, Munajjaza (of immediate operation) and Muakhkhara (deferred till death). The Muakhkhara is one in which a man makes a bequest for the emancipation of a slave or bequests for Mahabat or Sadaka, for it becomes binding on death. When a person performs Mahabat sale or emancipates or makes a gift and himself delivers possession it is called Munajjaza. The whole of this is Munajjaza gift. Then it will be further observed that if the gratuitous act takes place in a state of health or a disease which is not dangerous it will be enforcible in respect of his entire estate. But if it takes place in a dangerous illness, it will operate in respect of one-third."

The statement in Riaz that Mabsut contains a passage in favour of the doctrine of the whole was made on the authority of Sarair. The author of Sarair must have misquoted 'Mabsut.' Sharha Luma, a book of high and undoubted authority, has the following passage: "And a sick man is prohibited from making a disposal of what exceeds the 'third' when he makes a gratuitous disposal; but when he takes in return for it an adequate price, it (the disposal of more than the third) shall be effective. Even though he gives immediate effect to what he does gratuitously in his illness, for example, he makes a gift of it or wills it or gives it by way of charity or remits consideration in sale or lease. (*sic.*) This is the strongest opinion because of numerous traditional authorities supporting it, some expressly and some by implication." (1) "If he makes a gift, Wakf or Sadaqa in his death-illness, it shall take effect to the extent of one-third according to the more sound of the two dictums unless the heirs permit it."

[Their Lordships here quoted two passages from Sharhi Sunna, Chapters on Prohibition and Gift, pages 344 and 246, respectively.-*Ed.*]

[Shahid-i-Sani in says as follows:—Masalik]

(2) "The other (opinion) is that they (such transactions) shall take effect to the extent of the third. This opinion is held by a party of the ancients, one of them being Shaikh Saduq according to one of his two dictums and this is the opinion approved of by the modern jurists in general, one of them being the author himself. And this is the most strong view because of the numerous explicit dictums supporting it, some

by implication and some expressly." Shaikh Mohammad Hassan-an-Najafi gives his opinion in Jawahir-ul-Kalam in no uncertain words. His opinion is as follows:—

(3) "It has now become known to you, by God's grace, that it is impossible to say that it (a transfer without consideration) takes effect to the extent of (the) whole and verily it is not proper for any jurist to go against the principle of one-third.

(4) "What the learned Riaz has written on this subject is very wonderful. He has said that in his early period he compiled a brochure on this subject where he approved of the principle of one-third, but at that time he was not aware of the consensus of opinions of both Murtaza and Ibn-i-Zuhra and he afterwards turned from it (his first view). The fact is that he did not know that the ancients have differed from them and it is also not established that the majority of the ancients have held their views. Likewise some of those of whom it is related that they held the first view, as for instance Ali Hamza, I have shown in his description positively that he held the contrary view. There are some about whom different sayings are related on this subject, and there are others in whose books there is nothing clear, as for instance Kuleni who has prefaced his chapter with the words Nusus Ammar, about which it has already been described that it is not clear on the point. You have already known that about Shaikh it is related that he has said: 'What is known among ourselves during this age is the principle of one-third. This decides the whole question.'

Al-Muhakkik also is to the same effect.

(5) "A patient is prohibited from bequeathing more than one-third according to all unless the heirs permit it. But as regards his prohibition against gratuities of immediate operation exceeding the third there is a conflict of opinions between us. But the best opinion is that there is prohibition.

"On the other hand if a Wakf is made during the death-illness (it is valid) if allowed by the heirs, otherwise it is valid only to the extent of one-third, like gift and sale without consideration. It is said that it (Wakf) takes effect to the extent of the entire assets. But the first view is the most correct. If a person makes a Wakf or a gift or manumits (a slave) or sells (a property) and remits the sale consideration and the heirs do not permit, then it is valid only if the subject-matter does not exceed the limit of one-third. On the other hand if it exceeds one-third, the Wakf will operate from the first till the limit of one-third is reached and as regards the rest it becomes void."

It is clear from these authorities that some of the most eminent Shia jurists upheld the gift made in *maraz-ul-maut* in respect of one-third only of the donor's estate in spite of the delivery of possession to the donee before the death of the donor. But it is urged for the defendant-appellant that the books relied upon by him are of higher authority and in any case his view is supported by just as great doctors as those who hold the contrary view, and there is no reason why his contention should not be allowed. We do not think that it can be said, or at least no authority has been referred to to enable us to hold, that the opinions of the jurists quoted for the defendant-appellant carry more weight than the dicta of those relied upon by the plaintiff-respondent. But it must be conceded that the defendant-appellant has just as good authority in support of his view as the plaintiff-respondent has if reliance is to be placed on early writers. But the majority of the modern lawyers—modern as compared with early writers—is undoubtedly in favour of upholding the gift in respect of one-third of the donor's estate. We have, therefore, to choose between the two. We think that the Shia doctors who support the view of the plaintiff-respondent are preferable and for two reasons. First, because the reasons given by them appear to us to be more sound and consistent with the generally accepted principle that the heirs are not to be defeated by a disposition which does not in reality affect the person who has made the disposition. The second reason is that the opinion of the learned author of the Sharaya must carry greater weight than the opinion of other Shia jurists as he has been held by the Courts in this country from

early times as the chief authority on the law of the Shias. In support of the fact that Sharaya has been considered the leading book for the laws of the Shias we quote two passages from Morley's Digest and Shama Charan Sircar's Tagore Law Lectures of 1874. Morley in his Digest at page cclxxvii says as follows: "The most generally known of all the Shiah lawyers is the Shaikh Najam-ud din Abu-'l-Kasim Jaafer bin Muayyid-al-Hilli, commonly called the Shaikh Muayyid. He died in A. H. 676 (A. D. 1277). His great work the Sharaya-al-Islam is more universally referred to than any other Shiah law book and is the chief authority for the law of the Indian followers of Ali."

Shama Charan Sircar in his Tagore Law Lectures for 1874 says as follows as to the authority of the Sharaya: "The Sharaya-ul-Islam written by Sheikh Najmuddin Abu ul Kasim Jaafar bin Muayyid-al-Hilli commonly called Shaikh Muayyid, is a work of the highest authority at least in India and is more universally referred to than any other Shiah law book and is the chief authority for the law of Shiahs of India."

We, therefore, hold that under the Shia law a gift made in *maraz-ul-maut* (death illness) holds good to the extent of only one-third of the donor's estate inspite of the delivery of possession prior to his death.

The result of our findings on the two points raised in the appeal is that the appeal fails. We dismiss it with costs, including fees, in this Court on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 355 OF 1911.

August 30, 1912.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

February 10, 1914.

Mr. Justice Spencer.

D. SRINIVASA IYENGAR—1ST DEFENDANT—APPELLANT

versus

THIRUVENGADATHAIYANGAR MINOR BY GUARDIAN KRISHNASAMY IYENGAR—PLAINTIFF AND ANOTHER 6TH DEFENDANT—RESPONDENTS.

Hindu Law—Partition—Marriage, whether obligatory—Samskara—Reasonable marriage expenses—Necessity—Provision for marriage expenses of unmarried brothers, whether can be made in partition—Mesne profits, whether can be claimed in partition—Step-mother—Maintenance—Ancestral and self-acquired property, distinction between.

Per *Sundara Aiyar* and *Spencer, JJ.*—

As a marriage is an obligatory *samskara* for Hindus the reasonable expenses of performing the marriage of a male member of a co-parcener, if already incurred out of family funds, are necessary expenses and must be treated as binding upon the other co-parceners.

As the marriage is a *samskara* and it is not usual to omit it and it is necessary that *samskaras* should be performed out of family funds, the expenses for the marriage of unmarried co-parceners should be set apart at partition of the joint family property.

Per *Sadasiva Aiyar* and *Sundara Aiyar, JJ.*—

As the manager of a Hindu family is expected, after making all proper expenditure, to add any surplus that may be left to the family funds, no member of the family is entitled to claim a share of past profits on the ground of a separate residence, but if he is excluded by the act of the manager he is entitled to call upon the manager to account for the profits received during the time of his exclusion and to get his share of such profits as the manager is unable to account for.

Where an infant member of a Hindu family was living separately not owing to any fault on the part of the manager of the family:

Held, in a suit for partition by the infant, that he is not entitled to recover mesne profits, *i. e.*, a share of the past profits.

In awarding maintenance to a Hindu mother in partition of family property, the word 'mother' should be taken as including the 'step-mother' whose right of maintenance is ordinarily against the share of her own son or sons.

Per *Sundara Aiyar, J.*—

A brother who has had his own marriage performed before partition of the family property is not entitled at the time of partition to object to a provision being made for the marriage expenses of his unmarried brothers.

Per *Sadasiva Aiyar, J.*—

The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu Law. The expression "paternal estate" when used in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain "*through his relations as such son*" to his father.

As the marriage of males is not an indispensable *samskara* the initiated brothers are not bound to perform the marriage *samskaras* for their uninitiated brothers, and, therefore, the expenses of the future marriage ceremonies of the latter ought not to be deducted out of the patrimony before it is divided.

Second Appeal against the decree of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 52 of 1910, presented against that of the Principal District Munsif of Kulitalai, in Original Suit No. 351 of 1907.

SRINIVASA IYENGAR *v.* THIRUVENGADATHAIYANGAR.

JUDGMENT.

SUNDARA AIYAR, J.—The suit in this case is one for partition by a Hindu minor. The 1st defendant is the plaintiff's step-brother. The 5th defendant is the plaintiff's mother and 1st defendant's step-mother. The 6th defendant is the plaintiff's elder sister. The 5th and 6th defendants were made parties on the ground that provision should be made for the maintenance for the former and for the maintenance and marriage and other expenses of the latter.

The first question raised in second appeal is whether the plaintiff is entitled to a share of the amount recovered from a Life Insurance Company on a policy of insurance taken out by Doraisami Iyengar, the father of the plaintiff and the 1st defendant. The policy states that it was taken for the benefit of Doraisami's wife and two sons of whom the wife and one of the sons died, and the 1st defendant alone was left; but both the Courts have found that the premia for the policy were paid out of funds belonging to the whole family. This finding has been attacked in second appeal; but we are unable to interfere with it. It was argued that the finding of the lower Appellate Court was based in part on the supposition that Doraisami Iyengar was the managing member of the family and that this was not the fact. But no objection was taken to the finding on this ground in the memorandum of second appeal; nor does Doraisami Iyengar's management seem to have been denied in the lower Appellate Court. The plaintiff was, therefore, rightly held entitled to a share of the insurance money.

The next question is whether the decree in plaintiff's favour for mesne profits for two years before the suit is right. It was alleged by the plaintiff that he and his mother were turned out of the family house and had to live elsewhere. The Subordinate Judge has found that the plaintiff has failed to prove that they were turned out of the house; but he allowed mesne profits, because he held that a minor plaintiff is entitled to recover mesne profits in a suit for partition. I am of opinion that there is no foundation for this view. The case relied on by the Subordinate Judge, *Krishna* v. *Subbanna* (1), does not support it. In that case it was observed: "If an adult member is not excluded, but chooses to live apart from the manager, then as he did not choose to enforce partition, it may be very reasonable that, apart from the consideration of fraud or misappropriation by the manager, the principle above stated should be applied to him." (That is, the principle that the manager is not bound to account for past transactions or past income). 'But the principle cannot apply to the case of an infant member, who has been excluded by the manager from the family house and from enjoyment of the property. The infant is, by reason of infancy, incompetent to authorize the act of the manager, or, at all events, cannot be legally bound by any authorization in fact given during his infancy. Moreover, the infant being excluded cannot be assumed in point of law or fact to have known of any act of the manager." The observations relate primarily to a suit for account, including an account of past profits. An infant who has been excluded from commensality was held entitled to an account of past profits during the period of his exclusion. They do not support the view that the mere fact that the infant was living separately, when it was not due to any fault on the part of the manager, would entitle him to recover a share of the profits. The manager of a Hindu family is entitled to spend the income for the benefit of all the members of the family. It is unnecessary to consider whether a member living separately could make a claim for the expenses of his maintenance; for that is not the question raised for decision before us. The manager, after making all proper expenditure, is expected to add any surplus that may be left to the family funds. No member is entitled to claim a share of past profits on the ground of his separate residence. If he is excluded by the act of the manager, he has, no doubt, been held then entitled to call upon the manager to account for the profits received during the time of his exclusion. The manager would then be entitled to credit for all proper expenditure, including any investments made, in which

(1) 7 M. 564.

of course the excluded member would be entitled to share. With respect to any profits for which the manager is unable to account, the excluded member would be entitled to his share of them. There is no reason why the same principle should not apply to a minor co-parcener. No authority has been cited in support of the application of a different principle. The question here is not one of the right to an account. No doubt, one reason for refusing an account to an adult co-parcener suing for partition has been stated to be that "every adult member of an undivided joint family, living in commensality with the *karta*, must be taken, as between himself and the *karta*, to be a participator in, and authorizer of, all that is from time to time done in the management of the joint property to this extent, namely, that he cannot without further cause call the *karta* to account for it." *Abhay Chandra Roy Chowdhry* v. *Pyarimohan Guho* (2). This reason would not, of course, be applicable to the case of a minor member. But the point has no bearing in deciding whether a minor is entitled to claim mesne profits. The claim for mesne profits must, therefore, be disallowed. The Subordinate Judge's decree awarding 61½ on this account must be set aside.

The next question is whether the expenses of the plaintiff's Upanayanam and marriage and the 6th defendant's marriage were rightly provided for in the decree for partition. *Jairam Nathu* v. *Nathu Shamji* (3) and *Mahadeva Pandia* v. *Rama Narayana Pandia* (4) are clearly in support of the plaintiff's case. Two contentions have been raised in this Court,

(1) that such provision can be made only out of the separate or self-acquired property of the father of the parties, and cannot be made out of the ancestral property of the father derived from his father, and

(2) that the plaintiff is entitled to have a provision made only for his Upanayanam and not for his marriage, the latter not being a necessary *samskara* according to Hindu Law.

(2) 5 B. L. R. 347 at p. 354; 13 W. R. 75 (F. B.).
(3) 31 B. 54; 8 Bom. L. R. 632.
(4) 13 M. L. J. 75.

The first contention is entirely without foundation. Mr. P. R. Ganapathy Aiyar, the learned Vakil for the plaintiff, who has argued the question very fully, relies on certain passages in the Mitakshara. Yajnavalkya's text, chapter 2, verse 124, does not expressly refer to the ceremonies to be performed for the brothers, the text being to the effect that "uninitiated sisters should have their ceremonies performed by those brothers who have already been initiated, giving them a quarter of one's own share". But the text has been interpreted by commentators as including the ceremonies of brothers too. The Mitakshara in chapter I, section 7, verse 3, expressly provides: 'If any of the brethren be uninitiated when the father dies who is competent to complete their initiation? Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed.' Verse 4 lays down, 'By the brethren who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate.' Reliance is placed on chapter I, section 6, verses 14, 15 and 16. These verses deal with the power of the father to make gifts to one or another of the sons. The power to make gifts is now regarded as confined to the separate or self-acquired property of the father. The contention is that these verses show that section 3, verse, 1 dealing with partition after the father's decease—'Let sons divide equally both the effects and the debts, after (the demise of) their two parents,' relates only to the self-acquired property of the father. To a question put to the appellant's Vakil from the Bench, which text then provides for the division of the father's ancestral property, his answer was that section 5, verse 1, does so. 'But among grandsons by different fathers the allotment of shares is according to the fathers.' But this verse is intended merely to show that where the brothers have an unequal number of sons, the grandsons take *per stirpes* and not *per capita*. Section 1 of chapter I was referred to us as showing that the father and his sons have equal rights in property descending from the grandfather. But this does not help the contention that section 5,

verse I of chapter I and section 3 taken together show that the provision in section 7 for the *samskaras* of the uninitiated brothers and sisters is intended to be made only out of the self-acquired property of the father.

Reference is also made to the Smrithi Chandrika, chapter 4, verses 36 and 37, Verse 36 cites a text of Vishnu which runs thus:—"The text of Vishnu that 'the initiations of unmarried daughters are to be defrayed in proportion to his own wealth' is applicable either to a case where no partition of heritage takes place from there being an only son, or to a case where brothers live in union." Verse 37 is in these terms:—"Hence, Vyasa, brothers whose investiture and other ceremonies have not been performed are to be initiated in due time from the paternal wealth *alone* by brothers whose sacraments have already been completed. Unmarried sisters are also to be initiated by their elder brothers according to law." The word 'alone' is the translation of the Sanskrit word '*Eva*', the meaning being that the 'paternal wealth' *must* be used for the purpose indicated. The use of the word 'paternal' is relied on as showing that only the father's own wealth was intended. But this contention cannot be upheld. The language is comprehensive and would take in all ancestral property. The same observation applies to similar texts of Brihaspathi and Narada in verses 38 to 41. There is nothing to show that the author of the Smrithi Chandrika understood the expression 'paternal wealth' as meaning the self-acquired property of the father. The texts cited from the Madaviya, pages 17 and 18 of Burnell's edition, the Viramitrodaya, page 81 of Sitarama Sastri's Hindu Law Books, and the Vivada Chintamani, page 49 of the same book, do not carry the case any further. I must hold that the plaintiff is entitled to have funds set apart for his ceremonies out of the ancestral property which descended to plaintiff and the first defendant from Doraisami Iyengar.

The second contention is that the ceremonies for which the plaintiff is entitled to have provision made do not include his marriage. It is argued that marriage is not a necessary ceremony in the case of a Brahmin male and the case of *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (5) is relied on. That case decided that a debt borrowed for the expenses of the marriage of a co-parcener could not be enforced against the other co-parceners. That position has been considerably shaken by the observations contained in *Devulapalli Kameswara Sastry* v. *Polavarapu Veeracharlu* (6). The learned Chief Justice who was a party to the judgment in the earlier case was subsequently prepared to re-consider his view. The question has been elaborately considered by Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastry* v. *Polavarapu Veeracharlu* (6), and by Chandavarkar, J., in *Sundrabai Javji Dagdu Pardeshi* v. *Shivnarayana Ridkarna* (7). I have nothing to add to the reasons given by those learned Judges for holding, that marriage is a proper ceremony for a Brahmin and an obligatory ceremony for all with extremely few exceptions. See also West and Buhler, page 781, Strange's Hindu Law, Vol. 2, pages 286, 283, Sircar's Hindu Law (3rd Edition), page 245, section 292. But I do not think that it is necessary to rest the decision in this case on the ground that marriage is absolutely obligatory. There are, no doubt, texts in favour of the position that the initiatory ceremonies in the case of the three higher castes end with the Upanayanam. See Smrithi Chandrika, chapter 4, verse 42, which is supported by the author of Vivada Chintamani. (See Seetarama Sastri's edition, page 4). The Smrithi Chandrika text has been explained by Chandavarkar, J., in *Sundrabai Javji Dagdu Pardeshi* v. *Shivanarayana Ridkarna* (7). It was decided very recently in *Gopalakrishnamaraju* v. *Venkatanarasa Raju* (8) by a Full Bench of this Court, after the arguments in this case were heard that marriage is considered an obligatory ceremony for Hindus except in the case of one who is prepared to live the life of a perpetual Brahmachari or of a Sanyasi and that a debt borrowed for the marriage of one of the co-parceners is binding on all. This judgment,

(5) 27 M. 206.

(6) 8 Ind. Cas. 195 at p. 201; 34 M. 422; (1910) M. W. N. 649; 20 M. L. J. 855; 9 M. L. T. 23.

(7) 32 B. 81; 9 Bom. L. R 1366; 3 M. L. T. 46.

(8) 17 Ind. Cas. 308; (1912) M. W. N. 903 and 1231; 23 M. L. J. 288; 12 M. L. T. 292.

in my opinion, practically concludes the point raised in this case. The first defendant has no right to compel the plaintiff to abjure marriage and to become either a Naishtika Brahmachari or a Sanyasi. The plaintiff has the right to become a Grihasta and to live the life which is ordained for Brahmins in general; marriage is an indispensable ceremony (Avasyam Kartavyam) for all except the most spiritually advanced persons. The family property should provide the means for such an initiatory ceremony. There can, at any rate, be no doubt that marriage is regarded as a most proper ceremony for every Hindu. This is sufficient to justify the plaintiff's claim for a provision for his marriage. The first defendant has been married at the expense of the family. There is no reason for treating the brothers differently. Modern custom is, undoubtedly, in favour of allowing the provision. In deciding what ceremonies are regarded as proper and necessary regard should be had, in my opinion, to the sentiments of the community, especially when there is a difference of opinion amongst text-writers. I am also prepared to hold that a brother who has had his own marriage performed at the family expense is not entitled to object to a similar provision being made for the other brothers. The Subordinate Judge's view, therefore, must be upheld with respect to the allotment both for the plaintiff's Upanayanam and for his marriage. In the result the appeal must be allowed in so far as the award of mesne profits is concerned and dismissed in other respects.

Memorandum of Objections :—The first respondent has put in a memorandum of objections objecting to the lower Court's refusal to make a provision for the maintenance of the 5th defendant, the plaintiff's mother. A preliminary objection was raised by Mr. Ganapathy Aiyar to the memorandum on the ground that the 5th defendant, who appealed against the decree of the District Munsif disallowing a provision for her maintenance, has not herself appealed to this Court against the disallowance and that it was not competent to the plaintiff to do so. The ground on which the Subordinate Judge refused to make an allotment for the 5th defendant's maintenance was that her maintenance should come out of the plaintiff's own half share of the property and cannot be enforced against the first defendant's half share. The first respondent (*i.e.*, the plaintiff) is, therefore, affected by the judgment and is interested in disputing its correctness. The fifth defendant is a party to the second appeal. This Court has power under Order XLI, rule 33, of the Civil Procedure Code, to pass such decree as it thinks proper dealing with the rights of all the parties before it. The preliminary objection must be disallowed.

On the merits the memorandum is entitled to succeed. The question was decided so long ago as 1870 in *Sivananinanja Perumal Sethurayer (Zemindar of Orcad)* v. *Meenakshi Ammal* (9) by Holloway and Innes, JJ. The Smrithi Chandrika supports her claim. See chapter 41, verse 14:—"The word mother includes a step-mother." In verse 7 a text of Vyasa is quoted: "Even childless wives of the father are pronounced equal sharers and so also are all the paternal grandmothers: they are declared equal to mothers." See *Kumaravelu* v. *Virana Goundan* (10). The basis of the mother's right is, as pointed out by the author, the interest that she has by reason of her relationship to her husband. This reason is equally applicable to the step-mother. Mr. Ganapthi Aiyar's argument that the question was not really considered in *Sivananinja Perumal Sethuroyer (Zemindar of Oorcad)* v. *Meenakshi Ammal* (9) cannot be accepted.

The same view was apparently taken in *Subbarayalu Chetty* v. *Kamalavalli Thayarimma* (11) though the decision itself proceeded on another ground. The case relied on by the Subordinate Judge, *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (12), was based upon the express provisions of the Dayabhaga according to which the step-mother's right is only against the share of her sons.

The Subordinate Judge must be requested to return a finding on the 7th issue. He will also find whether the 5th defendant is in possession of any family jewels as distinguished from her own Stridhanam jewels and if so what is their value. One month will be allowed for the findings and seven days for objections.

(9) 5 M. H. C. R. 377.
(10) 5 M. 29.
(11) 10 Ind. Cas. 347; 35 M. 147; (1911) 2 M. W. N. 148; 21 M. L. J. 493; 10 M. L. T. 1.
(12) 16 C. 758; 16 I. A. 115.

SRINIVASA IYENGAR *v.* THIRUVENGADATHAIYANGAR.

SADASIVA AIYAR, J.—I have had the advantage of perusing the judgment of my learned brother in this case. I agree with him in all the conclusions formulated in that judgment except on one point which, however, is not unimportant. I am, therefore, obliged to write the following separate judgment and I shall notice in it only two points of Hindu Law, one point on which I regret I have to differ from, and the other point on which I agree with, my learned brother.

The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu Law. The expression 'paternal estate' when used in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain *through his relation as such son* to his father. In *Gudimetla Venkatarazu* v. *Bollozu Kottaya* (13) I have attempted to show that, according to the Shastras, sons had no right in the property which belonged to their father till both their father and mother were dead. Sankha and Likhita state (see Jagannatha, page 199) that even the properties acquired by the sons themselves independently of their father cannot be partitioned among them while the father lives since the sons are not their own masters in respect of any wealth so long as their father lives. Harita Smriti also says the same. Manu says that three persons including a son can have no wealth of their own so long as their superior is alive. Of course, we cannot now wholly go back to the ancient Law of the Shastras and we have to accept the Mitakshara which, relying mainly on a supposed text of Gautama, gives to the sons, by their mere birth, rights in the (self-acquired and ancestral) properties of the father. This supposed text of Gautama is not found in Gautama's institutes now and is opposed to the undoubtedly genuine text of Gautama, that property is acquired only in five modes, *viz.*, inheritance, purchase, partition, seizure, or finding. Even if it is genuine, it can only mean that 'birth' gives the son an inchoate and contingent right to inherit from his father or mother on their death and not a right in present in their property as soon as he is conceived. The text of Yajnavalkya in respect of ancestral immoveable property not being at the disposal of the father must be interpreted in the light of the moral obligation of a Grihasta to provide for the support of his wife and children, because not only those already born but even those thereafter to be born to him require maintenance and support according to Vyasa's text. There are passages in the Smritis to show that to pass the ownership in immoveable property, the consent of even neighbours and the whole of his village is requisite, the unrestricted private ownership and right of alienation in landed property having been greatly discouraged in some portions of the long past period of Hindu civilisation. In fact, the Mitakshara (chapter 1, section 1, slokas 24 to 27) clearly says that the father is not master of the immoveable property acquired even by himself. The text of Yajnavalkya about the ownership of father and son being equal in wealth received from the grandfather was merely intended as a moral injunction prohibiting the unequal division of the grandfather's wealth between the father and sons. In fact, this text has been rightly interpreted as giving only a figurative ownership to the sons in order that the father might fulfil his moral obligation of not making an unequal division of such property between himself and his sons. It was not at all intended to give a legal right of present ownership in ancestral property to the son. Some other commentators explain the text by saying that it was intended that where the father died, leaving a son and grandsons by the deceased son, the grandsons by the deceased son should obtain a share equally with their uncle. In other words, it was intended that the surviving son alone as the nearest Sapinda, should not take the whole of the estate to the exclusion of the grandsons by the deceased son. It was, therefore, stated that the right of inheritance after the *grandfather's death* is the same in the case of the son and the grandson (by a pre-deceased son). The son is never considered in the ancient textbooks as the true owner of any property so long as his father or mother is alive. See Jagannatha's Digest, page 283. Yajnavalkya says that among those whose fathers are deceased the allotment of shares is according to the fathers. Katyayana simi-

(13) 16 Ind. Cas. 139; (1912) M. W. N. 861; 23 M. L. J. 223; 12 M. L. T. 230.

larly says: "Should a brother die before partition, his share shall be allotted to his son provided he has received no fortune from his grandfather. The son's son shall receive his father's share from his uncle or from his uncle's son." As I have said already it may be to avoid the consequences of the logical effect of the dictum that the estate belongs to the nearest Sapinda that the Smriti texts make the son, the grandson and the great-grandson of the deceased owner to equally partake (*per stirpes* in the case of the grandson and the great-grandson) the estate of the deceased owner instead of the son alone taking the whole as such nearest Sapinda. But if a great-great-grandson is left, he cannot claim to inherit any share of his great-great-grandfather's property directly from the deceased owner. The Mitakshara, having laid down the principle of present right by birth instead of a mere figurative right, has led to a very large amount of anomalies in the Hindu Law. To adapt the language of Beaman, J., in a recent Bombay Case (that learned Judge was referring to the Muhammadan Law): "There seems now little hope of expecting from the vast entanglements of the Mitakshara Hindu Law anything like consistent principles or intelligible classifications, and every single rule seems to be open to innumerable exceptions many of which appear to conflict in principle with the main rule." This modern main rule as to right by birth was in hopeless conflict with the son's undoubted legal liability under the ancient Hindu Law to pay his father's debts and hence the Privy Council have been obliged to virtually destroy this rule by allowing the validity of alienations effected to discharge the father's debts provided they are not illegal or immoral. This alleged right by birth is also ignored when the father was given the right to alienate his self-acquisitions, even if they were immoveables. This same right by birth has led to the so-called right of survivorship unknown to the ancient Hindu Law. It has also virtually killed the numerous texts which show that the great-great-grandson has no right to inherit directly the property of his great-great-grandfather, if the great-great-grandfather at his death left nearer descendants. The clear texts (see Manu, slokas 186 and 187 of chapter 9 and the text of Katyayana) which deny the right of the great-great-grandson to inherit could not be explained away except by much involved ingenuity. Such misapplied ingenuity has been abundantly shown by the commentators who wrote the Viramitrodaya, the Smriti Chandrika, the Madhayya, the Vivada Chintamani, and the Vivada Ratnakara. These unsatisfactory commentaries the Courts have been obliged to accept as making the rule as to the non-existence of succession and inheritance beyond the third descending line inapplicable to the cases governed by the Mitakshara Law. (See the elaborate judgment of my learned brother Sundara Aiyar, J., in *Abhinana Purna Priya Vaedagi Bhaskar Tirumal Rao Saheb v. Arni Rangasawmy Rao Saheb* (14). For myself, I am unable to interpret the texts of Manu and Katyayana as intended only to apply to cases where the property to be inherited was the acquisition of the great-great-grandfather, because the Mitakshara confers right by birth even in self-acquisitions to the sons and through them, of course, to the grandsons and great-grandsons. I am clearly of opinion that the Mitakshara principle of right by birth utterly destroys the rule laid down in the texts of Katyayana and Manu that the great-great-grandson has no claim to inherit directly his great-great-grandfather's property.

When, therefore, the Hindu Law books treated of partition of the paternal estate—I would put it rather as the parental estate—they did not mean to confine themselves to the partition of the father's self-acquired estate, because according to the ancient law both his self-acquisition and his ancestral estate are his own and are parental estate so far as the sons are concerned. As my learned brother has pointed out, there are no separate chapters in the Smritis or even in the commentaries treating of the partition of self-acquired estate as apart from the ancestral estate of the father. The only difference made is between partition during the father's life-time and partition after the father's death. Mr. Ganapathi Iyer has attempted to confine the texts of Yajnavalkya and other Smriti writers (Vishnu, Vyasa, Brihaspati and Narada), which required initiated brothers to set apart from the paternal property the expenses of the initiation of uninitiated brothers and sisters before dividing

(14) 15 Ind. Cas. 412; 23 M. L. J. 79; 12 M. L. T. 245; (1912) M. W. N. 790.

the paternal property, to the father's *self-acquired* properties, and this attempt to restrict these texts to the self-acquired property of the father has, in my opinion, wholly failed. In fact, Narada says that if no wealth of the father exists, the cremonies of uninitiated brothers must, without fail, be defrayed by the brothers already initiated *contributing funds out of their own private wealth.* Thus when the initiated brothers are bound even in the absence of any property inherited by themselves to spend money for the Samskaras of their uninitiated brothers, it is impossible to hold that they are not bound to meet those expenses out of the property which they inherit from their father as ancestral estate.

We now come to the question as to what are the Samskaras of uninitiated brethren, the expenses of which have to be first set apart from the inheritance before it is divided among all the sons. (Formerly, sisters also had shares in the inheritance along with their brothers and the texts about expenses of initiation refer to both uninitiated brothers and sisters.) Brihaspati's text clearly points to the Samskaras in question, *viz.*, those which the brothers initiated by their father had to perform for their brothers and sister whose initiation had been left incomplete by the father at his death, such initiations which are morally obligatory on the father being rounded up by the Upanayana ceremony. His text is as follows:—"For younger brothers, whose *thread investiture*, etc., ceremonies have not been performed, their elder brothers shall perform them out of the collected wealth of their father." If the expenses of the marriage Samskara were also intended to be set apart before partition that Samskara would have been mentioned in preference to the thread investiture ceremony. The word "Dvijati Samskara", as used in the Shrimad Bagavatam and other sacred books, is intended to apply only to that important Samskara which initiates the Hindu into his caste, *viz.*, the Upanayanam ceremony. It is well-known that females also, according to the Shastras, had the Upanayana Samskara performed in former ages, just like males though now the Vivaha Samskara has become practically the only Samskara for females. But even now, at the time of the Vivaha Samskara, most of the previous Samskaras are rapidly gone through for females. The Smriti Chandrika is clearly of opinion that the ceremonies contemplated by Narada's text commence with Jatakarma and end in Upanayana. Now the Samskaras are variously numbered from 8 to 48 and even more (see also Jagannatha introduction, page XXX). The Savitri or the ceremony of investiture is the 7th when numbered from Jatakarma according to the Samskara Ratnamala and the 8th or 10th when numbered from Garbhadanam according to other works. Marriage or Vivaham comes as the 14th or 16th ceremony. That the marriage of males is not considered an indispensable Samskara is clear to me after a perusal of several of the ancient Shastraic books. The late Dewan Bahadur Raghunatha Rao, a very learned, accurate, and unprejudiced Sanskrit scholar, has, in my opinion, conclusively shown in his works that marriage both for males and females is optional and not obligatory. The late Mr. Justice Krishnaswami Aiyar, while inclined to attach great importance to the Vivaha ceremony [see *Devulapalli Kameswara Sastri* v. *Polavarapu Veeracharlu* (6)] admits that the Jabala Upanished, Manu, Yajnavalkya, and Mitakshara lay down that a Hindu can go straight from the Brahmacharya stage after Upanayana to the Sanyasashrama stage without having been a Grihastha and having had the Vivaha Samskara if he has conquered his animal passions during the Brahmacharya stage. (Yad Shareva Viramet Tad Shareva Pravrajet). See also Mitakshara, Prayaschitta Kandam on Yati Dhara. We have the well-known text of the Bhagavatham that animal sacrifices, intoxicating liquor, sacrifices, and marriage are not obligatory Samskaras but are intended only for those who have not conquered their desires for flesh, spirituous liquors and sexual gratification.

Loke Vyavayamishamàdhya Siva Nithyastu Jantoh nahi tatra chodana Vyavasthitis tasu vivaha Yagna sura Grahair Asu nivvithi rishta.

The texts which praise the Grihasthashramam as supreme are only what are known as Arthavada and laudatory texts intended to encourage the married house-holder to perform his duty of maintaining the other three Ashramas, and were clearly not intended to really lay down that the Grihasthashrama

is superior to the other Ashramas. In fact, in the Bhagavatham and other religious works and also in the Smritis, the married stage is in several places despised as the Jaghanyasrama and it is clearly laid down that apart from the exceptional cases of Jnana Sanasis like Janaka, a man who dies as an ordinary Grihasthashramee will be merely moving round and round in the three lower worlds, whereas the Naishtika Brahmacharya, the Vanaprastha and the Sanyasi alone can go to the higher four worlds, after passing to which there is no further *involuntary* return to the rounds of births in the three lower worlds. Marriage is only a Vikalpavidhi and it is not a Nitya or Apurvavidhi. It is either a Niyama Vidhi or is only a Parisankhyavidhi. Even Chandavarkar, J., in *Javji Dagdu Pardeshi Sundarabai* v. *Ridkarna Shivanarayani* (7), does not state that marriage is always obligatory but only that it might "become obligatory" in the cases and for the reasons he has set forth (page 93, 1st line). As regards the texts quoted by Krishnaswami Aiyar, J., which ordain that a man should discharge his three (or five) debts and that he should procreate sons by marriage to discharge one of those debts, *viz.*, the debt due to his Pitris, there are numerous passages in the Shastras to show that when real Vairagya is obtained and real undivided devotion to the Supreme Lord, the debts to Devas, Rishis, Bhootas, Aptas, fellow-men and Pitris all become non-existent and completely discharged and that on the very day such Vairagya and devotion are obtained, that very day you should give up the wordly life. The learned Judge himself does not state that marriage is a compulsory Samskara even for the man who is not fit to pass at once to the Vanaprastha stage, but that it is 'practically compulsory.' [See *Devulapalli Kameswara Sastri* v. *Polavarpu Veeracharlu* (6)]. The Bhagavatham says:

Devarshi Bhootapta Nrinam Pitrinam na Kinkaro Nayamrineecha Rajan Sarvatmana Yassaranam Saranyam Gato Mukundam parihritya Kartam.

Now according to the texts (see especially Narada quoted in the Smriti Chandrika, page 59 of Mr. Krishnaswami Aiyar's translation) which require the initiated brothers to perform the ceremonies of their uninitiated brethren, it is clear that it is only those ceremonies which the deceased father was expected and bound to perform for his sons, if he was alive, that the initiated brothers had to perform in the place of their father for their uninitiated brothers. "What is left to the father's property after the father's obligations have been discharged, let the brothers divide." Now what are those ceremonies? Manu says: "Let the father himself perform the eight ceremonies *which perfect the second birth of a twice-born man* like the ceremony on conception." Thus, it is clear that the father is under an obligation to perform only up to the Upananyana ceremony the Samskaras to be performed for his son. Vivaha is a ceremony which is performed after a man attains his majority and depends on his own will and option. It is, therefore, perfectly clear to me that the marriage Samskara is not one of the Samskaras which the initiated brothers have to perform for their uninitiated brothers and the expenses of the future marriage ceremony of the uninitiated brother is, therefore, not intended by the texts to be deducted out of the patrimony before it is divided. I am glad to have, for the above view, the support of that very learned Judge, the late Mr. Justice Krishnaswami Aiyar, who has said in *Devulapalli Kameswara Sastry* v. *Polavarapu Veeracharlu* (6): "There is also another reason for separating marriage from the Samskaras that precede it, for as pointed out at page 300 of the Digest, it is not a Samskara which a father does for the sons as he does in the case of the preceding Samskaras but one in which the son himself participates as the active agent." The learned Judge further on says: "The marriage of an unmarried brother is certainly not a duty cast on the married brothers when there is no patrimony." The texts of Narada make the initiated brothers perform the Samskaras of uninitiated brothers even out of their own acquisition if there is no patrimony, and as the Samskaras so made obligatory on the initiated brothers are the same whether there is patrimony or not, if such Samskaras cannot include the marriage Samskara in the one case, they cannot include it in the other case also. In the case of uninitiated sisters as the marriage ceremony has now taken the place of their Upanayana the marriage expenses must be met or set apart, but in the case of uninitiated brothers, I think we

must stop at the Upanayana ceremony as even the Smriti Chandrika does not venture to go beyond the expenses of the Upanayana ceremony as obligatory on the patrimony. If we go as far as the optional sacrament of marriage, why should we not go to the 30 and odd sacraments which follow the marriage sacraments, and where are we to stop? In these days when it is deemed essential to postpone the marriage of boys till their education is completed, I am not prepared to allow any monies for the future marriage of a minor boy to be set apart several years before the marriage is likely to take place. The making of such provision will be the holding out of a temptation to the boy and his widowed mother to hasten the marriage before he completes his education and such early marriages are utterly opposed to the Shastras. The question decided in *Devulapalli Kameswara Sastry* v. *Polavarapu Veeracharlu* (6) was that the expenses of the marriage of a male Hindu are expenses incurred on account of "family necessity" because they are reasonable and proper expenses. That question is quite a different question from that which we are now considering, *viz*, whether the expenses of such marriage ought to be set apart at a division among the brothers as the expenses of an obligatory Samskara, under the texts of Narada and other sages. The expressions "family necessity" and "family benefit" have always been liberally construed to include the expenses for purposes usually and reasonably incurred according to the status of the particular family, and that question was recently decided in *Gopalakrishnamaraju* v. *Venkatanarasa Raju* (8) by a Full Bench of which I was a member, but the present question as to the expenses of what Samskaras have to be set apart at partition has no connection with the question decided by the Full Bench, the decision of the Full Bench merely affirming that where the marriage had taken place and where, therefore, the Vivaham sacrament of male was found to have been obligatory owing to the unfitness of that male member for the life of a Naishtika Brahmacharya or of a Sanyasin, the reasonable expenses which had been incurred for his marriage were proper family expenses which would support the alienation of family property made for meeting such expenses. I wish to add that in these times when the giving of Varasulkam is so rampant, it is very problematical that any expenses need at all be incurred for a boy's marriage when he comes of marriageable age and on that ground also I should hold that the allowance of Rs. 150 to the minor plaintiff for his marriage expenses is based on a remote speculative necessity. In this case, the plaintiff is only a boy five years old and to speculate about his marriage and his marriage expenses now seems to me to be a great deal premature. In the result, I would modify the lower Court's decree by deleting the provision made in it to the extent of Rs. 150 for the plaintiff's marriage, plaintiff being a child five years old, his marriage, if it takes place at all in future, having to be postponed till he is 24 according to the Shastras, it being problematical whether his marriage instead of entailing expense may not even be a source of pecuniary profit to him when it occurs and the Hindu Law contemplating the expenses up to Upanayanam alone being set apart at the time of division for the benefit of uninitiated brothers. In other respects, I agree with the judgment of my learned brother and I agree in the order proposed by my learned brother to be passed in this case as regards the question of 5th defendant's maintenance.

SUNDARA AIYAR, J.—As my learned brother does not agree with my view on the question of the plaintiff's right to have provision made to defray the expenses of his marriage, we refer under section 98 of the Code of Civil Procedure for the decision of a third Judge the question whether, when one only of two co-parceners in a Hindu family has been married at the family expense, the other co-parcener, a minor, is entitled at a partition of the family property to have provision made for his marriage out of it.

This second appeal coming on for hearing on 5th February 1914 under the provisions of section 98 of the Code of Civil Procedure, upon hearing the arguments of Mr. *T. Natesa Iyer*, Vakil for the Appellant, and of Mr. *K. R. Rangaswami Aiyangar*, Vakil for the 1st Respondent, and the 2nd respondent not appearing in person or by Pleader and the case having stood over for consideration till this day, the Court expressed the following

SRINIVASA IYENGAR v. THIRUVENGADATHAIYANGAR.

OPINION.

SPENCER, J.—The authorities for the proposition that marriage for Hindus is an obligatory Samskara quoted in the judgment of Sundara Aiyar, J., namely *Devulapalli Kameswara Sastry* v. *Paluvarapu Veeracharlu* (6), *Sundraboi Javii Dagdu Pardeshi* v. *Shinarayana Ridkarna* (7), *Gopalakrishnamaraju* v. *Venkatanarasa Raju* (8) and the books on Hindu Law by West and Buhler, page 781, Sarkar, page 245, and Strange, Volume 2, page 286, are so weighty that I cannot usefully add anything in my own words to what is contained therein. I, therefore, take it that it is settled law that the reasonable expenses of performing the marriage of a male member of a co-parcenary, if already incurred out of family funds, are necessary expenses which must be treated as binding on the other co-parceners.

The further question to be decided is, supposing that the separation of a minor's estate takes place by partition from the family estate before his marriage has been performed, whether provision should be made for an expense that may never be actually incurred for some reason or other, such as the minor remaining unmarried, dying young, or passing to the Sanyasi Asramam (ascetic stage) without passing through the Grihasthasramam (married stage). This question arises out of modern conditions. In the ancient history of the Hindu joint family I imagine that it must have been most unusual to have partitions effected before the parents died. In the event of a minor who has obtained partition of his share dying without issue his estate will revert to his heirs according to the rules of Hindu succession and this will include the unspent provision, if any, made for his marriage, so that the other members of the family will not lose unfairly by making provision for the minor's marriage beforehand. Instances of a man becoming a Sanyasin without passing through the stage of Grihasthasramam appear to be so exceptional that it seems hardly necessary at partition to contemplate the possibility of the abnormal happening. In this connection I may quote the words of Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastry* v. *Paluvarapu Veeracharlu* (6). He says: "Except for him who has thus qualified for entry direct into other Asramas than that of house-holder, the stage of house-holder is practically compulsory;" and at p. 430, "Both the commentators of Manu and the commentators of Yajnavalkya have come to the conclusion after a full discussion of Sruti and Smriti texts that the stage of house-holder is obligatory on all the twice-born. But to those who have pursued the path of non-attachment, Naishtika Brahmacharya or perpetual studentship or entry from studentship into the stage of the hermit or ascetic direct is open." Moreover, when a Hindu renounces worldly affairs, it is usual for him to relinquish also his property in favour of other members of his family.

The considerations of expediency which appear in the judgment of Sadasiva Aiyar, J., do not appeal much to me, unless they can be supported by the sacred texts or by established custom. For such considerations there is generally much to be said on the other side to balance or outweigh them. The learned Judge's observation that a provision for marriage will serve as a temptation to the boy and his widowed mother to hasten the marriage before he completes his education and that such early marriages are utterly opposed to the Shastra does not seem to me to be a sufficient reason for altogether withholding such a contribution from family funds. Principles cannot be created out of particular cases in which unfortunate results have ensued. In some cases, if a minor's guardian is his mother, there may be a risk of the minor being pushed into an improvident early marriage. In other cases, there may be some security that the marriage will be deferred to a reasonable age. I doubt whether the evil of early marriages can be prevented by judicial pronouncements anticipating a change in popular opinion. Again, the learned Judge remarks that the practice of Varasulkam being on the increase may obviate any expenses being incurred on the boy's side. So long as the boy's parents have, as a general rule, to incur some expenses at his marriage, I should hesitate to describe the allowance for marriage expenses a 'remote speculative necessity.' In the family concerned in this case the 1st defendant has been married out of family

funds. It is probable that the plaintiff will marry and it is equitable that when he does, he should be treated like his brother.

Turning to the authorities, Sadasiva Aiyar, J., refers to the texts of Narada which make the initiated brothers perform the Samskaras of uninitiated brothers even out of their own acquisition if there is no patrimony. He proceeds to argue that, as the Samskaras so made obligatory on the initiated brothers are the same whether there is patrimony or not, if the marriage Samskara is not included in the one case it cannot be included in the other case also. He would set apart the marriage expenses of uninitiated sisters for the reason that the marriage *ceremony* has now taken the place of Upanayanam, but in the case of uninitiated brothers he would stop at the Upanayanam *ceremony*. For this view he quotes the Smriti Chandrika. In Mr. Krishnaswamy Aiyar's translation, Chapter 4, verse 40, Narada states: "For those whose initiatory ceremonies have not been regularly performed by the father, those ceremonies must be completed by the brethren out of the patrimony." Verse 41 goes on: "if no wealth of the father exists, the ceremonies of brethren must, without fail, be defrayed by the brothers already initiated contributing funds out of their own portion." Verse 42 says: "The ceremonies contemplated by this text commence in Jatakarma and end in Upanayana."

In the next verse the learned author observes that marriage is not one of the ceremonies that must, without fail, be performed, as the law permits the life of a perpetual student (Naishtika Brahmachari). As regards this text, Chandavarkar, J., in *Sundrabai Javji Dagdu Pardeshi* v. *Shivnarayana Ridkarna* (7), remarks: "It (this text) deals only with brothers. And, secondly, even as to them, it deals only with the case of brothers who have no joint estate, and, therefore, are not bound by any mutual obligations incidental to a co-parcenary family;" and at page 87 he observes: "The word used for 'ceremonies,' whether as applied to brothers or to sisters, is Samskaras. In the case of sisters it can have no meaning if marriage be excluded from it. And if marriage is included in the use of the word with reference to sisters, it must be understood as having been used in the same sense with reference to brothers also, since both brothers and sisters are mentioned in the same connection and the same word is used as to both." Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastry* v. *Polavarapu Veeracharlu* (6) states: "There can be no doubt that the Smriti Chandrika is no authority for the position that marriage is not an obligatory Samskara." This is sufficient to show that the authority of the Smriti Chandrika upon which the appellant's Pleader relies cannot be invoked for the purpose of showing that the Samskara of marriage creates no obligation upon brothers, who have ancestral property, to meet the cost of the marriages of the other members of the family.

In the judgment of Sadasiva Aiyar, J., Vivaha is referred to as a ceremony performed after the man has attained his majority and depends on his own will and option. It may be true that a man who has overcome his passions can attain salvation without marriage, but he does not necessarily become Anasrami or the Vratya (outcaste) if he has, in due course, entered the other Asramas in order and has remained unmarried.

Whether omission to perform the Samskara of marriage would work forfeiture of caste or status is not, in my opinion, the true test to be applied for determining whether the expenses of marriage are or are not debts of family necessity which must be provided for. As observed by Sundara Aiyar, J.: "There can, at any rate, be no doubt that marriage is regarded as a most proper ceremony for every Hindu. This is sufficient to justify the plaintiff's claim for a provision for his marriage." We may safely be guided by what is considered normal and proper. I would, therefore, be inclined to take the view that marriage expenses may be 'necessary expenses', although salvation can be obtained without marriage. It does not follow that because a man, in exceptional circumstances, can attain salvation without passing through the stage of *grihasthasramam*, marriage which is introduction to that stage is not a necessary ceremony for the ordinary man. "The ceremonies for the performance of which immoveable properties can be alienated by the manager do not include only those for the non-performance of which forfeiture of

caste is the penalty." [*Devulapalli Kameswara Sastry* v. *Polavarapu Veeracharlu* (6).] This decision and that in *Gopalakrishnamaraju* v. *Venkatanarasa Raju* (8) and in *Sundrabai Javji Dagdu Pardeshi* v. *Shivnarayana Ridkarni* (7), while laying down that marriage expenses already incurred are binding on the members of a Hindu family, incidentally decided also that marriage is obligatory on Hindus who do not desire to adopt the life of a Sanyasi.

The appellant's Pleader contends that the above text of Smriti Chandrika is in his client's favour and that there is nothing to the contrary in any other of the ancient writings.

He has also called my attention to the decision of *Govindarajulu Narasimham* v. *Deverabhotla Venkatanarasayya* (5). This decision appears to have been practically overruled by the later decisions of *Devulapalli Kameswara Sastry* v. *Polavarpu Veeracharlu* (6), *Gopalakrishnamaraju* v. *Vencatanarasa Raju* (8). I have shown that the Smriti Chandrika is not really in his favour.

In Colebrooke's Digest of Hindu Law, Book V, chapter 3, section 123, the saying of Yajnavalkya appears thus: "For any of the brothers, whose investiture and other ceremonies had not been performed by the father, those ceremonies shall be performed by brothers, of whom the sacraments have been completed." On referring to the text, the literal translation of the Sanskrit is: "Samskaras are to be done for the uninitiated by those fully initiated." Thus no mention is made in the text of Upanayanam, as distinct from other Samskaras. Admittedly, however, marriage is a Samskara and there is nothing to show that it was intended to be excluded here. In Stoke's Hindu Law, Mitakshara, chapter I, section 7, verses 3 and 4, I find: "If any of the brethren be uninitiated when the father dies who is competent to complete their initiation, uninitated brothers should be initiated by those for whom the ceremonies have been already completed. By the brethren who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate." Under this there is an annotation by which all the initiatory ceremonies are interpreted by Balambhatta as including marriages. But Balambhatta is not mentioned in Mr. Mayne's Hindu Law as an authority in the south of India and in *Bhagwan* v. *Warubai* (15) Chandavarkar, J., remarks that Balambhatta is not regarded by Hindus in the Bombay Presidency as an authority to be accepted without question in the interpretation of Mitakshara. On the broad footing that marriage is a Samskara, that it is not usual to omit it, and that it is necessary that Samskaras should be performed out of family funds, when such exist, I would allow this charge.

Moreover, the decisions quoted by me at the outset are to the effect that marriage is an obligatory ceremony; and Sarkar and West and Buhler in their works on Hindu Law and Steele's Law and Customs of Hindu Castes, p. 404, declare that the expenses for the marriage of unmarried co-sharers should be set apart at partition.

I consider that the opinion of Sundara Aiyar, J., in this appeal is correct and supported by authority.

(15) 32 B. 300 at p. 312; 10 Bom. L. R. 389.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 182 OF 1910.

July 31, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Agnew.

Sardar MUHAMMAD CHIRAGH KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

AMIR CHAND, PLAINTIFF AND ATTAR CHAND—DEFENDANT—RESPONDENTS.

Custom—Mauza *Girote, Tahsil Khushab, District Shahpur—Submersion of* malik qabza's *land—Emersion—Special custom—Burden of proof.*

In the village of Girote, Tahsil Khushab, District Shahpur, a special custom exists whereby a *malik qabza*, whose land is submerged, loses all his proprietary rights in that land and on its re-appearance it becomes the exclusive property of the full owners of the village.

The onus of proving a special custom lies on those who affirm it.

Dilsukh Ram v. *Nathu Singh*, 98 P. R. 1894; *Ahmad Shah* v. *Khuda Bakhsh*, 33 P. R. 1903; *Sahib Din* v. *Ilam Din*, 15 P. R. 1904, followed.

Sahib Rai v. *Khair Shah*, 19 P. R. 1876; *Sultan Khan* v. *Syed Mahomed Shah*, 59 P. R 1877; *Lal Shah* v. *Karim Buksh*, 96 P. R. 1879; *Chiragh* v. *Turel Khan*, 1 P. R. 1880; *Raja* v. *Sarfaraz*, 152 P. R. 1883; *Ghulam Mohay-ud-din* v. *Faiz Baksh*, 97 P. R. 1902;

MUHAMMAD CHIRAGH KHAN *v.* AMIR CHAND.

21 P. L. R. 1902, *Dewa Singh* v. *Bishambar Das*, 80 P. R. 1905; 184 P. L. R. 1905; *Jangi* v. *Dalipa*, 15 Ind. Cas. 942; 8 P. W. R. 1912 Rev.; 4 P. R. 1912 Rev., cited and explained.

Second appeal from the decree of the Divisional Judge, Shahpur Division, dated 23rd June 1909, affirming that of the Munsif, 1st class, Shahpur, dated 24th November 1908, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Nanak Chand*, for the Appellants.

Rai Bahadur Pandit *Sheo Narain* and Mr. *Shah Nawaz*, for the Respondents.

JUDGMENT.—The plaintiff, Lala Amir Chand, is a *malik qabza* in *Mauza* Girote, Tahsil Khushab, District Shahpur, and the first two defendants, who are the contesting defendants in the case, are full proprietors in the village, being admittedly descended from the original Baloch founder thereof. In the year 1904, the land in dispute, which was entered in the revenue papers as owned by the plaintiff, was submerged by the action of the river Jhelum, and it re-appeared in the year 1907. On its re-appearance the defendants took possession of it, claiming to have become its owners on the strength of an entry in the Wajib-ul-arz of the village, and the plaintiff brought the present suit for recovery of possession in the beginning of 1908.

Both the Courts below have decreed the plaintiff's claim, holding that the defendants, on whom the onus lay, had failed to prove that there was a special custom in *Mauza* Girote by which the land of a *malik qabza* which was submerged by the action of the river would become on its re-appearance the property of the Baloch proprietors; and the question for decision in this appeal is whether or not the custom relied upon by the defendants has been established. It is not disputed that in a case like the present the *malik qabza* whose land has been washed away is entitled on its re-appearance, in the absence of a custom to the contrary, to take possession of it as owner, so that if the custom alleged is not proved to prevail in the village in which the land is situated the claim of the *malik qabza* to resume possession of his land must succeed. The simple question, therefore, in this case is whether the special custom set up by the defendants has been proved by them.

In support of his client's case the learned Counsel for the defendants-appellants has relied on paragraph 21 of the Wajib-ul-arz of *Mauza* Girote drawn up at the Settlement of 1558, on paragraph 6 (*b*) of the Wajib-ul-arz of 1892, and on the following judicial precedents relating to this very village in which the custom pleaded by the defendants is said to have been held established:—

I.—*Ram Kaur* v. *Allah Yar Khan* decided by Mr. Johnstone, Assistant Commissioner, on the 30th March 1863.

II.—*Ali Muhammad* v. *Allah Yar* decided by Captain Davies on the 9th January 1865. On appeal this case was remanded for re-decision by the Commissioner by order dated the 22nd March 1865; and the case was decided a second time by Captain Davies on 12th July 1865. This decision was appealed to the Commissioner who rejected the appeal on the 11th September 1865, and a further appeal to the Financial Commissioner was also dismissed on the 15th January 1868.

III.—*Ali Muhammad* v. *Sardar Mubarik Khan* decided by Diwan Tara Chand, Tahsildar, on the 31st October 1876. An appeal from his decision was dismissed by Maulvi Zulfiqar Ali on the 5th February 1877.

IV.—*Bawa Kanshi Das* v. *Jiwan Khan* decided by Mirza Ahmed Beg, Tahsildar, on the 17th October 1883. An appeal from the decision of the Tahsildar was preferred to Mr. Clifford, Judicial Extra Assistant Commissioner, who accepted the appeal on the 24th of January 1884; but on further appeal the decision of the first Court was restored by Mr. (now Sir Charles) Roe, Additional Commissioner, on the 12th of June 1884.

In all these cases the claims of the various plaintiffs to recover possession of their lands on their re-appearance after submersion were dismissed as against the Baloch proprietors who had taken possession of the same by virtue of their alleged rights as based upon the Wajib-ul-arz entry. The appellant's Counsel has further relied upon the following decisions of this Court:—

Dilsukh Ram v. *Nathu Singh* (1), *Ahmad*

(1) 98 P. R. 1894 (F. B.).

Shah v. *Khuda Bakhsh* (2); *Sahib Din* v. *Ilam Din* (3); Further Appeal No. 1208 of 1907, decided by Sir William Clark on the 9th of April 1908.

The learned Advocate for the plaintiff-respondent has contended that the entries in the Wajib-ul-arz of 1858 and of 1892 are not evidence of the special custom set up by the appellants and in any case do not carry much weight and that the four judicial precedents relating to this village which are relied upon by the other side are insufficient to prove that a *malik qabza* in this village whose land is submerged loses all his proprietary rights therein and cannot recover possession of it on its re-appearance. The learned Advocate has cited the following authorities in support of his position:—

Sahib Rai v. *Khair Shah* (4), *Sultan Khan* v. *Syed Mahomed Shah* (5), *Lal Shah* v. *Karim Buksh* (6), *Chiragh* v. *Turel Khan* (7), *Raja* v. *Sarfaraz* (8), *Ghulam Mohay-ud-din* v. *Faiz Bakhsh* (9), *Dewa Singh* v. *Bishambar Das* (10), *Jangi* v. *Dalipi* (11).

We now proceed to deal with the argument of the appellants' Counsel first. The entry in the Wajib-ul-arz of 1858, runs as follows:—(The first portion of the entry is to the effect that the land of this village is subject to river action, that if more than 10 per cent. of the village area is washed away the land revenue will be proportionately remitted, and that if more than 10 per cent. re-appears then the land revenue will be similarly enhanced. Then follow the words which bear on the point before us) *Aur jo zamin burd baramad hogi us ka muamila zimme Ghulam Muhammad ke hoga khawah Sarkar chhore khawah leve aur kisi malik ko dawa na hoga aur ala haz-ul-qiyas jo zamin baramad hogi us men dusre ka wasita na hoga. Magar jo athais bigha zamin Jhanjhi Mal ne ba iwaz chaurasi rupia ke kharid ki thi woh darya burd hai, agar baramad hogi Jhanjhi Mal mazkur malik hoga.* The meaning of this entry is perfectly clear, and it is not disputed that according to its terms, the land of any land-owner in the village, who was not descended from the original Baloch founder, on being washed away would cease to be the property of its former owner. Ghulam Muhammad mentioned in this entry was the mortgagee from the Baloch proprietors and he admittedly represented the latter at the Settlement of 1858. The last portion of the entry is rather important, as, according to it, an exception was made in favour of one Jhanji Mal who had purchased 28 *bighas* of land for Rs. 84 before the Settlement. This area was under water when the Wajib-ul-arz was drawn up and as an exceptional favour to Jhanji Mal it was provided that when the land in question re-appears Jhanji Mal will continue to be its owner. We shall presently see that about this very land there was a suit in Court when it re-appeared in 1863, and that Jhanji Mal's successor-in-title was held to have lost whatever rights he had in the land by reason of its submersion. We may note here that the Wajib-ul-arz of 1858 purports to have been signed by a large number of proprietors, many of whom were apparently *malikan qabza* in the village.

The Wajib-ul-arz of 1892 re-produces, word for word, the above entry of 1858, and it is noteworthy that the new entry was made after a hot contest between the Baloch proprietors and some of the leading *malikan qabza* in the village who made an application on the 4th of December 1890 to the Settlement Authorities asking that the old entry in paragraph 21 of the Wajib-ul-arz of 1858, regarding the loss of their proprietary rights in submerged lands, be amended. After full inquiry the Settlement Tahsildar, Lala Ganga Ram, and the Revenue Assistant, Mian Ghulam Farid, reported adversely to the *malikan qabza*, their opinion being that, in view of the previous civil litigation between the Baloch proprietors and the other land-owners of the village, the old entry should be repeated. The Settlement Collector, Mr. (now Sir James) Wilson, agreed with the Tahsildar and the Revenue Assistant, and

(2) 33 P. R. 1903.
(3) 15 P. R. 1904.
(4) 19 P. R. 1876.
(5) 59 P. R. 1877.
(6) 96 P. R. 1879.
(7) 1 P. R. 1880.
(8) 152 P. R. 1883.
(9) 97 P. R. 1902; 121 P. L. R. 1902.
(10) 80 P. R. 1905; 184 P. L. R. 1905.
(11) 15 Ind. Cas. 942; 4 P. R. 1912 Rev.; 8 P. W. R. 1912.

by his order, dated the 1st April 1892, rejected the application of 4th December 1890. The applicants were referred to a civil suit to establish their alleged rights in submerged lands, but no such suit was brought by them. Clause 6 (*b*) of the Wajib-ul-arz in question appears to have been drawn up after the order of the 1st April 1892, but the *malikan qabza* appear again to have disputed the correctness of the entry in question, and final orders were passed by Mian Ghulam Farid on the 14th of July 1893. He decided that to the said clause 6, which was a reproduction of the entry in the Wajib-ul-arz of 1858 relating to alluvion and diluvion, the following words be added: *Jab malikan qabza ki zamin burd ho kar bar-amad howe to us ke malik qaum Baloch honge.* By this addition the pre-existing rights of the Baloch proprietors to the ownership of such of the lands of *malikan qubza* as would re-appear after submersion were placed beyond doubt so far as the Settlement Authorities were concerned Since the order of the 14th July 1893 was passed, the present suit is, so far as the record shows, the first occasion on which the rights of the Baloch proprietors as laid down in the Wajib-ul-arz of 1892 have been disputed.

Soon after the Wajib-ul-arz of 1858 was framed, disputes arose between some of the *malikan qabza* and the Baloch proprietors of this village as to their respective rights in submerged lands belonging to the said *malikan qabza*, and we shall refer in chronological order to the suits which arose out of these disputes.

I. The case of *Ram Kaur* v. *Allah Yar*. The 28 *bighas* of land, which Jhanji Mal had purchased before Settlement and which, as we have seen above, were under water when the Wajib-ul-arz was prepared, re-appeared some time in 1862, and it was taken possession of by the Baloch proprietors. Ram Kaur, son of Jhanji Mal, sued for possession on the ground that on its re-appearance the land continued to be his property. This claim was in accordance with the exception made in favour of Jhanji Mal by paragraph 21 of the Wajib-ul-arz. Ram Kaur's suit was, however, dismissed by Mr. Johnstone, Assistant Commissioner, on the 30th March 1863, on the ground, *inter alia*, that the Baloch proprietors were not bound by the arrangement come to as regards this land between their mortgagee Ghulam Muhammad, and Jhanji Mal, and that the general rule laid down in the Wajib-ul-arz governed the case. The land in dispute was occupancy land. No appeal was preferred from Mr. Johnstone's decision.

II. The case of *Ali Muhammad* v. *Allah Yar*. This suit related to proprietary land which originally belonged to the plaintiff, Ali Muhammad, who was a *malik qabza* in the village. The land was washed away and it then re-appeared, on its re-appearance it was taken possession of by the Baloch proprietors, and the plaintiff sued to recover possession on the ground that the submersion of the land did not work forfeiture of his proprietary rights. The claim was thrown out by Captain Davies, Deputy Commissioner, on the 9th of January 1865, the grounds of decision being that the entry in the Wajib-ul-arz under which, on the land of a *malik qabza* being washed away, the Baloch proprietors had to pay land revenue assessed on it had been acted upon; that the plaintiff had lost all rights in the land; and that it must be presumed that the entry in the Wajib-ul-arz was made with the knowledge and consent of the *malik qabza* concerned. From the decision of Captain Davies there was an appeal to the Commissioner, Mr. Brandreth, who set aside the order of the Deputy Commissioner and sent the case back for further inquiry and re-decision. The Commissioner noted in his order that there was a great distinction between *malikan qabza* and occupancy tenants, and that even if an occupancy tenant were to lose his rights on his land being submerged, a *malik qabza* need not necessarily be subject to the same disability. The Commissionor directed that further investigation be made into the custom prevailing in the village of Girote and in the neighbouring villages as regards the rights of *malikan qabza* whose lands were submerged by river action. On the case going back, Captain Davies made the further inquiry directed, and as a result of that inquiry again came to the same conclusion at which he had arrived before. After referring to two decided cases bearing upon the question of custom, Captain Davies says in his judg-

ment, dated the 12th July 1865: "These are both cases in point, they seem exactly on all fours with this; and in both the claim of the *malik qabza* was rejected and the orders upheld throughout in appeal up to the Financial Commissioner. In these cases the principle that *malik qabzas* as regards land once carried away, and subsequently re-gained from the river, occupy the same position precisely as hereditary cultivators is affirmed, and I think very rightly for after all the distinction between the two is entirely of our own creating, the *malik qabza* being nothing but a cultivator who owing to length of occupation without payment of proprietary dues to the original proprietor has obtained a modified proprietary footing in the village. The *malik qabza* is quite a new creation and is, I believe, confined for the most part to this division. In the older Districts the probabilities are he would have obtained the status only of a hereditary cultivator. He is only a make shift, you cannot get rid of him altogether, and so rather than introduce the double Government of the proprietor and hereditary cultivator which is bad for both, and for the land too, you transform the cultivator into a subordinate proprietor. But it is an incident of his tenure that if the land is carried away he loses his modified proprietary rights in it and they revert to the original proprietor. And this would seem most consonant with equity, the cultivator obtained his proprietary status through the forbearance of the real proprietor in times when land was not so valuable, and rights were not so easily lost as they are under our rule. Taking an abstract view of the case the cultivator's right was only one of occupancy; under an arbitrary rule we, on grounds of policy, converted this right of occupancy into a right of property. But when by the operation of natural causes the cultivator, transformed by our *fiat* into a proprietor, loses possession of the land which originally belonged to another, and the land is afterwards recovered, does not equity require that it should be restored to the original proprietors? I think so, and such was evidently the feeling which caused the entry to be made in the administration paper by which plaintiff's claim is barred."

From the decision of Captain Davies an appeal was again preferred by the plaintiff to the Commissioner, but the appeal was dismissed. A further appeal to the Financial Commissioner was also rejected on the 15th January 1868. The Financial Commissioner says in his order that, in view of the previous decisions referred to by the Deputy Commissioner, the rule must be taken as settled that a *malik qabza* whose land is washed away by the river is on the same footing as an occupancy tenant, and that on the re-appearance of the land from the river he cannot resume possession of it as owner. This case of *Ali Mohammad* v. *Allah Yar* is, in our opinion, a valuable precedent in support of the appellant's claim in the present suit.

III. The case of *Ali Mohammad* v. *Mubarik Khan*. This suit related to occupancy land which had been carried away by the river and which had afterwards re-appeared and been taken possession of by the Baloch proprietors. The suit was dismissed by the Tahsildar on the 31st October 1876, and the appeal was rejected by the Judicial Extra Assistant Commissioner on the 5th February 1877. The latter officer in his judgment referred to the decision of Captain Davies, dated the 9th January 1865, and to the decisions of the Commissioner and Financial Commissioner in the last-mentioned case, and held that the plaintiff was governed by the rule of custom laid down in the Wajib-ul-arz. He noted further that since the plaintiff had himself applied for remission of the land revenue in respect of the land in suit because of its submersion and since the revenue had been paid by the Baloch proprietors as provided for in the Wajib-ul-arz the plaintiff had lost all rights to resume possession of the land on its re-appearance.

IV. The case of *Kanshi Das* v. *Jiwan Khan*. This suit related to proprietary land. The plaintiff, Kanshi Das, a *malik qabza* in the village, sued the Baloch proprietors for recovery of possession, the land having re-appeared after submersion. The claim was dismissed by the Tahsildar on the strength of the Wajib-ul-arz, but on appeal was decreed by the Judicial Extra Assistant Commissioner. On further appeal the final judgment was delivered by the Additional Commissioner, Mr. (now Sir Charles) Roe, on the 12th June 1884, and he held that, according to the custom of this particular village, a proprietor who was not descended from

the Baloch founder thereof, no matter whether he was a *malik qabza* or an occupancy tenant, lost all his rights in his land by reason of its submersion in the river. After referring to *Sultan Khan* v. *Syed Mahomed Shah* (5), *Raja* v. *Sarfaraz* (8), which were relied upon by the plaintiff, Mr. Roe remarked in his judgment:—No doubt the judgments quoted do lay down the rule that the custom is to be presumed to be in favour of the tenant until the contrary is proved, but what is the particular custom in each village is a question of fact to be proved by evidence. Of course, if there were no evidence, *i. e*, if there were no entry in the Wajib-ul-arz and no precedent, the land would go to the tenant. But this is all that can be held to be laid down by the rulings of the Chief Court."

"In the present case we have as evidence of custom:

"I. The entry in the Wajib-ul-arz;

"II. the evidence of defendants' witnesses;

"III. and of the Patwari."

"The words of the Wajib-ul-arz, clause 21, ...make no special mention of tenants or even *malik qabza*, they go much further than this; they assert that all land thrown up by the river goes absolutely to the family of Ghulam Muhammad, the Baloch proprietors. No one else—be he proprietor or tenant—has any claim to it. It is, therefore, unnecessary to decide the precise status of the plaintiff. He is not one of Ghulam Muhammad's family and, therefore, he can have no claim, if the above clause is a correct exponent of custom.....The Wajib-ul-arz derives its force, not from its professing to be an embodiment of a contract, but from its being presumed under the Land Revenue Act to be a correct exponent of existing custom. The fact that only a portion of the village were consulted when it was drawn up would, no doubt, lessen the value to be attached to it, but that is a very different thing from saying that it is invalid because the representatives of the parties in suit were not parties to the agreement. Whether they were present when the Wajib-ul-arz was drawn up or not, it is equally incumbent on them to rebut by good evidence the presumption of its correctness. In the present case this presumption is unusually strong on account of the case quoted by the Judicial Assistant in which two occupancy tenants actually sued to have this very clause in the Wajib-ul-arz altered and their suit was dismissed on the ground that the entry was correct".

As regards the village of Girote, (prior to the present litigation), this is the latest expression of judicial opinion on the question of custom which is now under consideration before us, and is all the more valuable because it proceeded from an officer of the experience and acumen of Mr. Roe, who not long after rose to be a Judge of this Court and whose expositions of the rules of custom prevailing in the different parts of this Province have always been regarded with the greatest respect.

After the above-mentioned decision of 1884 by Mr. Roe, no disputes seem to have arisen between the Baloch proprietors and any *malik qabza* or occupancy tenant with regard to recovery of possession of land belonging to the latter on its re-appearance after its submersion in the river, until at the commencement of the Settlement operations in 1890, some of the *qabza maliks* applied for an amendment of paragraph 21 of the Wajib-ul-arz of 1858. As we have seen above, the application of the *qabza maliks* was rejected finally by the Settlement Collector on the 1st April 1892; and a second attempt by the *qabza maliks* to get the proposed entry in the Wajib ul-arz revised was also frustrated by the final order passed by Mian Ghulam Farid in the 14th July 1893.

In support of the appellants' case, then, we have

(1) the entry in the Wajib ul-arz of 1858;

(2) a similar entry in the Wajib-ul-arz of 1892, which was made after a hot contest between the Baloch proprietors and the *qabza maliks*; and

(3) no less than four judicial precedents, spread over a period of about twenty years from 1863 to 1884, in which the rights of the Baloch proprietors of this village to take proprietary possession of the lands of occupancy tenants or *qabza maliks* on their re-appearance after submersion in the river were recognized and repeatedly confirmed after prolonged litigation. In not one single instance was the land of an occupancy tenant or of a *malik qabza* restored to him by judicial authority after it had been carried away by the river, and it is a point of some

importance in favour of the appellants that, in spite of the exception made in paragraph 21 of the Wajib-ul-arz in favour of Jhanji Mal, whose newly-purchased land was then under water, as soon as that land re-appeared from the river it was taken possession of by the Baloch proprietors, and their right to take possession of it in accordance with the general rule of forfeiture laid down in the Wajib-ul-arz was fully upheld by Mr. Johnstone, Assistant Commissioner, in 1863 in the case of *Ram Kaur* v. *Allah Yar Khan*, to which reference has been made above. It seems to us, therefore, that so far as this village of Girote is concerned, the appellants have made out a very strong case in support of their position that when the land of any *malik qabza* is carried away by the river action, the owner thereof loses his proprietary rights therein and that on its re-appearance the land becomes the exclusive property of the Baloch proprietors. The fact that two out of the four judicial precedents noticed above relate to occupancy land, and not to proprietary land, makes no difference so far as this village is concerned, for after the Wajib-ul-arz of 1858 had been drawn up it was judicially decided in 1865 in the case of *Ali Mohammed* v. *Allah Yar* that in *Mauza* Girote occupancy tenants and *qabza maliks* were on the same footing, and this view was again emphasized in the judgment of Mr. Roe in the case of *Bawa Kanshi Das* v. *Jiwan Khan*, which was decided in 1884.

We may now briefly notice the rulings of this Court which have been relied on by the appellants' learned Counsel. *Dilsukh Ram* v. *Nathu Singh* (1) has settled once for all that entries in a Wajib-ul-arz relating to questions of custom are not agreements between the members of the proprietary body but that they are presumptive evidence of the existence of the rules of custom embodied therein. In *Ahmad Shah* v. *Khuda Bakhsh* (2) it was held, on the strength of an entry in the Wajib-ul-arz of *Mauza* Muradpur, Tahsil Alipore, in the Muzaffargarh District, that an *adna malik* in that village could not recover possession of his land which had been submerged and had thereafter re-appeared from the river without paying *haq juri* to the *ala malik* who had taken possession of it. Thus the rights of the *ala maliks* to take possession of the lands of the *adna maliks* on their re-appearance from the river as laid down in the Wajib-ul-arz of the village were affirmed. In *Sahib Din* v. *Ilam Din* (3) it was held that in cases of alluvion and diluvion according to the custom prevailing in *Mauza* Khanpur, District Gujrat, a proprietor loses all his rights on the submersion of his lands, as such land on restoration becomes *shamilat-deh* and ceases to be the exclusive property of the proprietor to whom it belonged at the time of submersion. The entries in the Wajib-ul-arz of the village of the years 1868 and 1891 were given effect to although it would seem that there were no judicial precedents showing that the entries in the Wajib-ul-arz had been recognized before as having a binding force. In Further Appeal No. 1208 of 1907, the learned Chief Judge Sir William Clark, held that in village Madwal, Tahsil Alipore, an *adna* proprietor loses his proprietary rights in his land which is submerged in the river and is on its re-appearance taken possession of by the *ala* proprietor. The entry in the Wajib-ul-arz of the village was acted upon.

The learned Advocate for the respondent has strenuously contended that the custom set up by the appellants is most inequitable, inasmuch as it is directly opposed to the principles of universal law and justice underlying the enjoyment of proprietary rights in land which have been explained with such lucidity by their Lordships of the Privy Council in the well-known Lopez case [*Lopez* v. *Muddun Mohun Thakoor* (12)] that in order to succeed in this case the appellants must give strict proof of such custom, and that such proof is not afforded by the entries in the Wajib-ul arz of 1858 and of 1892 and by the four judicial precedents relating to this village upon which reliance has been placed by the appellant's Counsel. The first part of the argument may at once be accepted as correct, for it must be conceded that the custom as to the loss of proprietary rights by a *malik qabza* in his land which has been submerged is *primâ facie* inequitable; and we further think that very satisfactory proof of such custom must be forthcoming before a Court of Law can be called upon to enforce it. The authorities cited by the learned Advocate do not go beyond this; and we certainly are not prepared to subscribe to the proposition which the

(12) 14 W. R. 11 (P. C.); 5 B. L. R. 521; 13 M. I. A. 467; 20 Eng. Rep. 625.

learned Advocate endeavoured to press on our attention to the effect that the custom sought to be enforced by the appellants is so contrary to all notions of justice, equity and good conscience and so incongruous with modern conceptions of rights of ownership in land in a civilized society that the Courts should pronounce it as absolutely unreasonable and should decline to recognize and act upon it.

We may here briefly notice the rulings cited by the respondent's Advocate in support of his position.

Sahib Rai v. *Khair Shah* (4) is referred to with approval in *Sultan Khan* v. *Syed Mahomed Shah* (5) which is the leading authority for the proposition that, in the absence of a custom to the contrary, an occupancy tenant whose land is submerged by river action does not lose his rights therein by reason of its submersion. This Full Bench case related to a plot of land situate in *Mauza* Khai, Tahsil Khushab, which had been carried away by the action of river Jhelum. The Wajib-ul-arz of the village contained no provisions as to whether the rights of occupancy tenants in such of their lands as were submerged were lost or not, and the Courts below had found in that case that in the village of Khai and in the neighbouring villages there was no established custom as regards the loss of right by occupancy tenants in lands which had re-appeared after submersion. Boulnois, J., after referring to *Sahib Rai* v. *Khair Shah* (4), *Bhup Singh* v. *Sardha Singh* (13), observed in his judgment at page 153: "It is clearly the opinion of the majority of the Judges of this Court that, in the absence of custom to the contrary, the land occupied by an hereditary cultivator, whether carried away by, or submerged in, a river, is not lost to him if it is thrown up again by the river or is left uncovered by the water." Since there were no provisions in the Wajib-ul-arz of the village on the subject, and no satisfactory evidence of the alleged custom relied upon by the proprietors, who were defendants in that case, was given, the question of loss of rights in the submerged land was decided by this Court upon general principles applicable to such cases, and the soundness of those general principles is in no way disputed in this present case. The Full Bench ruling does not, therefore, help the respondent.

(13) 108 P. R. 1876.

Lal Shah v. *Karim Buksh* (6) related to land, situate in *Mauza* Khairpur, Tahsil Khushab, and the question for consideration in that case was the same as in the Full Bench case just cited. The case for the proprietors was somewhat stronger than the Full Bench case, in so far as there was an entry in the Wajib-ul-arz of the village to the effect that occupancy tenants lost all their rights when their land was submerged and that on re-appearance the proprietors had a right to occupy it. Apart from the entry in question, however, there was no satisfactory evidence of the assertion of the alleged right by the proprietors or of the forfeiture of the right on the part of the tenants; and it was held that the mere entry in the Wajib-ul-arz was not sufficient evidence of the custom set up by the proprietors, especially as the Wajib-ul-arz had not been attested by the occupancy tenants. After observing that there was no uniform custom established in the Shahpur District among the villages affected by river action as regards the rights of occupancy tenants being destroyed upon submersion of their lands, Plowden, J., says at page 264 of the report:—

"We are thus, it seems to me, driven back to the village of Khairpur, and the question whether there is any custom in that village by which the hereditary cultivators' right is extinguished. And that question must, I think, be answered in the negative. All that it has to rest upon is the *ex parte* statement, as it may be fairly described, in the Wajib-ul-arz, and the fact that upon two previous occasions the *maliks* have without objection (as it seems) taken possession of lands submerged upon emersion. I do not think that can be said to establish a custom which is to take effect to deprive a hereditary cultivator of a right of property, which, in the absence of custom, he is by law entitled to retain. It is quite unnecessary, and would be most difficult, to lay down any proposition as to what would be proof of a custom in a particular village, sufficient to oblige a Court to affirm its existence. But whatever might be said of other villages where the instances had been frequent or the practice uniform for a considerable period, I think that all that can be affirmed as to this village is that there is no established custom."

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It is clear from the above passage that the question of the existence of the custom such as we are considering in this case has to be decided with reference to the amount and quality of the evidence adduced in each particular case as regards the prevalence of the custom in the village concerned; and if satisfactory proof of the prevalence of such custom in any particular instance is forthcoming, the general principles laid down in *Sultan Khan* v. *Syed Mahomed Shah* (5) and *Lal Shah* v. *Karim Buksh* (6) will not stand in the way of such custom being enforced.

In *Chiragh* v. *Turel Khan* (7) it was found that there was no established custom in *Mauza* Shergarh, Tahsil Khushab, whereby a *malik qabza* loses his right in lands which have been submerged by river action. There was no express provision on the subject in the Wajib-ul-arz of the village; and after examining a judicial decision between the parties, which was relied upon by the full proprietor as against the *malik qabza* as having already settled the question in dispute, and after noticing two other cases which were relied upon as judicial precedents against the claim of the *malik qabza*, Plowden, J., held that no local custom contrary to the general rule of law as enunciated in the previous decisions of the Court had been established in that case. The judicial precedents relied upon by the full proprietor were clearly distinguishable from the case before the Court; and in the absence of an express provision in the Wajib-ul arz bearing on the question of custom involved the case for the *malik qabza* stood wholly unrebutted.

Raja v. *Sarfraz* (8) does not help the respondent. In that case, which was one relating to village Sadda Kambo in Tahsil Shahpur, certain occupancy tenants whose lands had been submerged and had on their re-appearance been taken possession of by the proprietors were held to be entitled to recover those lands, because it was found that the provision in the Wajib-ul-arz of the village as to the occupancy tenants preserving their rights by payment of revenue during the period of submersion had been duly acted upon by them. The ruling in effect was that, no custom to the contrary being proved, an occupancy tenant did not lose his occupancy rights merely by reason of his land being submerged; and that though there did exist in the village concerned a custom by which occupancy tenants became liable, under certain circumstances, to lose their rights on the submersion of their lands, still under that custom the tenants could preserve their rights intact, notwithstanding the submersion of their land, by paying the revenue assessed thereon during the period of submersion, though if they failed to do so during such period, their right of occupancy ceased to exist. This ruling certainly does not go to support the sweeping proposition sought to be laid down by the respondent's Counsel that a village custom sanctioning the loss of rights in land on its submersion must always be considered as unreasonable and that Courts of Law should not enforce such a custom.

The next ruling relied upon by the respondent's advocate is *Ghulam Mohay-ud-din* v. *Faiz Bakhsh* (9). In that case which relates to *Mauza* Bullewahan, Tahsil Muzaffargarh, the land of certain *adna maliks* had been washed away by the river Chenab, and on its re-appearance it was taken possession of by the *ala maliks* on the strength of an entry in the Wajib-ul-arz of the village to the effect that the submersion of *adna maliks'* lands worked a forfeiture of their proprietary rights. It was found in that case that the Wajib ul-arz of the Settlement of 1866-67 contained no provision on the subject, shewing that there were at that time no *adna maliks* holding land on *adhlapi* tenure. The custom relied upon by the *ala maliks* was recorded in the later Wajib-ul-arz of the Settlement of 1873—79 and there was no other evidence of any value on the record in support of the alleged custom. The village Patwari stated that in some instances the *adna maliks* whose lands had been submerged and had subsequently re-appeared had abandoned their claims, and that mutations in favour of *ala maliks* had been made by consent, and some *adna maliks* also gave evidence supporting the Patwari. There were no judicial precedents at all relating to the village in question either for or against the alleged right of the *ala maliks* to claim the ownership of submerged lands belonging to *adna maliks*, and this Court held that the evidence

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in support of the provisions of the Wajib-ul-arz of 1879 was quite insufficient to establish the custom set up by the *ala maliks*. It is clear, therefore, that in the case under consideration it was only the solitary entry in the Wajib-ul-arz of one Settlement that was relied upon by the *ala maliks* in support of their claim; and the ruling of this Court, that in the absence of evidence that this entry had been acted upon, it could not be held that a custom in favour of the *ala maliks* had grown up in the village, can be of no great value in the present case in which the existence of the custom alleged by the Baloch proprietors has been proved not only by the entries in two successive Wajib-ul-araiz, but also by judicial decisions spread over a period of about twenty years.

Dewa Singh v. *Bishambar Das* (10), again, does not afford us much assistance. There the dispute was between the occupancy tenants of village Pakhiwan in the Gurdaspur District and their landlords, and it was held that by the custom of that village the land of occupancy tenants which is recovered from the river Ravi after submersion does not revert to the proprietors. The entry in the Wajib-ul-arz supported the alleged right of the proprietors, but, as held by this Court, it had no special value as a statement of custom, because it did not appear to have been uniformally acted upon, and, as an agreement between the parties, it was worthless, because the occupancy tenants were not shown to have agreed to an arrangement by which their interests were disregarded.

Jangi v. *Dalipa* (11) is a recent ruling by the Financial Commissioner, Punjab, (Mr. M. W. Fenton), and it is to the effect that an entry in a Wajib-ul-arz, which lays down that occupancy tenants lose the portion of their tenancy which is submerged by a river, and that it goes to the owners on recovery, who will reduce the rent *pro rata*, is not enforceable (1) as being without consideration and (2) as being opposed to the provisions of Regulation XI of 1825. It will be observed that in that case the entry in the Wajib-ul-arz of 1869 was relied upon by the proprietors as an agreement between the occupancy tenants and themselves; and the learned Financial Commissioner held that the alleged agreement, being one without consideration, was not enforceable as such, and being one relating to alluvion and diluvion was *prima facie* opposed to the express provisions of Regulation XI of 1825. Viewed as a record of custom the said Wajib-ul-arz entry was held to be of no value, (1) because the Wajib-ul-arz of the previous Settlement of 1851 contained no provision similar to the one in the Wajib-ul-arz of 1869, and (2) because there was no evidence that prior to 1869 the practice in the village was in accordance with the conditions laid down in the Wajib-ul-arz of that year. The learned Financial Commissioner further held, following *Roshan* v. *Pohlo* (14), that, in the absence of proof of custom to the contrary, the general rule in the Punjab must prevail, *viz.*, that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. He, then, proceeded to consider whether in the case before him the proprietors had proved that a custom contrary to the general rule existed in their village, and he came to the conclusion that they had not. No judicial precedent relating to the village in question was forthcoming; and the proprietors relied upon the solitary case relating to another village in which, on the strength of an entry in the Wajib-ul-arz, it was held that occupancy tenants had lost their rights by reason of the submersion of their land. On the other hand, there was, according to the learned Financial Commissioner, a mass of evidence in decided cases relating to a large number of villages in the same Tahsil to the effect that occupancy tenants were entitled to recover diluviated land inspite of provisions in the Wajib-ul-arz to the contrary. It is clear that the considerations which influenced the decision of the Financial Commissioner in the case under consideration do not apply to the case before us, and it will be observed that both Sir L. Tupper, in *Roshan* v. *Pohlo* (14), and Mr. Fenton, in *Jangi* v. *Dalipa* (11), agreed in laying down that if a custom is proved to exist in a village to the effect that occupancy tenants lose their rights in their lands on submersion and that on reappearance they revert to the proprietors, such custom can be given effect to. Strict

(14 8 P. R. 1901 Rev. 54 P. L. R. 1901.

proof of the existence of such a custom must, no doubt, be demanded, and it will be a question for consideration in each case whether, with reference to the evidence on the record, such proof has or has not been adduced by the party concerned.

Upon a review, then, of the whole evidence in this case and of the authorities cited on both sides, we hold that a local custom or usage has been proved to exist in the village of Girote, Tahsil Khushab, whereby a *malik qabza* whose land is submerged loses all his proprietary rights in that land, and on its re-appearance it becomes the property of the Baloch proprietors. We accordingly accept this appeal, and setting aside the decree of the lower Appellate Court, we dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 772 OF 1913.

January 21, 1914.

Present:—Justice Sir George Knox, Kt.

OMAN PRASAD—OBJECTOR—APPELLANT

versus

JANI DURLAB SHANKAR AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Execution of decree—Application by alleged transferee of real decree—Judgment-debtor served with notice—Ex-parte order—Res judicata.

B obtained a decree against *J* on the 29th of August 1905 and applied for execution of the decree on the 12th March 1908. The proceedings resulting from this application were infructuous. Later on, on the 26th of January 1910, one *D* applied for execution of the same decree claiming to be the transferee of the decree. Notices were issued. *J* did not respond to the notice. The Court then on the 12th February 1910 ordered the issue of notice calling upon *J* to show cause why an order for his arrest should not be made. *J* again made no appearance but as *D* failed to pay the process fee for his arrest, his application was dismissed. *D* again applied for execution on the 13th of January 1912 and this time a representative of *J* appeared and objected that as *D* was neither the decree-holder nor a transferee of the decree he had no right to take out execution:

Held, that the order of the 12th of February 1910 granting the application of *D* operated as *res judicata* as to his right to execute the decree and that *J* could not go behind that order.

Behari Lal v. *Majid Ali*, 24 A. 138; A. W. N. (1897) 29; *Sheoraj Singh* v. *Kameshar Nath*, 24 A. 282; A. W. N. (1902) 63 and *Dhonkal Singh* v. *Phakkar Singh*, 15 A. 84; A. W. N (1893) 36, referred to.

Execution Second Appeal from the decree of the Subordinate Judge of Aligarh, dated 12th May, 1913.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Baldeo Ram Dave*, for the Respondents.

JUDGMENT.—These execution proceedings arise out of a decree, which was passed on the 29th of August 1905, in favour of Dube Bhola Nath against Janki Prasad. Oman Prasad whose name appears as appellant in this Court is the legal representative of Janki Prasad deceased. Dube Bhola Nath applied for execution of the decree on the 12th of March 1908. The proceedings resulting from that application were infructuous. On the 26th of January 1910, Jani Durlab Shankar and others came before the Court whose duty it was to execute the decree and applied for execution. The usual notices were issued. But so far as the record shows no notice was served upon Dube Bhola Nath. Janki Prasad in no way responded to the notice issued to him, and the next order was an order issuing notice calling upon him to show cause why he should not be arrested. This notice was duly served upon him. To this he made no response. Apparently those who had applied for execution of the decree failed to pay the process-fee for arrest, and the application was dismissed. Nothing further was done until the 13th of January 1912 when Jani Durlab Shankar and others applied as before for execution. This time Oman Prasad appeared and objected *inter alia* that the application was barred by time, and that the real decree-holder being Dube Bhola Nath, Jani Durlab Shankar and others had no right to take out execution. The Court of first instance, holding that Jani Durlab Shankar and others were neither the decree holders nor transferees of the decree and were not competent to apply for execution, dismissed the application. Jani Durlab Shankar and others appealed. The lower Appellate Court, agreeing with the lower Court that the applicants were neither the decree holders nor transferees of the decree, went on, however, to hold that the order of the 12th of February 1910 amounted to an order granting the application of Jani Durlab Shankar and others. This order was held as having the force of *res judicata*

and that Oman Prasad cannot go behind it. The lower Appellate Court remanded the case for decision on the merits. The present appeal is from this order. It is contended that the application for execution is time-barred, that the order of the 12th of February 1910 has not the force of *res judicata* and that the applicants cannot be brought on the record as decree-holders, they not having been brought on the record up to the present moment. The lower Appellate Court in arriving at its decision that the order of the 12th of February 1910 had the force of *res judicata* relied upon the case of *Behari Lal* v. *Majid Ali* (1), also *Sheoraj Singh* v. *Kameshar Nath* (2). These cases were again cited in this Court on behalf of the respondents. The learned Counsel for the appellant contends that there is a sharp distinction between the case of *Sheoraj Singh* v. *Kameshar Nath* (2) and the present case inasmuch as in the former case the judgment-debtor appeared in Court and filed objections. His argument is that the notice which was served in the present case gave no indication to Oman Prasad as to the title under which Jani Durlab Shankar and others were taking out execution proceedings. There is that difference between that case and the present case and it is to be noted that in the case of *Sheoraj Singh* v. *Kameshar Nath* (2) the Court considering the principle laid down in *Dhonkal Singh* v. *Phakkar Singh* (3) held that it did not apply to the disposal of objections of this kind raised in the execution of decree cases. I am of opinion that the present case is sufficiently covered by the cases cited in the lower Court's judgment; and I agree with the lower Court. The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 24 A. 138; A. W. N. (1897) 29.
(2) 24 A. 282; A. W. N. (1902) 63.
(3) 15 A. 84; A. W. N. (1893) 36.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 438 OF 1911.
August 4, 1913.

Present:—Mr. Justice Chaudhuri.

GOURI SANKAR BYAS—PLAINTIFF
versus
NIADAR SING AND ANOTHER—DEFENDANTS.

Hindu Law—Inheritance—Yati, *meaning of*—Sat-sisya—Chela *and* sisya, *distinction between.*

The virtuous pupil, *sat-sisya*, takes the property of a *yati* or ascetic.

The virtuous pupil is one who is assiduous in the study of theology, in retaining the holy science and in practising its ordinances.

There is a clear distinction between a *chela* and a *sisya*. A *chela* is a personal attendant who may be raised to the rank of a *sisya*.

A *yati* means a *bhikshu*, a *sanyasi*, an ascetic or anchorite.

A *Brahmin*, who left his home in the Punjab, lived in Burra Bazar, the very heart of Calcutta, earned money by *paths* and *poojas*, did not give up his sacred thread, did not take the *danda*, wore leather shoes, did not dress himself in *gerooa* or red clothes, deposited money in different Marwari firms in Calcutta which carried interest, and on one occasion went to his native village and purchased property of considerable value, was not a *yati* or ascetic.

A person who lives with his mother and brother, although he is always with a certain *sadhu*, cannot be said to be a *sat-sisya* of that *sadhu* to entitle him to inherit the *sadhu's* property.

Mr. *R. N. Mitter* (with him Mr. *C. C. Ghose*) instructed by Babu *Achal Nath Mitter*, Solicitor, for the Plaintiff.

Mr. *S. K. Mullick* (with him Mr. *S. N. Dutt*) instructed by Babu *Amar Nath Ghose*, Solicitor, for the Defendants.

JUDGMENT.

CHAUDHURI, J.—The plaintiff alleges that one Pandit Sobharam Sadhu, who was also known as Sadhu Sudarsan Das, was by caste a Brahmin and by faith and profession a religious mendicant, having renounced his family, relations and original home in Zillah Rohtak in the Punjab when he was only a boy ten years old; that Pandit Sobharam never married, and permanently resided in Calcutta and practised religious austerities, and down to the time of his death led the life of a religious Hindu mendicant; that he died intestate at the age of 80 or thereabouts, on the 28th September 1910, leaving no issue of his body, no brothers, nephews or sister's son nor any blood relations either on his

father's or mother's side. That inasmuch as he was a Sadhu, and had entered into the religious order of Bhikshus or mendicants, his relatives had no right to succeed to him; that he had taken the plaintiff as his religious disciple or *chela* when the plaintiff was only ten years old, and that the Sadhu thereafter performed the initiation ceremony of the said religious order upon the plaintiff, who thus became the recognised *chela* or disciple of the said Sadhu, and that he alone is entitled to succeed to the estate and effects left by the said Sadhu, as his heir according to Hindu Law in preference to the defendants who, the plaintiff alleges, have falsely put forward a pretended relationship to the said Sadhu. The plaintiff further alleged in his plaint that the Sadhu who used to be revered by a large number of people in the town of Calcutta and other places in India was the recipient of various donations of money from various persons in order that the said money might be spent by him in religious and charitable purposes according to his absolute discretion, and in this way the said Sadhu during the whole period of his life as such "Bhikshu or religious mendicant" as aforesaid came to have in his hands, from time to time, considerable sums of money wherewith after defraying the expenses of such religious and charitable works as he considered proper, he used to deposit the surplus for safe custody with several respectable Hindu firms in Calcutta in whom he could trust, such as the firm of Messrs. Juggernath-Madan Gopal of No. 70, Cross Street, Calcutta, where he had deposited Rs. 3,000, and that of Messrs. Dhunraj-Gunpat Rai of No. 42, Armenian Street, Calcutta, with whom he had deposited about Rs. 2,600.

The plaintiff further alleges that the defendants, on coming to learn of the death of the said Sadhu in Calcutta and having discovered that he had left some money in deposit with certain Hindu firms in Calcutta, began to pretend as aforesaid to be the distant kinsmen of the deceased Sadhu, and surreptitiously and without any notice or intimation to the plaintiff applied for and fraudulently obtained a certificate under the Succession Certificate Act of 1889 from the Court of the District Judge of Rohtak to the estate of the said deceased, and on the strength of such certificate were trying to realise and appropriate the said sums of money. He, therefore, prayed that it might be declared that the plaintiff was the sole heir under Hindu Law of the said Sadhu and entitled to his estate and effects, and that the succession certificate should be annulled by this Court, for an inquiry for the ascertainment of the assets which the said deceased died possessed of, and for other relief.

The first question, therefore, is as to whether the deceased was a religious mendicant or a *yati*, and whether the plaintiff as his *chela* was entitled to succeed to him.

There is no doubt about the law on this subject. According to the text in Yajnavalkya the heirs of a hermit, of an ascetic, and of a professed student are, in their order, the preceptor, the virtuous pupil, and the spiritual brother and associate in holiness. Yajnavalkya II, 138.

The commentary on the text is that the virtuous pupil, *sat-sisya*, takes the property of a *yati* or ascetic. The virtuous pupil, again, is one who is assiduous in the study of theology, in retaining the holy science and in practising its ordinances.

The next question that I have to decide is, is the plaintiff the *sisya* and *sat sisya* of the deceased? The text quoted above is the only text relating to succession to the property of a *yati* and subsequent commentaries and works on Hindu Law have dealt with this text alone in dealing with the matter. Mayne in his Hindu Law, page 816, 7th edition, paragraph 603, says this :—

"One who has entered into an order of devotion is also excluded from inheritance, since he has of his own accord abandoned all earthly interests. The persons who are excluded on this ground come under three heads, *viz.*, the Vanaprasatha, or hermit; the *Sanyasi* or *yati*, or ascetic; and the Brahmachari, or perpetual religious student. In order to bring a person under these heads, it is necessary to show an absolute abandonment by them of all secular property, and a complete and final withdrawal from earthly affairs."

The plaintiff alleges, as I have

mentioned, that the Sadhu left his house when he was ten years old, and, as it is stated, that he gave up his home and all his earthly connection with his family; that he came without any money, but that he has left a fairly large sum of money in Calcutta, is not disputed. Then how did he make this money?. If he brought it from his house it does not show complete abandonment of all earthly interest. If he made it in Calcutta, how did he make it? The plaintiff alleges in the plaint that he received large sums of money from different parts of India, which were entrusted to him for charitable purposes, and this is the residue left over. There is absolutely no evidence that he ever received money in this way, and, therefore, I cannot but hold that he earned this money while in Calcutta. The plaintiff gives no explanation how he made it. That he left Rohtak and lived in the very heart of a large commercial town, in Burra Bazar, shows that he had no intention of taking the *sanyas* and that he rather profitably employed his time, when he was living in Burra Bazar. I think it is ridiculous to ask me to hold that a person of this character has satisfied the description of a "*yati*," as it is contained in the Hindu Law books. The plaintiff claims to succeed on an exceptional rule of succession and he must show that the requirements have been fulfilled. It has been rather poetically and unconvincingly argued that in the old days people were "giants" and that the present generation is a generation of "pigmies," and, therefore, a modern *yati* need not satisfy the ancient standard. I am unable to hold that in interpreting this particular text of the Hindu Law the old standard should be lowered. It must be shown that the person was a "*yati*" according to its accepted meaning. The text has been strictly construed in different Courts in India. The Madras Court has refused to hold that it applies to Sudras because a *yati* belongs to an *asram* to which only the twice born class is admitted. *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (1).

Witnesses have said that the deceased was a religious Brahmin; that he was not a mendicant in the sense that he begged and lived upon what he obtained by begging; that he practised his religion in a small room on the 3rd story of Monohar Dass's Katra, which is a very populous quarter inhabited by a large number of Marwari merchants. He is respectfully spoken of by some of the witnesses as a "Mahanta," some called him a "Babaji." He appears to have been a Brahmin who lived in Burra Bazar and earned money as such, that is to say, by performing, from the evidence that has been given although slender, "*paths* and *poojas*" in different places.

The plaintiff said that the Sadhu had not given up his sacred thread, had not taken the *danda*, and did not wear *sanayasi's* clothes, because he was a Ramanuja Vaisnab, and according to the custom amongst Vaisnabs of this class it was not necessary to give up the sacred thread and take the *danda*, although some of them did become *dandis*. He wore leather shoes and dressed himself in the ordinary way, and did not dress himself in *geroon* or red clothes.

I am not satisfied that there is any ground for holding that he was a *yati*. The plaint distinctly made him out to be a religious mendicant, which has not been proved.

The next question is, has the plaintiff shown that he is a *sisya*? He says he was taken as a *chela* when he was ten years old. That he was taken as a *sisya* is nowhere stated in the plaint. It is merely stated therein that he was taken into the order, some time later, by which I understand he is referring to the order of a religious mendicant. Evidence has been given that he lived with his mother and brother. I entirely disbelieve the plaintiff when he says that he has no connection with them, and does not live with them and does not even know where they live, although they live in Calcutta. Persons in the employ of his landlord have produced books and have spoken to having realized rent from him personally for the rooms which they stated he occupied with his mother and brother. I accept their evidence as true.

(1) 22 M. 302.

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About his initiation, he is the only witness with the exception of a person of the name of Sugan Chand and another, both of whom I consider absolutely untrustworthy witnesses. I disbelieve Sugan Chand's statement altogether without any hesitation. He was asked about certain allegations, which he had made in an affidavit, and he said that he knew nothing about them. If those statements were untrue he knowingly made them to support the plaintiff's case. If true, his present statements are untrue. It is impossible to place any reliance upon him. I considered his conduct so serious, that at one time I thought that proceedings ought to be taken against him. The other witness called was a person of the name of Gobind Ram Sett who came and spoke to the plaintiff being a *sisya*; that he knew Sobharam Sadhu. He introduced himself as a jeweller who used to live in Monohar Dass's Katra. I happened to know this man, and I mentioned to learned Counsel what I knew about him. Learned Counsel for the plaintiff stated that he did not intend to rely on this man at all. Witnesses of this kind having been called show that there are certain influences at work; some persons more influential than the plaintiff have been assisting him in this case. It lends support to the suggestion that Kanhai Lall has been engineering the case of the plaintiff. I hold that there is no reliable evidence that this man was ever taken as a *sisya* by Sobharam. He describes himself as a *chela* in the plaint. There is clear distinction between a *chela* and a *sisya*. A *chela* is a personal attendant who may be raised to the rank of a *sisya*, but there is no evidence of any value that he was ever taken as a *sisya*. Evidence has been given that he earns his livelihood by selling powders and *sherbet*; how far that is a fact I need not determine. He has failed to establish his status, and, therefore, his suit must fail. One of the persons called by the plaintiff, Radha Kissen Kabani, is a respectable person. The only thing that he said about the plaintiff was that "he was always with the Sadhu since fourteen or fifteen years." "Sobharam was a Babaji"; "he was a Sadhu." It has been argued that a *yati* does not necessarily mean a Sanyasi, and a passage has been quoted to me which says that a person is a Sanyasi and *yogi* who does work (*karma*) without having any desire for the effect (*falam*) that the work would produce. He should not be *niragin* and he should not be *akriya*. That is not the definition of a *yati* in the text that I have quoted. "*Yati*" means a Bhikshu, a Sanyasi, an ascetic or anchorite. Some reliance has also been placed on certain texts quoted from a work called the Vaisnab Dharma Ratnakar. It is a sectarian treatise in which Vaisnabs are described as *asramis*. I do not think it is a work of any authority and in fact, judging from certain quotations placed before me, I am not prepared to attach any weight to the work. One of the passages was that a Brahmin who gives up the Brahmanic religion by holding the *danda* is sure to go to hell after death and a Sanyasi who also gives up his *sikha yagnopabit* is equal to a Chandal when alive and goes to hell after death. I have gone through the book and found certain outrageous passages relating to the life of Sankaracharya of a most revolting character. It is only a sectarian work, of a controvertial character, meant to glorify the Ramanuj Vaisnabs. I hold that the plaintiff's case fails in both respects. Sobharam was not a *yati* and the plaintiff has not proved that he was his *sisya* or *sat-sisya*, and it must be dismissed. The defendants have proved that they are the legal heirs of the deceased and in my view they are entitled to his property. They have shown by producing a certified copy of a conveyance, that in 1873 some property was acquired in the District of Rohtak in the name of the Sadhu, and I accept the defendants' evidence that the property was purchased by Sobharam which showed that he had not only not cut off his connection with his native village, but went there and acquired property of considerable value. There is also evidence that he attended the wedding ceremony of the defendant Niadar Sing. This is uncorroborated by any other evidence, and I am not prepared to place much reliance upon it.

It is also clear from the evidence given on behalf of the defendant that Sobharam kept money in different Marwari firms in Calcutta which carried interest; that he kept his money with two different firms and transferred his deposit from one firm

to another. The man seems to have been well-known in Burra Bazar. He lived there for a number of years, and it is very curious that not a single Marwari merchant a great many of whom live in and near Monohar Das's Katra has been called, nor any of the members of the firms or their Gomastas with whom the money is now in deposit. Witnesses belonging to the old firm which kept his money have been called on behalf of the defendant. One of them, a Marwari Gomasta, said that he knew that Sobharam used to perform "*paths*" and was paid for them.

The suit must be dismissed and dismissed with costs. There is not the faintest chance of the defendants realising any of the costs from the plaintiff. I was asked to make Kanhai Lall responsible for these costs, but there is no evidence justifying it.

Mr. *Mullick*—The Rule will be discharged with costs and we are also entitled to the costs incurred before the Registrar on giving security.

THE COURT.—Yes.

Mr. Mullick—We have put in certain books of various firms. May we have them back on putting in copies of the entries?

THE COURT.—Yes.

Suit dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 303 OF 1911.

March 20, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ALI HUSSAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

FAZAL HUSSAIN KHAN—PLAINTIFF—RESPONDENT.

Muhammadan Law—Shia school—Wakf *made during* maraz-ul-maut—*Valid to the extent of one-third.*

Under the Shia Law, a *wakf* made in death-illness (*maraz-ul-maut*) is valid only to the extent of one-third, unless assented to by the heirs, even if possession has been delivered under the *wakf.*

Nazar Hussain v. *Rafeeq Hussain*, 12 Ind. Cas. 730; 8 A. L. J. 1154; *Baqar Ali Khan* v. *Anjuman Ara Begam*, 25 A. 236 at p. 255; 7 C.W.N. 465; 5 Bom. L. R. 410; 30 I. A. 94 (P. C.); *Agha Ali Khan* v. *Altaf Hussain Khan*, 14 A. 429; A. W. N. (1892) 187; *Abbas Ali* v. *Maya Ram*, 12 A. 229; A. W. N. (1890) 93, referred to.

First Appeal from the decision of the District Judge of Jaunpur, dated 23rd May 1911.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Haider Mehdi*), for the Appellant.

Mr. *B. E. O'Conor* (with him Dr. *Suleman*), for the Respondent.

JUDGMENT.—The suit which has given rise to this appeal was brought by the plaintiff-respondent for possession of property the bulk of which belonged to one Gazanfar Husain. The remainder of the property is alleged to have belonged to Azima Bibi, sister of the plaintiff and aunt of Gazanfar Husain. The plaintiff claims as heir to both these persons.

Gazanfar Husain died on the 13th of May 1907 but two days before his death, that is on the 11th of May 1907, he executed a deed of *waqf* in respect of the whole of the disputed property under which the appellants were appointed trustees of the *waqf*. The validity of the *waqf* is disputed by the plaintiff on various grounds, the principal grounds being that the donor was suffering from death-illness (*maraz-ul-maut*), that he had no mental capacity to make the *waqf* and that possession was not delivered under it. The Court below has found that Gazanfar Husain was suffering from death-illness of which he died, that he was in the full possession of his senses when he made the *waqf*, and that he delivered possession of the property to the *mutwallis*. On these findings the learned Judge has held the *waqf* to be valid only as regards a one-third share by reason of *maraz-ul-maut* (death-illness) and has granted a decree to the plaintiff for a part only of the property claimed. The defendants have preferred this appeal and the plaintiff has filed objections under Order XLI, rule 22, of the Code of Civil Procedure, as regards the portion of the claim dismissed.

Accepting the findings of fact of the Court below, the appellants contend that as possession was delivered the *waqf* is valid in respect of the entire property under the Shia Law. It

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is admitted that Gazanfar Husain belonged to the Asna Asharya or Imami sect of Shias. It is stated, however, that he was an *asuli* and followed the tenets of that school among Imamias, but this is denied by the plaintiff. Holding the view that we do, we deem it unnecessary to determine whether he was an *asuli* or an *akhbari*.

It is common ground that among Sunnis, who comprise the great majority of the Musalmans of India, a gift or *waqf* made in mortal illness (*maraz-ul-maut*) unless assented to by the heirs, is valid only to the extent of one-third. It is urged, however, that a different rule prevails among Shias. If this is so, we should apply in the case of Shias the law of that sect under the rules of justice, equity and good conscience which we are bound to administer. [See the ruling of their Lordships of the Privy Council in *Raja Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa* (1)]. We have, therefore, to determine whether under the Shia Law a *waqf* made in death-illness is valid as regards the entire property if possession has been delivered under it.

The case has been argued with great ability on both sides and various original texts of writers on Shia Law have been cited. Many of these works have not yet been translated into English and we have been supplied with translations by the learned Counsel of the parties. The opinions of these writers, as is usual in such cases, are conflicting and we have to ascertain as best we can what has hitherto been regarded as the law on the subject among Shias in this country.

We shall first consider the opinions of English text-writers on the subject.

In Baillie's Digest of Muhammadan Law, Imamia Sect, in the Chapter on *waqfs*, the learned author says at page 212: "The contract is not rendered obligatory except by giving possession; but when so completed it cannot be revoked if made in health, and even when made in death-illness it is equally valid if allowed by the heirs, though if disallowed by them it is valid only to a third of the deceased's estate, in the same way as a gift on a *muhabat* in sale. Some of own doctors insist that it should be sustained out of the whole of the estate; but the first opinion is the more approved. If one in death-illness should make a *waqf*, a gift, a *muhabat* sale, and also emancipate a slave and neither of the bets is allowed by his heirs, all are valid if they can be carried into effect out of a third of his estate". The above remarks are based on the Sharaya-ul-Islam which was printed in India so far back as 1839.

In the Tagore Law Lectures for 1874 by Shama Charan Sircar, the rule on the subject is thus laid down (page 864):

"Made in death-illness, a *waqf* or appropriation becomes valid (to the full extent) if allowed by the heirs; otherwise only to the extent of a third (of his property) in the same way as a gift or *muhabat* in sale". The learned author had before him and consulted almost all the works of authority on Shia Law, including the works on which the appellants rely (see page 169 *et seq*) and he also referred, as he states in his preface, to the Mujtahid ("Law Doctor") of Lucknow. So that it cannot be said that he deduced the above rule without consulting all the authorities on the subject.

The latest writer on the subject is the Right Hon'ble Mr. Ameer Ali. In the first volume of his well-known work on Muhammadan Law he states the Shia Law as to *waqfs* made in death-illness in the following terms on page 501 (4th Edition):

"If a *waqf* be constituted at a time when the *waqif* is suffering from a death-illness, and there is a clear indication of an intention on his part to transfer possession, it will take effect with reference to the entirety of the dedication, provided the heirs consent, either before or after the death of the *waqif*, otherwise the *waqf* will operate only in respect of one-third of the estate of the testator. 'For a *waqf* is like other acts which take effect immediately such as *hiba*, sale and similar obligations'. If the *waqf* property is covered by one-third of the estate, then it is valid as regards the entirety of the dedication. If not, each provision will be given effect to with regard to its priority until one-third of the estate is exhausted." This learned author also has referred in the introduction to his book to the various

(1) 2 M. I. A. 441; 18 Eng. Rep. 368.

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Shia Jurists on whose authority his conclusions are founded and among them he enumerates the works of Abu Jafar at Tusi, to which we shall refer hereafter and on which much of the argument on behalf of the appellants is based.

The result of the above authorities is that among Shias a *waqf* made in death-illness is valid only to the extent of one-third of the estate of the maker of the *waqf*, unless assented to by his heirs, even where the *waqf* is of immediate operation.

The above view is in consonance with the opinion of a large number of later writers on Shia Law, the principal among whom is Shaikh Najmuddin, Abul Kasim Jafar, the author of the Sharaya-ul-Islam. As has been stated above this work was published in India so far back as 1839 and portions of it have been translated by Mr. Baillie. According to Mr. Shama Charan Sircar it is "a work of the highest authority, at least in India, and is more universally referred to than any other Shia Law book and is the chief authority for the law of the Shias in India" (Tagore Law Lectures, 1874, page 171). Its great influence among Shias is referred to by Mr. Ameer Ali, though he considers the influence to be "baleful". Mr. Justice Mahmood in his judgments in *Abbas Ali* v. *Maya Ram*(2) and *Agha Ali Khan* v. *Altaf Hasan Khan* (3) described this work as one of the greatest authority among Shias "and as being the most authoritative text-book of the Shia Law". Their Lordships of the Privy Council in the case of *Baqar Ali Khan* v. *Anjuman Ara Begam* (4) regarded the Sharaya-ul-Islam as "the most authoritative work" of the Shia school. In this work the rule is thus stated: "If a man were to make *waqf* and die without giving possession the *waqf* would be void; but if a *waqf* be made in death-bed and possession be given, then it will take effect to the extent of a-third if the heirs do not consent. Without possession the *waqf* fails whether made in health or illness. It (the *waqf*) does no become binding except by delivery of possession, and when completed (by delivery of possession) it cannot be revoked if made in health, but if made during illness and allowed by heirs it is operative in full, otherwise it is valid as regards a-third." (Ameer Ali page 499, note).

The same view is held by the authors of Jwahir-ul-Kalam, Masalik-ul-Afham, Jama'a-ul-Maqasid, Mukhtashar Shara-i-Luma and other works regarded as authoritative among Shias. They refer to the existence of a contrary opinion among some of the earlier writers but they consider the view adopted by them as the better and more approved view.

On the other hand, we find that some other writers have held a different opinion. Of these the principal authority relied upon by the appellant is that of Abu Jafar-at-Tusi, the author of Khilaf-ush-Shaikh, the Nihaya, the Istibsar, and the Tahzib-ul-Ahkam and the Mabsut. The last of these, the Mabsut, is referred to by Mr. Ameer Ali as a work of great authority. The appellants have also referred to the Maqna by Mufid, the Intisar by Murtza, the Ghunia by Ibn Zuhra, the Al-Sarair by Ibn Idris, the Burhan-i-Qati, and the Jama'a-ush-Shitat, a collection of traditions published in Persia in the last century. Other authors of less note have also been referred to. Translations of extracts from all these authors have been placed before us and their correctness is generally admitted. In the Khilaf-ush-Shaikh the author, Abu Jafar-at-Tusi, states as follows:

"The lawyers are unanimous that disposition by a sick person exceeding one-third of his property is invalid, if this disposition is not to have immediate operation (Ghair Munnajjiz). If the act is to have immediate operation (Munajjizah) such as manumission, gift and *muhabat*, there are among us two opinions, one of which is that it is valid and the other that it is invalid. The latter is the view of Shafai and all the Jurists (Sunnis). They do not mention any difference of opinion. Our arguments for the first opinion are the traditions prevalent according to the narration of our Ulamas which we have mentioned in our book (the Tahzib)". A similar statement is contained in the Nihaya, and the Istibsar. In the Tahzib-ul-Ahkam

(2) 12 A. 229; A. W. N. (1890) 93.
(3) 14 A. 429; A. W. N. (1892) 187.
(4) 25 A. 236 at p. 255; 7 C. W. N. 465; 5 Bom. L.R. 410; 30 I. A. 94 (P. C.).

the tradition referred to is that of Abi Abdullah "who said that a dying man has the best right to his property so long as there is life in him". This tradition is derived from Amar and Samaah, both of whom are according to the author of Jamaa-ul-Makasid unreliable In Tusi's great work, the Mabsut, he refers to the existence of two conflicting opinions among Shia Jurists and apparently states the approved rule to be that the disposition takes effect as regards one-third only. He does not give preference to one opinion over the other. The names of the authors holding conflicting views on the point are enumerated in the Burhan-i-Qati. It is clear, however, that later writers, whose works are regarded as of the highest authority and have hitherto been followed in India, are of opinion that a *waqf* made in death-illness is valid only to the extent of one-third. In this conflict of opinions we see no reason to disregard what has till now been regarded as of paramount authority and follow texts (some of them obscure) which were practically unknown among Shias in this country. The danger of adopting the latter course was pointed out by their Lordships of the Privy Council in *Baqar Ali Khan* v. *Anjuman Ara Begam* (4) to which we have already referred. At page 254 of the report their Lordships say: "Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts, however authoritative." It is not easy to reconcile conflicting opinions on a question like this. No doubt, as a general proposition, a man is the owner of his property as long as he lives and may dispose of it in any manner he likes. But the Muhammadan Law is jealous of acts which interfere with the expectations of heirs and is always anxious to maintain their rights. It is this jealousy which seems to be at the root of the rule that a Will can only take effect as to one-third, unless assented to by heirs. Apparently on the same principle, in the case of a disposition in death-illness (*maraz-ul-maut*) without the consent of heirs, the disposition is held to be valid as regards one third only as in the case of a Will. As a donor suffering from death-illness has only a short time to live, his disposition can come into actual operation only after his death and is for all practical purposes a Will. The contention of the learned Counsel for the respondent to this effect seems to be to have much force.

In regard to the plea of the appellants that Gazanfar Hussain was an *asuli* and, therefore, the *waqf* made by him should be governed by the views of Shaikh Tusi and the author of the Intisar which, according to Mr. Ameer Ali, are in force among *Asulis*, we may observe, in the first place, that no issue was raised in the Court below as to whether he was an *asuli* or an *akhbari*. In the next place he himself made no distinction between these schools in the deed of *waqf*. According to the terms of that document the benefit of the *waqf* was to be enjoyed by all Asna-Asharyas, irrespective of the school to which they belonged. Furthermore, we may observe that inspite of the views of Shaikh Tusi and the other writers whose opinions coincided with his, Mr. Ameer Ali himself laid down the rule about the validity of *waqfs* made in death-illness which we have quoted above and made no distinction between *asulis* and *akhbaris*. We are, therefore, unable to accede to the argument put forward on behalf of the appellants in this respect.

In our opinion the weight of authority is in favour of the view that under the Shia Law a *waqf* made in death-illness is valid only to the extent of one-third, if not assented to by heirs, even if possession has been delivered by the maker of the *waqf*. A similar view was held by Mr. Justice Piggott in the case of gift in *Nazar Husain* v. *Rafeeq Husain* (5). The decision of the Court below on this point is, in our judgment, correct. The other pleas taken in the memorandum of appeal were not and, in our opinion, could not be seriously pressed. The appeal must, therefore, fail.

We now proceed to deal with the objections filed on behalf of the plaintiff. He claims that a certain part of the property has vested in him as heir of Azima Bibi, the wife of Karam Ali Khan, and accordingly that any portion of the property which the Court finds to belong to Azima Bibi or her heirs was not the property of Gazanfar Husain

(5) 12 Ind. Cas. 730; 8 A. L. J. 1154.]

and that he had no power to make a *waqf* of it. The contention relates to the property claimed other than the eight villages which admittedly belonged to the three brothers Karam Ali Khan, Ghulam Nabi Khan, and Ghulam Ali Khan. The plaintiff alleges that this property represents acquisitions made from time to time out of the surplus of the income. It is admitted by both sides that if the plaintiff can make good his contention then the decree of the Court below must be varied by giving the plaintiff a decree for 8 annas 1·3 pies share of all the immoveable property claimed. The learned Judge at page 23 of the judgment states: "It is an admitted fact that the three brothers Karam Ali Khan, Ghulam Ali Khan, and Ghulam Nabi Khan were joint in every respect. They lived together, carried on business together and held all the property in common." The defendant Ali Husain, in mutation proceedings which took place after Gazanfar Husain's death and when he was alleging that Azima Bibi was not the wife of Karam Ali Khan, in a deposition made the following statement: "The ancestral as well as the acquired property is joint. Gazanfar Husain when he came to make the deed of *waqf* expressly omitted one-third of all the property as belonging to the heirs of Ghulam Ali Khan. In this he made no distinction between the property acquired in his own name and the property acquired in the name of Muzaffar Ali Khan, the son of Ghulam Ali Khan, after Karam Ali's death. From the way in which the case proceeded in the Court below and the admitted facts, we are satisfied beyond all question that so long as the three brothers lived, there was no division of profits, but that all the property belonging to the brothers and the income thereof were applied for the benefit of all the brothers. It would be impossible to argue that while Karam Ali Khan lived, all acquisitions would not have belonged to the three brothers, no matter in whose name they were made. It is an admitted fact that after the death of Karam Ali Khan, and again after the death of Ghulam Ali Khan, the whole family continued to reside in the same house and their affairs were carried on in exactly the same manner as before. The learned Judge says at page 25 in dealing with the fact that one particular village Badheti had been recorded in the name of Azima after the death of Karam Ali Khan: "It has not been suggested there was any arrangement that she should take Badheti in satisfaction of all her claims." Indeed it is quite clear from the way in which this village was subsequently dealt with that this village was never given to her as an equivalent or in lieu of her share of her husband's estate. In our opinion, under the circumstances of the present case, it must be held that the heirs of Karam Ali Khan stepped into his shoes and are entitled to all that he would have been entitled to had he lived. It is urged that the income of the eight villages was very small and that the property acquired is large, but the eight villages were not necessarily all that the brothers possessed. In later years it was proved that there was a money-lending business and the admitted fact is that whatever the brothers possessed was treated by them and their representatives as common. No attempt was made to show that Ghulam Nabi Khan and Ghulam Ali Khan or either of them had any private or separate means either during the life-time of Karam Ali Khan or after his death. We think, therefore, that this objection must be allowed.

The other objections, including the objection relating to the condition of health of Gazanfar Husain at the time of the *Waqf-nama*, were not and could not, in our opinion, be seriously pressed.

The result is that we dismiss the appeal with costs. We allow the objection of the plaintiff to this extent that we vary the decree of the Court below by granting the plaintiff a decree for 8 annas 1·3 pies share of all the property claimed. In other respects we affirm the decree of the Court below. The parties will pay and receive costs in both Courts in proportion to failure and success. Costs in this Court will include fees on the higher scale. We direct that the defendants shall be entitled to be recouped out of the trust estate any costs which they may pay to the plaintiff under this decree.

Appeal dismissed.

NISHIKANT CHATTERJEE *v.* ASHUTOSH MUKHERJEE.

CALCUTTA HIGH COURT.
ORIGINAL SIDE SUIT No. 9 OF 1912.
February 25, 1912.
Present:—Mr. Justice Fletcher.
In the goods of SARASWATI BALA DEVI.
NISHIKANT CHATTERJEE—PLAINTIFF
versus
ASHUTOSH MUKHERJEE—DEFENDANT.

Letters of Administration—Application by husband—Estate of deceased wife—Issue as to title, whether ought to be allowed to be raised—Probate and Administration Act (V of 1881*), s.* 23.

It is not the practice of the High Court in its Testamentary and Intestate Jurisdiction to go into questions of title.

It is sufficient under the Probate and Administration Act if the person making an application for grant of Letters of Administration is, according to the rule for the distribution of the estate of the deceased, entitled to the whole or a part of the property and alleges that there is property of that nature.

Raghubar Hazam, in the goods of, 3 C. W. N. cclxxvii, *Raghunath Misser* v. *Musammat Pate Koer*, 6 C. W. N. 345 and *Ochavaram Nanabhai Haridas* v. *Dolatram Jamietram Nanabhai*, 28 B. 644; 6 Bom. L. R. 966, relied upon.

An application by a husband for grant of Letters of Administration to the estate of his deceased wife was opposed by the wife's brother. In the application it was alleged that part of the property was the *yautuka stridhan* of the deceased. An issue was settled as to whether any portion of the property left by the deceased was her *yautuka stridhan*:

Held, (1) that the issue as to title ought not to have been allowed to be raised;

(2) that it was not necessary for the husband to prove his title, and that as there was no other application before the Court, the Letters of Administration should be issued to him.

Application by the husband for Letters of Administration in respect of her deceased wife's estate.

Messrs. *S. K. Chakravarti* and *M. N. Mitra* instructed by Mr. *K. N. Ganguly*, Attorney, for the Plaintiff.

Messrs. *H. D. Bose* and *J. Bonnerjee*, instructed by Mr. *B. Srimany*, Attorney, for the Defendant.

JUDGMENT.—A point is now raised in this suit which was not raised when the matter was before me a short time ago. On the authorities and on the wording of the Act the point raised by Mr. Chakravarti is obviously right. What is the present application? It is an application by the husband for grant of Letters of Administration to the estate of his deceased wife. There is no other application before the Court although the respondent, the brother, who has entered a caveat to the issue of the grant to the husband, expresses a hope or desire that at some future date he may apply that a grant be made to himself. The only application that the Court has got to consider is the petition to the Court to grant Letters of Administration to the husband in respect of his deceased wife's estate. Under section 23 of the Probate and Administration Act, on the allegations contained in that petition the husband would be the person who, according to the rules for the distribution of the estate of the intestate, is entitled to the whole or a part of the estate, the husband having alleged in his petition that part of the property is the *yautuka stridhan* of his wife. On the last occasion the learned Counsel who appeared for the petitioner did not take the point now taken by Mr. Chakravarti on behalf of the petitioner and allowed the caveator to settle issues and to put in issue whether any portion of the property left by the deceased was her *yautuka stridhan*. That ought never to have been done. If my attention had been called to the section or to the authorities I would have overruled that issue. No finding by the Court as to the rights of the parties as to *yautuka stridhan* or other *stridhan* would have been binding between the parties. No finding as to whether if it were *yautuka stridhan* would be binding on the parties. It is not the practice of the Court in its Testamentary and Intestate Jurisdiction to go into questions of title and whether the property was *yautuka* or other *stridhan*. It is sufficient under the Probate and Administration Act if the person making the application is according to the rule for the distribution of the estate of the deceased entitled to the whole or a part of the property and alleges the fact that there is property of that nature. This has been held in *In the goods of Raghubar Hazam* (1) and also in *Raghunath Misser* v. *Musammat Pate Koer* (2) and *Ochavaram Nanabhai Haridas* v. *Dolatram Jamietram Nanabhai* (3), where it was pointed out that the rights of the parties are amply protected since before the Letters

(1) 3 C. W. N. cclxxvii.
(2) 6 C. W. N. 345.
(3) 28 B. 644; 6 Bom. L. R. 966.

of Administration go out, the applicant has to give security for the amount of the assets and there is obviously no necessity to determine whether the property of the deceased was *yautuka stridhan* or not. It seems to me that in such a small case as the present I ought not to enter into a protracted hearing to determine what is not necessary. If in the first instance these matters had been brought to my notice the matters would have been then and there determined and I would have held that it was not necessary for the applicant, the husband, for Letters of Administration to prove his title. There is no other application before the Court. If the husband's application be refused, it may be no other application will be made to the Court. It seems to me that Letters of Administration must be granted and the caveator must pay the costs, but the costs of the last occasion when this matter was heard ought not to be allowed to the petitioner because the matter was not then presented to the Court in the manner it has now been presented. If it had then been so presented the Court would, no doubt, have directed the Letters of Administration to issue to the husband as I now direct. The applicant will have one day's costs of hearing.

Letters of Administration granted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 900 OF 1912.

November 26, 1913.

Present:—Mr. Justice Miller.

NALLABOLTU BODI NAIDU *alias* VENKATAPPA—PLAINTIFF—PETITIONER

versus

CHENGAMA NAIDU AND OTHERS—COUNTER-PETITIONERS.

Civil Procedure Code (Act V of 1908), O. XVIII, r. 18—Inspection by District Munsif—District Judge's sanction not necessary.

Order XVIII, rule 18, of the Civil Procedure Code, Act V of 1908, gives absolute discretion to every Court to inspect any property or thing without the sanction of its superior Court.

Petition, under section 115 of the Code of Civil Procedure, to revise an order made by the District Munsif of Tirupati, in Miscellaneous Petition No. 233 of 1912, in Original Suit No. 291 of 1911, on the file of the said Court.

Mr. *N. Chandrasekhara Iyer*, for the Petitioner.

Mr. *C. K. Mahadeva Iyer*, for the Counter-Petitioners.

JUDGMENT.—So far as the rule at page 53 of the Civil Courts Guide, made under section 392 of the old Code of Civil Procedure, requires the sanction of the District Judge for an inspection, it is clearly opposed to Order XVIII, rule 18, of the present Code which makes inspection purely a matter of discretion of the Court. The rule seems to apply only to cases where both parties agree to the inspection and seems to make no provision for payment of expenses in other cases or either to prohibit the payment of expenses in other cases. But it is open to the District Munsif, if he so desires, to make the inspection without charges and the District Judge's sanction is not required for that purpose. It is perhaps not necessary that I should set aside his order refusing to inspect, because that order will not prevent him from acceding to another application if one is made. But it is necessary to point out that as the law now stands, the District Judge's sanction to make an inspection is not required and the District Judge's refusal will not affect the District Munsif's discretion to make an inspection should he be asked to do so and see fit to comply without charges. The order does not, therefore, prejudice the petitioner. I need not interfere with it. I make no order as to costs.

Petition dismissed.

DEO NANDAN PERSHAD *v.* UDIT NARAYAN SINGH.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 3982 OF 1910.
March 10, 1914.
Present:—Mr. Justice Coxe and
Mr. Justice D. Chatterjee.
DEO NANDAN PERSHAD—PLAINTIFF—APPELLANT
versus
UDIT NARAYAN SINGH—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Alienation without legal necessity—Voidable or void—Binding against all but reversioners—Symbolical possession—Effect of formal delivery—Suit for possession of land held by raiyats—*Rent decrees obtained by plaintiff's predecessor—Saving of limitation—Limitation Act (IX of* 1908*), Sch. I, Arts.* 142, 144.

An alienation by a Hindu widow, if made without legal necessity, is voidable and not void. Until the reversioner, including in that term the Crown, if there is no nearer reversioner, decides to avoid it or to treat it as a nullity, it stands good.

Modhu Sudan Singh v. *Rooke*, 25 C. 1; 24 I. A. 164; 1 C. W. N. 433; and *Bijoy Gopal Mukerji* v. *Krishna Maheshi Debi*, 11 C. W. N. 424, relied upon.

A formal delivery of symbolical possession is conclusive evidence between the parties that possession was delivered. It is perhaps somewhat of a legal fiction in many cases, but it is a very valuable one as it affords a starting point for limitation. But it cannot be denied that it is often little more than a fiction and it is not in the least conclusive evidence that the possession so delivered continued. There may be a presumption that such possession would continue until the contrary was proved, but that is all.

In a suit for possession of land held by *raiyats*, limitation is saved by rent decrees obtained by the plaintiff's predecessors within twelve years before suit.

Appeal from the decree of the District Judge of Bhagalpur, dated August 26th, 1910, affirming that of the Sub-Judge of Monghyr, dated February 19th, 1910.

Dr. *Rash Behary Ghose*, Babus *Provash Chunder Mitter* and *Kulwant Sahay*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Karunamoy Bose* for Babu *Kshetra Mohan Sen*, for the Respondent.

JUDGMENT.

COXE, J.—The property in suit originally belonged to one Rukmini. She mortgaged it and the mortgagee in the end sold it in execution of a decree on the mortgage. It was purchased by a predecessor-in-interest of the plaintiff. The defendants are successors-in-interest of Rukmini's brothers to whom she is said to have transferred the property. The plaintiff has sued for possession. The suit has been dismissed by the Courts below, partly on the ground that the plaintiff has not made out his title, and partly on the ground that the defendants have acquired a title by adverse possession. The plaintiff appeals.

On the first point I think that the plaintiff is entitled to succeed. The Courts below hold that he has not succeeded in proving that Rukmini's mortgage was made for legal necessity. But the defendants are not the reversioners. The alienation, if made without legal necessity, was voidable but not void. Until the reversioner, including in that term the Crown, if there is no nearer reversioner, decides to avoid it or to treat it as a nullity it stands good. This, I think, is the result of the decisions in *Modhu Sudan Singh* v. *Rooke* (1) and *Bijoy Gopal Mukherji* v. *Krishna Mahishi Debi* (2).

As to the question of adverse possession it is argued that the Courts below have wrongly applied Article 144, instead of Article 142, of the Schedule to the Limitation Act. So far as regards the *kamat* land it does not appear to me that this question really arises on the findings of fact arrived at by the Courts. The defendants have always claimed adversely to the plaintiff and his predecessors since long before 1882. In that year it was decided that the plaintiff's predecessors were entitled to possession during Rukmini's life-time. It was not decided whether or not they were entitled to possession afterwards. They obtained, however, formal delivery of possession. But the District Judge finds, and it is a finding of fact with which we cannot interfere, that although the plaintiff's predecessor "got symbolical possession through the Court in 1883 in pursuance of the order of the District Judge, it is quite certain that he never got actual possession." Now, of course, the formal delivery of possession, as, no doubt, the learned District Judge was well aware, is conclusive evidence between the parties that possession was delivered. It is perhaps somewhat of a legal fiction in many cases, but it is a very valuable one as it

(1) 25 C. 1; 24 I. A. 164; 1 C. W. N. 433.
(2) 11 C. W. N. 424.

affords a starting point for limitation. But it cannot be denied that it is often little more than a fiction, and it is not in the least conclusive evidence that the possession so delivered continued. There may be a presumption that such possession would continue until the contrary was proved, but that is all. The District Judge's finding that the plaintiff's predecessor never got actual, as distinguished from symbolical, possession, can only mean that the possession delivered did not continue at all and that the defendants, except for the unimportant interval while possession was being formally delivered, remained in actual occupation of the land. Such a finding of fact is fatal to the mere presumption referred to above. Such possession could not but be adverse. There is no reason to suppose that the defendants have ever changed their claim, and where possession is exercised by the actual cultivation of the ground, the plaintiff, who admittedly has never been in possession of the *kamat* land, must necessarily have known that the possession of the defendants was adverse.

But as regards the land held by *raiyats*, limitation is saved, in my opinion, by the rent decrees obtained by the plaintiff's predecessor in 1901. The defendants in those suits are admittedly tenants of the land. It was finally decided in those suits that the relationship of landlord and tenant existed between them and the plaintiff's predecessor. That being so, I do not see how it can be said that the plaintiff's predecessor was not then in possession. The tenants were admittedly in possession and their possession was his possession. The respondents have not shown that those decrees were fraudulent and collusive. Indeed it was found in those suits that the tenants were colluding with the present respondents. If the tenants had attorned to the plaintiff their possession would have been his possession. It seems to me that the same result must follow if it is decided in a suit between the parties that they are his tenants.

The appeal will accordingly be allowed in part. The plaintiff will get a declaration of his proprietary right in the land covered by the rent decrees of 1901, but otherwise the suit will fail.

D. CHATTERJEE, J.—I agree.

Appeal allowed in part.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 73 OF 1912.

June 18, 1913.

Present:—Mr. Justice A. Kensington, Offg. Chief Judge.

PHUMAN SHAH—PLAINTIFF—PETITIONER

versus

CHHANGA—DEFENDANT—RESPONDENT.

Punjab Alienation of Land Act (XIII of 1900), s. 21A (2)—Limitation, whether Chief Court can extend.

It is not open to the Chief Court to extend in any way the time prescribed for an application under section 21A (2) of the Punjab Alienation of Land Act.

Obiter: It is doubtful whether a decree under section 9 of the Specific Relief Act, which settles no question of title, can be revised under section 21A (2), Punjab Land Alienation Act.

Case referred by the Deputy Commissioner, Gurdaspur, with his No. 1320, dated 11th July 1912, for orders of the Chief Court of the Punjab.

ORDER.—This is an application to the Chief Court professing to be made under section 21 A (2), Land Administration Manual.

Section 21, Land Administration Manual, has no bearing on the matter, and apparently the reference should be to the Land Alienation Act.

The Civil Court decree in question was one for possession under section 9, Specific Relief Act. It was passed on the 9th June 1911.

I think it extremely doubtful whether a decree of the kind which settles no question of title can be revised under section 21 A (2), Land Alienation Act, but however that may be, the Deputy Commissioner's application must be refused as not having been made within the prescribed period of two months from the date on which he was informed of the decree.

The decree was brought to the Deputy Commissioner's notice by an English report from the Tahsildar, dated 16th November 1911. The Deputy Commissioner merely recorded on this a vernacular order dated 25th November 1911 that the case should be brought up at the Sadr.

Eventually application was (erroneously) made to the Divisional Judge, Amritsar, by letter No. 292, dated 23rd February 1912. The Divisional Judge returned the application on the 24th June 1912 as being beyond his jurisdiction. The present reference was then made to the Chief Court on the 11th July 1912.

Even if allowance is made for the whole of the period taken up with the erroneous reference to the Divisional Judge, it is clear that the prescribed period of two months had long expired when application was made to him on the 23rd February 1912.

It is not open to the Chief Court to extend the time for applications of the kind in any way. The record will accordingly be returned without orders, the application being refused.

Application refused.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2205 OF 1911.
March 27, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
JOGENDRA NARAIN SIRKAR—PLAINTIFF—APPELLANT
versus
RAM CHANDRA ADHIKARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Nankar *grant—Land subject to burden of service—Right of grantor to put end to tenure when grantee is willing to perform service—Ejectment.*

Where a grant of land is subject to a burden of service, that is to say, is *nankar*, and not a mere grant in lieu of wages, the grantor has no right to put an end to the tenure whether the services are performed or not, as long as the grantee is willing and able to perform the services.

Venkata Narasimha Appa Rao Bahadur v. *Sobhanadri Appa Rao Bahadur*, 29 M. 52; 3 C. L. J. 1; 10 C. W. N. 161; 3 A. L. J. 55; 8 Bom. L. R. 1; 16 M. L. J. 1; 1 M. L. T. 3 (P. C.); 33 I. A. 46, followed.

Radha Pershad Singh v. *Budhu Dashad*, 22 C. 938, referred to.

The defendants and their ancestors had been dwelling upon the land in dispute for more than half a century, being inducted into the land by the plaintiff's predecessor in permissive possession, owing to the facts that the parties were on very friendly terms and the defendants were *kavirajs* by profession. This good feeling led the plaintiff's ancestor to allow the defendants' ancestor to occupy the land and raise huts on it for habitation without payment of rent. The lower Appellate Court held that this evidence amounted to a proof of presumed *nankar* grant to the defendants' ancestor. The defendants were still holding the profession of *kavirajs* and did not decline to render any service to the plaintiff:

Held, that the plaintiff was not entitled to eject the defendants.

Appeal from the decree of the District Judge of Pabna and Bogra, dated May 12th, 1911, confirming that of the First Munsif of Bogra, dated December 9th, 1910.

Babu *Trailokya Nath Ghose*, for Babu *Bankim Chandra Sen*, for the Appellant.

Babus *Surat Chandra Rai Chaudhuri* and *Charu Chandra Bhattacharjee*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for ejectment brought by the plaintiff against the defendants after notice to quit and for removal of the defendants' huts existing upon the land.

It has been found by both the Courts that the defendants and their ancestors had been dwelling upon this land for more than half a century and that they were inducted into the land by the plaintiff's predecessor and ancestor, as the Munsif found, in permissive possession. Owing to the fact that the parties were on very friendly terms and that the defendants were Kavirajs by profession, this amity and good feeling between the two families led the plaintiff's ancestor to allow the defendants' ancestor to occupy the land and raise their huts on it for convenient habitation without payment of rent. The evidence on the record shows that this was the arrangement and the learned Judge in appeal has held that this evidence amounts to a proof of a presumed *nankar* grant to the defendants' ancestor. As the defendants are still holding the profession of Kavirajs and have not declined to render any service to the plaintiff it appears to us that on such a finding the plaintiff cannot eject the defendants. That is what was held in a precisely similar case decided by the Privy Council in *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (1). That was a case of *Mokhasa* tenure, and that is defined in Wilson's Glossary, which their Lordships of the Judicial Committee followed, in precisely the same terms as the Bengal expression *Nankar*, and it was there held that where a grant of land is subject to a burden of service, that is to say, *Mokhasa* or *Nankar*, and is not a mere grant in lieu of wages, the grantor

(1) 29 M. 52; 3 C. L. J. 1; 10 C. W. N. 161; 3 A. L. J. 55; 8 Bo. L. R. 1; 16 M. L. J. 1; 1 M. L. T. 3 (P. C.); 33 I. A. 46.

has no right to put an end to the tenure whether the services are performed or not, as long as the grantees are willing and able to perform the services. In an earlier judgment of this Court reported as *Radha Pershad Singh* v. *Budhu Dashad* (2), certain distinctions were made with regard to these tenures, but we do not find that anything contrary to the principle laid down by their Lordships of the Judicial Committee was there held. If it had been it is hardly necessary to point out that the decision of their Lordships of the Judicial Committee would overrule any such distinction.

A great deal has been said in argument about technical terms, such as the use of the word "gift" by the learned Judge, "permissive possession" by the first Court and inconsistencies in the pleadings, etc.; but the simple question is, what was the origin of the tenure? It being found by the Judge, as a matter of fact, that it was a *Nankar* grant—and the facts that he found justify him, in our opinion, in the finding of that legal status and of no other, the judgment of the Privy Council to which we have just referred undoubtedly governs this case.

When the appeal fails from this point of view the appellant's Vakil tries to argue forfeiture by denial of possession. This cannot be allowed. It has never been taken either in the plaint or in the Court of first instance, nor in either of the Appellate Courts. The pleadings of the defendants are not really inconsistent. The learned Judge finds that the grant was of 100 years ago and the defendants could not speak to its validity. They admit that their ancestors were the Kavirajs of the plaintiff's ancestors, but they plead in the alternative that having no knowledge of the plaintiff's title they are not estopped from raising as an alternative defence the question whether the plaintiff has any title to the land or not. However, as we have said, this point was not raised in either of the lower Courts and cannot now be further considered.

There is one slight error in the judgment of the learned District Judge in the Court below in that he has dismissed the appeal with costs and decreed the cross-appeal. It appears to us that the cross-appeal on his findings should also have been dismissed. He does not in any way find that the plaintiff had no title to the land, and he does not find that by reason of a valid gift the title had passed out of the plaintiff's hands. What he does find is that the plaintiff had made a *Nankar* grant, and this does not on all the authorities destroy the plaintiff's *lakhiraj* title to the land.

The appeal is dismissed with costs and the order decreeing the cross-appeal in the lower Court is set aside without costs.

Appeal dismissed.

(2) 22 C. 938.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 74 OF 1912.

March 16, 1914.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

BISHAMBAR DAS—DEFENDANT—APPELLANT

versus

GOBIND DAS—PLAINTIFF—RESPONDENT.

Caste—Panchayat, power of—Ex-communication—Jurisdiction—Natural Justice—Defamation.

To say that a man has been outcasted is *prima facie* to defame him. But where the Chaudhri of a community, duly recognised and acknowledged as such, convened a regular Panchayat according to the custom of the caste, and in fulfilment of his duties as Chaudhri, communicated a resolution, passed by the Panchayat, temporarily excluding the plaintiff from social intercourse with the members of the caste, and it was not shown that he was actuated by any ill-will or ulterior or improper motive:

Held, that the Chaudhri was not liable in damages for libel or defamation.

The Courts in India should refuse to interfere with the autonomy of caste, or, in other words, with the decisions of a Panchayat, provided that those decisions affect matters within the jurisdiction of the Panchayat and are not contrary to natural justice.

Some members of a caste refused to subscribe to a declaration of faith issued by the Panchayat and instead issued over their signatures a leaflet calculated to bring the Panchayat into contempt. Upon this the Panchayat convened a meeting. Notice of this meeting was not served upon those members personally though other members of their families were served. The Panchayat decided to temporarily exclude from all social intercourse their families until those persons appeared before the Panchayat and cleared themselves. It was contended that the order of the Panchayat was without jurisdiction in that no caste offence had been committed, and that the Panchayat had acted contrary to natural justice in not giving the persons

BISHAMBAR DAS *v.* GOBIND DAS.

concerned an opportunity of defending themselves before passing the order of temporary exclusion:

Held, (1) that the issue of the leaflet and the refusal to sign the declaration of faith were both social questions, closely concerning the community and well within the jurisdiction of the Panchayat;

(2) that personal service upon the persons complained against was unnecessary, in as muchas other members of their family had been served with notice of the meeting, and that as Panchayats deal with families as units and not with individuals and as any member of a family can appear on its behalf and defend, the procedure of the Panchayat was not contrary to natural justice;

(3) that as the family had been suspended pending the appearance before the Panchayat of the offending members, there was no denial of justice.

First appeal from the decision of the Subordinate Judge of Benares, dated 18th September 1911.

FACTS.—There are two divisions among the Agarwal community of Benares known as the Pacham Tar and the Purbia Tar, each having two Chaudhris whose offices are hereditary. The parties belong to the latter Tar. It appears that one Babu Lakshmi Chand returned from England some time in 1910. Prior to his arrival, however, the Purbia Tar held a Baithak (a small meeting especially called for the occasion by the Chaudhris) and issued a Chitha advocating the exclusion of England-returned persons from caste and calling upon the members of the Biradri to sign it. This Chitha was not signed by the plaintiff. In view of the commotion in the community the plaintiff and five other persons circulated a notice on the 16th of May 1910, stating that if an enquiry was to be held regarding the re-admission of England-returned gentlemen into caste, it should not be confined to Babu Lakshmi Chand only but that it should have a wider scope before it. On the 19th of June 1910 there was a Panchayat of the Purbia Tar to consider the question. At this meeting a resolution was passed that those persons who had not signed the Chitha should be *bartao band* (*i.e.*, all social dealings with them be stopped until they got their position cleared).

The plaintiff thereupon brought a suit in the Court of the Subordinate Judge of Benares to recover Rs. 11,000 for damages due on account of defamation. The Subordinate Judge held that the action of the defendant was illegal and contrary to natural justice and decreed the plaintiff's claim in part.

The defendant appealed and the plaintiff filed objections.

Mr. *B. E. O'Conor*, for the Appellant — The Court below has found that the Panchayat was properly convened and the resolution was passed at the instance of the whole representative body and not that of any single individual. No question of malice consequently arises. Moreover, the action originated from the Pacham Tar while the plaintiff and the defendant belong to the Purbia Tar. There was no ex-communication. The plaintiff was only temporarily suspended. He could easily have explained matters; but he chose to keep silent.

Even if the defendant Chaudhri be taken to have entertained any feelings of malice, he could not influence the whole body of persons constituting the Panchayat. There is nothing on the record to show that there is any act of the defendant to single him out from others who took part in the affair. The Chaudhuri was only acting as the agent or mouthpiece of the Biradri. It is perfectly open to the community to take exception to the actions of any member of the community. He cited *Vallabha* v. *Madusudanan* (1). He also relied on a decision of the Calcutta High Court (31st August 1880), in *Samat Das* v. *Kunj Behari Lal*, in which McDonell and Tottenham, JJ., held that if some persons carry out the directions of the Panchayat, they are not liable.

There is no denial of what the defendant did, inasmuch as it was simply the action of the Panchayat. There is no specific act of the defendant which would give any cause of action to the plaintiff. What might have been a basis of action against the Panchayat has been made a cause of complaint against a single individual. The publication of the resolution does not constitute defamation. It is simply the publication of a fact which is true in itself. Whether the Panchayat was or was not justified in passing a resolution like this is another matter.

Dr. *Satish Chandra Banerji*, for the Respondent.—Three things have to be considered in this case: (*i*) the nature of the suit,

(1) 12 M. 495.

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(*ii*) the cause of action and (*iii*) the relief claimed.

As to (*i*) this was an action to recover damages for defamation. The mere suggestion by the defendant that the plaintiff had been put out of caste was defamatory.

[RAFIQUE, J.—The recital of a fact which took place in the Biradri is not defamatory].

The publication of the resolution is calculated to lead men to make surmises of all sorts regarding the plaintiff's character and conduct and to shun his society.

Mr. Bower defines defamation in his book on "Actionable Defamation" (page 2, article 3). The statement here would be *prima facie* defamatory.

[RAFIQUE, J.—The truth of the statement may also be set up as a defence].

That would be justification: Odger's "Libel and Slander" (page 18, 5th Edition).

As to the cause of action, we have to see whether the resolution passed was a nullity and whether the defendant, knowing it to be such, published it. Merely because the defendant was acting under the orders of the Panchayat would not be sufficient to exonerate him.

The position of a caste is discussed by Sir Guru Das Banerji in *Jagannath Churn* v. *Akali Dassia* (2) where it was said that the man was born into a caste and, therefore, his case is different from the case of a member of a club: *Krishnasami Chetti* v. *Virasami Chetti* (3).

[TUDBALL, J.—Is a caste bound by the rules of evidence?].

No; but then castes are bound by the rules of natural justice; the Court's jurisdiction is not barred simply because the caste has arrived at a certain decision: *Gompertz* v. *Goldingham* (4).

[TUDBALL, J.—The Chaudhri published the resolution as an office-bearer of the Panchayat. How can he be liable for damages?].

The question is one of qualified privilege. If the resolution was a nullity, its publication was defamatory. No sufficient notice was given to the plaintiff; he has had no opportunity of explaining his conduct and there was no fair and *bona fide* inquiry into the charges.

If the community said that they were not going to associate with the plaintiff for even a short period, that would lower him in the estimation of the public.

[RAFIQUE, J.—But it would not constitute defamation unless malice is shown].

Malice is only relevant when privilege is established. It is no part of the cause of action: *Cuppusawmi Chetty* v. *Doraisawmy Chetty* (5).

Even if a member says that a person is an outcaste and that he has published the statement as a member of the caste, he is pleading privilege: *Keshavlal* v. *Bai Girja* (6); *Vallabha* v. *Madusudanan* (1).

It is not necessary to prove actual hostility in order to prove malice.

Sir F. Pollock's Law of Torts 319 and 125 (8th Edition), malice means "a wish to injure the opposite party rather than to vindicate a wrong" Odger's Libel and Slander, page 343, Bower's Actionable Defamation, page 155, *Innes* v. *Wylie* (7); Worthymen on Clubs, 130, *Dawkins* v. *Antrobs* (8); *Labouchere* v. *Earl of Wharncliffe* (9); Lord Halsbury's Laws of England, Volume IV, 415, 416, *Appaya* v. *Padappa* (10).

When qualified privilege is pleaded on the ground of duty or common interest, the statement should not be made before any person who is not a member of the Biradri.

Mr. *B. E. O'Conor*, in reply.—It is immaterial whether a caste rule is or is not reasonable. What has to be seen is whether the action of the plaintiff was calculated to call forth the reprobation of the caste: *Nathu Velji* v. *Keshawji Hirachand* (11).

The facts of this case are very much similar to the facts of the present case.

(2) 21 C. 463 at p. 470.
(3) 10 M. 133 at p. 143.
(4) 9 M. 319.
(5) 3 Ind. Cas. 955; 33 M. 67; 6 M. L. T. 290; 19 M. L. J. 714.
(6) 24 B. 13; 1 Bom. L. R. 478.
(7) 1 Car. & K. 257; 70 R. R. 786.
(8) 17 C.D. 615 at p. 622; 44 L.T. 557; 29 W. R. 511.
(9) 13 Ch. D. 346 at p. 350; 41 L. T. 633; 28 W.R. 357.
(10) 23 B. 122.
(11) 26 B. 174; 3 Bom. L. R. 718.

Sudharam Patra v. *Soolha Ram*(12), *Venkatachalapati* v. *Subbarayadu* (13).

It is not for a Court of Justice to determine what is a caste offence. Moreover, the order of the Panchayt was a conditional and not a final order. No question of natural justice arises. The plaintiff could, if he liked, have explained his conduct. No special malice is proved.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent to recover the sum of Rs. 11,000 as damages "on account of defamation and mental and moral suffering" as stated in paragraph 14 of the plaint. At page 25 of the paper-book, the learned Subordinate Judge has described it as "an action in libel, pure and simple."

It has arisen out of the following circumstances.

The parties are members of the Vaish Agarwal caste resident at Benares. This community is divided into two sections called "Tars", the Purbia or Eastern "Tar" and the Pacham or Western "Tar." The parties belong to the Purbia Tar. Each Tar or section has a separate Panchayat managing its own affairs. Matters of minor importance are decided by what is called a Baithak, *i.e.*, a small meeting, but major matters are only dealt with at a full meeting of the Panchayat. This Panchayat may be attended by all or any members of the section The meeting is convened by the Chaudhris of the section who, in the customary way, send round barbers to the residences (which are said to be registered) of the families which constitute the caste or section. The subject-matter of the meeting is discussed and the resolution is duly recorded in a register.

This community has been divided, like many other similar communities in India, into two parties over what is called the sea voyage question. One party, which calls itself the advanced or progressive party, maintains that there is nothing in the Hindu faith or its sacred books, forbidding the crossing of the seas, that rather the sacred books distinctly contemplate it as permissible and that when a Hindu has done it, he may be taken back into caste after performing the purificatory ceremonies laid down. The other party, which may be called the orthodox party, maintains that it is not permissible but contrary to their Dharma or faith, and that once a Hindu has done it, he cannot be taken back into caste even on the performance of the purificatory ceremonies. The plaintiff is a member of the advanced party. The defendant is a member of the opposite party and also one of the two Chaudhris of the Purbia Tar.

It is an admitted fact that some members of this community have left India for foreign countries and have been and still are outcasted. One Babu Ram Krishan *alias* Nanhe Babu went to England in 1888, returing in 1891. In 1892 he again went to England returning in 1895. The caste appears to have been slow to act in this first case as Nanhe Babu was not apparently outcasted until his second voyage, *i.e.*, about 1894. The exact date of his outcasting is not clearly given. Then Babu Ajhudia Das, Bar-at-Law, went to England and was outcasted by a resolution of the Panchayat dated Magh Sudi 3rd, Sambat 1955.

The present trouble between the parties is an off-shoot from the case of the third member of this caste, B. Lakshmi Chand, who went to England about 1907 and returned some time in May 1910. He is or rather was a member of the Pacham or Western Tar and when he left for England before his return, he was outcasted by the Panchayat of his Tar and all social dealings with him were forbidden (*vide* Exhibit L dated Baisakh Badi 2, Sambat 1967=26th April 1910). But on his return, he went through the purificatory ceremonies and certain members of the caste dined with him. Among these were the plaintiff's sons and nephews. This was at the end of April or the beginning of May 1910. A storm at once arose over this, an anonymous leaflet was printed and circulated discussing the whole subject from the view of the advanced party.

This was followed by what may be described as (and what in substance really is) a declaration of faith published by the orthodox

(12) 3 B. L. R. 91; 11 W. R. 457.
(13) 13 M. 293 at p. 300.

party and circulated to the members of the caste for signature in token of their approval. It is Exhibit B (6) printed at page 9 of the appellant's book. It sets out that there is a rumour that young members of the community had brought about the performance of the Prashchit (purificatory ceremony) of an "England-returned" person (evidently Lakshmi Chand) and had dined with him contrary to the Dharma and old traditions of the brotherhood, that there can be no "Prashchit" of an "England-returned" man etc., etc.

It concludes thus:—"Therefore, even now, we are not willing to act against the old usage, the Dharma, the traditions of the brotherhood, the Bevastha of Gopal Mandir and the path marked out by our forefathers, *i.e.*, we do not want to associate in any way with people who have returned from England and those who mix with them. In witness whereof we on the testimony of our Dharma, etc., affix our signatures below."

The exact date on which this was published and circulated is not known, but from the evidence of the defendant it must have been early in May 1910. The document bears the signatures of a large number of persons.

Here we may point out that whatever may be the case in other cities and parts of India, in Benares at least and its two appurtenant towns, Chunar and Mirzapore, the old orthodox party are greatly in the ascendant as far as numbers are concerned. This is evident from the evidence of Babu Gokul Das, the plaintiff's own witness, who is a Professor of Science at the Holkar College, Indore. He says: "We dined with Babu Lakshmi Chand as a protest in order to stop excommunication by the brotherhood. We knew that the general sense of the community was against us." This gentleman is connected by marriage with the plaintiff and on matters of caste has very broad and heterodox views, as his evidence shows, and desires that those views should generally be adopted, but he has candidly admitted that they are only held by a minority. Though he has been outcasted, he has been more candid in this respect than others of the plaintiff's witnesses who would suggest that they are the views of the majority. This has been done with a view to casting doubts on the good faith of the defendant in what subsequently happened.

The issue and circulation of the declaration of faith was followed by the issue of the leaflet dated 16th May 1910 over the signatures of the present plaintiff, his brother Bhagwan Das and other persons. It is to be found at page 123 of the respondent's book. It sets out that "discussion is going on in regard to social intercourse (*bartao*) with persons who have returned from foreign countries, but that they hear that the matter is being confined to the case of Lakshmi Chand, that they (the signatories) think that if the brotherhood wants to devote its attention to such matters, a sifting inquiry should be made into the cases also of those who had dined with B. Ajhudia Das for the last twelve years and also into the cases of those who had become Theosophists, Radha Swamis, Freemasons and Arya Samajists and that if this were not done, it would be unjust and others would say that action had been taken through enmity." This document clearly roused the feelings of the community. Under the guise of an appeal for justice and an extended inquiry it really covered a taunt (which perchance may have been well merited) that there were many other black sheep in the fold among those who were thirsting to excommunicate the friends and associates of B. Lakshmi Chand.

The learned Subordinate Judge calls it an appeal to the community to take back Lakshmi Chand and he fails to see in it what he calls "defamation of the caste," though it clearly implies that the members of the caste are mixing socially with many persons who are unfit to be in caste.

It, however, clearly gave great umbrage and on the 19th June 1910 two Panchayats were held, one of the Eastern Tar and one of the Western Tar. We are concerned in this case chiefly with that of the Purbia Tar, but sight must not be lost of the fact that both sections held Panchayat at the same time though at different houses and they met to consider the conduct of those persons who had signed the leaflet of 16th May 1910. At each Panchayat it was decided that the families of those members of the section who

had signed this leaflet and had refused to sign the declaration of faith should be temporarily excluded from all social intercourse until those persons appeared before the Panchayat and cleared themselves.

The resolution of the Eastern Tar Panchayat was as follows: "That, since B. Gobind Das and B. Bhagwan Das publicly circulated among the Biradris and non-Biradaris a pamphlet about the Biradri contrary to the custom thereof, and did not attend the Panchayat on being called upon to do so, and these facts show that these gentlemen circulated the pamphlet simply to disgrace the Biradri, and their not signing the Chitha (*i.e.*, the declaration of faith) shows that their views are against the Panchayat, therefore, it is ordered that until B. Gobind Das and B. Bhagwan Das come and clear themselves the family of B. Madho Das be "Bartao Band", *i.e*, social dealing with them be stopped.

Communication. There were other resolutions passed but we are not concerned with them. According to the rules of the caste, the Chaudhri of each section has to communicate to the Chaudhri of the other section and to the Chaudhris at Chunar and Mirzapore the resolutions passed at Panchayat. The defendant Bishambar Das, therefore, sent the following information in respect to the above resolution:

"To-day the Bari Panchayat was held and the Panches arrived at a decision as follows:—

'That social dealings with the family of B. Madho Das be stopped until B. Gobind Das and B. Bhagwan Das come and clear themselves.' "

A similar resolution was passed at the Panchayat of the Western Tar in respect to the families of those members of that Tar who had joined with the plaintiff and his brother in signing the leaflet of 16th May 1910, and a similar communication was sent to the defendant Chaudhri by the Chaudhris of that section.

On July 8th, 1910, the plaintiff and his brother sent a registered letter, *vide* page 7, appellant's book, to the effect that they had heard of the resolution and that he (the defendant) had proposed it, they, therefore, asked him whether he had proposed it and to let them know what explanation was required and when and where and to whom it was to be submitted.

On 13th July 1910, a Baithak was convened and it was decided that the letter should be placed before a full Panchayat to enable the plaintiff and his brother to attend and make any inquiries they liked.

A Panchayat was held on August 22nd, 1910. The plaintiff did not attend nor did any one on his behalf attend and it was decided that no reply should be sent to the letter.

Then the present suit was launched. The plaintiff's case as set out in the plaint is as follows:—

(1) That the defendant had for a long time been bearing ill-will against plaintiff and his family;

(2) that the defendant had made an unsuccessful attempt to excommunicate Lachmi Chand;

(3) that the family of the plaintiff by reason of its lofty status in the community was exempted from all appearance before the Chaudhri and the Panchayat and, moreover, that it was the Chaudhiri's duty to wait upon any member thereof to take his explanation if necessary;

(4) that on the 19th June 1910 the defendant, without formulating any charge against him, without any valid reason and without giving him an opportunity of defending himself, called a meeting at his own house of a few of his friends who were under his influence and recorded the following resolution: "As long as B. Gobind Das does not come and get his position cleared, so long should the social dealings with the family of B. Madho Das remain stopped";

(5) that the defendant published the above by communicating it in writing to the Chaudhri of the Pacham Tar and generally amongst the brotherhood by directing them to stop social intercourse with him, and also generally published to the world that the plaintiff had been outcasted. In paragraph 8 of the plaint the plaintiff says that, owing to the said writing which was unlawful and owing to its publication, he has been disgraced and has suffered material damage in various ways in that he has been falsely notified as an outcaste.

The amount claimed is Rs. 11,000 and the cause of action is said to have accrued on the

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19th June 1910 and on every subsequent date on which the defendant notified his expulsion from caste.

It is clear from the above that the plaintiff's case was that the defendant out of malice convened a bogus Panchayat and without formulating any charge, or giving the plaintiff an opportunity of defending himself, formally recorded an order of excommunication and falsely published in writing that the plaintiff had been outcasted, and had, therefore, libelled him.

It will be seen that in the course of the hearing the plaintiff also attacked the defendant's claim to be the Chaudhri or head of the Purbia Tar. The defendant in his reply set forth the constitution of the Agarwal community at Benares and the rules of the Panchayat, the customary method of convening meetings thereof and communicating its resolutions to those concerned and to the Agarwals of Chunar and Mirzapore. He denied that resolutions of the so-called Vaish Conference are binding on the community at Benares which has always refused to accept them. He alleged that Lachmi Chand had been duly excommunicated for having crossed the seas, as others had been; that the plaintiff and his brother had published the leaflet of 16th May 1910 contrary to custom and to bring the community into contempt, and had also refused to sign the declaration of faith; that to consider these matters Punchayats were convened by both sections of the community to consider the conduct of those who had signed the leaflet and refused to sign the declaration of faith.

That the Panchayat of the Purbia Tar was convened in the customary manner by sending round barbers to the registered addresses of the families which constituted the section, that information was duly sent to the plaintiff's family of both of the meeting and the objects with which it had been convened.

That as no one appeared on behalf of the plaintiff's family, the Panchayat passed the resolution mentioned to stop all social dealings with the plaintiff's family until he and his brother appeared before the Panchayat to clear themselves of the charges.

That he, the defendant, was the Chaudhri of the Purbia Tar and as such it was his duty to communicate the resolution to the Chaudhris of the Pacham Tar and of the caste at Chunar and Mirzapore and that he accordingly did do so. He denied that the plaintiff's family was exempt from attendance at Panchayats. He denied that he bore any ill-will towards the plaintiff or that he acted with any improper motive. He pleaded that he acted in good faith in execution of his duties as a Chaudhri and that he had published no false statement but a true one; that the Panchayat had been duly and properly convened and was a genuine meeting of the brotherhood; that the caste had full power to manage its own concerns and that its action could not be called in question in a Civil Court.

The learned Subordinate Judge framed sixteen issues.

With the first two we are not concerned in this appeal. We equally are not concerned with the 15th. It runs as follows:—"Is going to England against the Shastras and does it entail loss of caste? Is the custom prohibiting sea voyage valid?" The Subordinate Judge has written a judgment covering some 68 pages of the printed book. Six are devoted to setting forth the facts and pleadings and the issues. Of the remaining 62 pages as many as 46 are devoted to this one issue. It is admitted before us that it is one which does not arise in the case at all; but the result of its framing has been that an enormous mass of irrelevant evidence has been brought upon the record and the learned Subordinate Judge, whose sympathies are clearly all the one way, has held that a sea voyage is valid and that taking Mlechcha's food is an expiable sin and one who takes it does not become unfit for social intercourse, that it is illegal to outcaste one who associates with him and that under the Hindu Law an illegal outcasting was a crime punishable by the King. He held, therefore, that the defendant was a Dandya or person who ought to be punished. This view, in our opinion, has tainted the whole of his judgment. He decided the 3rd, 5th, 6th and 9th issues together. These are:—

3. Has the defendant done any act which constituted malicious defamation of the plaintiff?

5. Whether there was any Panchayat held on 19th June 1910?

6. Is the defendant personally liable for the resolution passed by the Panchayat?

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9. Whether the defendant maliciously published the words of the resolution complained of?

He held:—

1. That there was a *bona fide* meeting of the Panchayat, but that no notice thereof was given to the plaintiff personally nor was he informed of the charge preferred against him.

2. That the defendant having been present at the Panchayat was as much liable for the resolution as any other member who was present.

3. That he published the resolution in that he communicated it to the Chaudhris of the Pacham Tar and of the community at Chunar and Mirzapore.

4. That the language of the resolution was defamatory as it laid down that the plaintiff was not entitled to social privileges.

5. That it was malicious defamation in that the plaintiff had received no notice of the Panchayat or of the offences charged against him and the defendant was liable

In regard to the question whether the defendant had acted from positive ill-will against the plaintiff, he held that it was not necessary to come to a finding, though he points to the evidence on the subject and adds that there is abundant evidence to show that his conduct had been such as would be consistent with the fact that he was not acting with any good motive or out of a sense of duty to his caste.

The 4th issue was: Has the plaintiff done any act which would justify the Panchayat in passing the resolution of the 19th June 1910? Three grounds are given in the resolution of the Panchayat for the order passed:—

1. That the plaintiff had signed and circulated the leaflet of the 16th May 1910.

2. That he had refused to sign the declaration of faith (called a Chitha).

3. That he and his brother had not appeared before the Panchayat. The Court held that the first was no offence against the caste; that the plaintiff was not guilty of the second as no opportunity had been given to him of refusing and lastly that he was not guilty of contempt of the Panchayat because he was absent from Benares on 19th June 1910 and could not possibly have appeared as notice was only given on that date. In connection with this last finding the Court also found on the 7th issue that the plaintiff and his family were exempt from personal attendance at the Panchayat.

The 8th issue was: Has the plaintiff been expelled from the Biradri? If not, what is the effect of the resolution of 19th June 1910? The Court held that the plaintiff was virtually *finally* expelled from the caste because *one of the conditions laid down for his re-entry was impossible of fulfilment.* Having found this, the Court in its judgment points out that the plaintiff ought to have demanded a meeting of the Panchayat as the resolution left him a loophole to come in (presumably into caste) if he liked.

The 9th issue was:—Whether the defendant published maliciously the words of the resolution complained of? On this point the judgment runs thus:—"It was the duty of the Chaudhri to publish the resolution and there is no malice in such publication. The legal malice consisted in not giving an opportunity to the plaintiff to defend himself and in passing that order behind his back. The publication of the order cannot be called malicious."

Issue 10th was: Whether there was any notice given to the plaintiff of the meeting of the Panchayat? The Court found that the defendant gave notice to the plaintiff in the usual manner, *i. e.*, according to the custom of the caste a barber was sent to the registered family address; but it held that that notice was legally insufficient because the plaintiff was himself the accused and ought to have had a proper opportunity of defending himself.

On the 11th issue the Court held that the resolution of the 19th June 1910 was not communicated to the plaintiff, but that it was not the defendant's duty to send it to him and that the plaintiff showed his utter disrespect for the defendant Chaudhri by sending to him a registered letter and demanding a copy. The issue, in our opinion, was an unnecessary one.

On the 12th issue the Court found that the plaintiff was absent from Benares on the 19th June 1910; that B. Bhagwan Das, his brother, was absent from Benares on that date; but it did not come to a clear finding as to whether or not he (Bhagwan Das) had returned from Ghazipore at the hour when the Panchayat met; it held that B. Sita Ram, a third brother, was present in Benares but was not aware of the

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Panchayat; that though for ordinary purposes, the notice of the meeting issued was sufficient still in the present case as there was a personal charge against the plaintiff, personal notice should have been given.

On the 13th issue the Subordinate Judge held that the plaintiff had a cause of action (but only a sentimental one) in that he had been outcasted.

The 14th and 16th issues (of which the former was unnecessary and really included in the latter) related to the amount of damages, and the Court held that in the circumstances the plaintiff was entitled to only nominal damages which, after deciding the 15th issue, it finally assessed at Rs. 220. It decreed the claim to this extent.

The judgment ends with an expression of thanks tothe learned Advocates and Vakils for their help and assistance in the case during a protracted trial lasting several months. We would point out that the trial was quite unnecessarily protracted. The Court and the parties seem to have treated the case as a struggle on the question of the validity or invalidity of a sea voyage in the eye of Hindu religion and law. The battle raged chiefly round this point and a mass of evidence relating thereto was brought upon the record and two-thirds of the judgment devoted to it. The facts of the case as stated above and the pleadings of the parties show that the issue did not arise and there has been a considerable waste of public time and money in the hearing of the case.

The defendant has appealed against the decree.

The plaintiff has filed objections claiming the balance of Rs. 11,000, which the lower Court has disallowed, and also pointing to an error in the costs calculated in the lower Court's decree as due to him.

In regard to these objections we would point out that they were not pressed. No attempt was made to point to any special damage incurred and the learned Advocate for the respondent said that he left the amount of damages entirely to the Court.

In regard to errors of calculation in the decree, they will be corrected when the decree of this Court is drawn up.

In regard to the defendant's appeal it is necessary to first arrive at clear and definite conclusions as to the actual facts before we can decide as to the liability or otherwise of the defendant for the damages claimed. *Prima facie* to say that a man has been outcasted is to defame him. The libel, of which complaint is made in this suit, is the communication by the defendant made in *writing* to Babu Krishna Chandar, Chaudhri of the Pacham section, that the Panchayat of the Purbia section had resolved that as long as B. Gobind Das did not come and get his position cleared, so long would social dealings with the family of Babu Madho Dass be stopped (*vide* plaint paragraphs 7 and 8.)

The first question for decision is whether or not there was a genuine meeting of the Punchayat duly convened according to the custom of the caste or whether there was only a bogus meeting consisting of only a few friends of the defendant. If the latter be the true fact, then it is clear that the communication made by the defendant must have been false to his knowledge and his liability clear beyond question.

The Court below has held, and we fully agree with it, that there was a genuine meeting of the Panchayat duly convened according to the custom of the caste. It is unnecessary, as we agree with the Court below, to go at length into the evidence on the point. That the community was really in twain over the question of Lala Lachmi Chand and the attempt to take him back into caste admits of no doubt; that the plaintiff and certain others had issued the leaflet of 16th May 1910 is an admitted fact, and the evidence leaves it beyond doubt that what we have designated the declaration of faith had been circulated for signature. There was not and could hardly have been any secrecy in the matter. The evidence of the barber and the defendant and his witnesses as well as that of Babu Baleshwar Pershad, late Secretary to the Board of Revenue, shows clearly that it was a regular Panchayat duly convened by the defendant according to the custom of the caste. The plaintiff has attempted to attack the regularity of the convention by alleging that the defendant is not a legally appointed Chaudhri but only a self-constituted Chaudhri, and by claiming that notice of the Panchayat ought to have been sent to him and his brothers separately at their separate residences (which admittedly was not done). On the first point he has

not been supported by his own witnesses, *e.g.*, Narain Dass and Vidya Nath Das. Another witness has also admitted that the order passed against the plaintiff was passed by the Chaudhri with the consent of the Biradri in general. In our opinion there can be no doubt that the defendant is the Chaudhri of the community for the Purbia section and duly recognised and acknowledged as such.

In regard to the notice of the Panchayat it is proved beyond doubt that in the customary way a barber was sent round to the registered addresses of the families which constitute the community. The plaintiff and his brothers are the sons of B. Madho Das. The defendant's evidence (and it does not stand alone) shows that their family is registered in the Panchayat's list as the family of B. Madho Das, the registered address of which is "Lakhi Chabutra, Benares," and that notice was given at that house by the witness Mahadeo Barber to one Debi Prashad, also a member of the caste, who is the agent of all the brothers. The plaintiff did not dare to put Debi Prashad into the witness-box, but he pleaded that as he and his brothers are now all separate and live in separate houses, separate notices should be sent to each of them. In the first place he has to admit that though the brothers may not be, strictly speaking, members of a joint Hindu family, inasmuch as they have specified their shares, still their business and affairs are carried on jointly and that Debi Prashad is a joint servant and manages their joint affairs at Lakhi Chabutra, a house which is the joint property of the brothers and is the old family residence. In this respect we would refer to the evidence of B. Baleshwar Prasad again where at the bottom of page 3 of the appellant's book he tells how his own family is treated in this matter. He and his brothers are actually separate in business and residence, but in "Biradri" matters are treated jointly, the family standing in the Chaudhuri's list in the name of his father and grandfather. The barber when going round to give notice calls at the family home in which the witness' younger brother alone lives. "Bhaji presents (he says) can be '*one*' even if the members of the family are separate." This is the evidence of the plaintiff's own witness, a man of good position who lately held a responsible, good post. Part of the plaintiff's own evidence (*vide* page 95 of the respondent's book) also strongly points to the correctness of this evidence. It also shows how the house at Lakhi Chabutra was used at times for general family purposes. See also the evidence of his brother Sita Ram. We have no hesitation in accepting the defendant's evidence and holding that the Panchayat was a real *bona fide* convention of the Purbia section of the caste duly and regularly called according to custom. We would point to the fact that the Pacham section also met that same evening for exactly the same purpose. The plaintiff's plea that it was a bogus meeting of a few of the defendant's friends falls to the ground.

2. That the resolution to temporarily exclude the plaintiff's family from social intercourse until he and his brother appeared before, the Panchayat to clear themselves, was passed is equally beyond doubt. It is not so much the plaintiff's case that no such resolution was passed as that it was a bogus and not a genuine Panchayat which passed it. That the defendant did publish it is also an admitted fact. He has pleaded that it is his duty to publish all such resolutions to the members of his section and to the Chaudhris of the other section. That this is his duty is not seriously contested before us. It is proved not only by the evidence of himself and several of his witnesses but also out of the mouths of some even of the plaintiff's own witnesses, *e.g.*, Vidya Nath Das and Babu Baleshwar Prashad already mentioned above and Babu Moti Chand. The first in his cross-examination says: "The order passed by the Panchayat of our sub-division is communicated to the Panchayat of the other sub division and the Chaudhri informs the members of his sub division.

In this respect also the Court below has held "that it was the duty of the Chaudhri to publish the resolution complained of and there is no malice in such publication."

3. The third question is whether the defendant throughout this matter has acted *bona fide* or from some improper motive. It is the plaintiff's case that some ten years or more prior to this suit the defendant's brother was prosecuted for a technical breach of the Municipal rules. He had apparently omitted to inform the Municipal authorities of the death of the person in whose name the family house had been registered by the Municipal Board. The case was sent for trial to the Bench of Honorary Magistrates, and

BISHAMBAR DAS v. GOBIND DAS.

it came before a Bench of which the plaintiff was a member. It is admitted that the defendant's brother admitted the breach of the rules and was fined the small sum of Rs. 5. The plaintiff states that the defendant approached him and he asked him to acquit the brother, but he replied that it was impossible to decide the case otherwise than honestly. This, it is urged, gave great umbrage to the defendant.

In regard to this we would point out that the defendant admits that there was such a case and that his brother pleaded guilty, but he totally denies on oath that he ever approached the plaintiff on the subject. The matter was a very trivial one, a breach (and that only a technical one) of Municipal rules to which no stigma of moral turpitude attached in any way, and in respect to which the accused admitted his fault. We fail to see that there was any sufficient ground for any person even to approach *one* member of a Bench of Magistrates to secure an acquittal and we have grave doubts as to the truth of this allegation.

Next the plaintiff states that the feelings of the defendant began to be inimical to him when he (the plaintiff) gradually ceased to give help financially to the Chaudhris. In cross-examination he reduced this general statement to this that he used to pay a sum of money monthly to one Ganesh Das Chaudhri and he admitted that he had not paid money at any time to any other Chaudhri. He had to admit that his account books could show no entry of any such payment; that the son of Ganesh Das, one Sarju Das, had had a running account with him and that there "might" have been a partnership between his father and Ganesh Das in some transactions; that he had sued Sarju Das on his account (when he, Sarju Das, went over to the opposite party), and that he lost his suit on a point of limitation. It is not clear why all this should have roused feelings of hostility in the breast of Bishambar Das, the present defendant, except that he has succeeded Ganesh Das and Sarju Das in the office of Chaudhri and Ganesh Das, no doubt, was his uncle ut was entirely separate from him and he was not in any way financially affected. In his cross-examination the plaintiff has given Chaudhris in general and one deceased Chaudhri in particular a very bad character, accusing them of using their position and power to extort money from members of the caste on threats of expulsion, and he charges the defendant with rage in that he knew that he could not extort money from him (the plaintiff). A witness has been called to state that the defendant had asked him what he was going to get out of the matter when there was a talk of settling the dispute over the question of excommunication on the sea voyage question. In the state of bitter feelings which evidently exist between the two parties we cannot place any trust on such vague evidence. There is nothing in the evidence to cause us to believe that the defendant personally ever used his position to extort money either from the plaintiff or others. The sins of Ganesh Das and his son Sarju Das cannot be rested on the defendant's head.

Next there is the matter of what is called the Sauri affair which the plaintiff states occurred some years after the conviction of the defendant's brother in the Municipal matter. According to the plaintiff he had unwillingly performed a ceremony too early in respect to his daughter-in-law who had been confined, and there was a meeting of the caste and an order of excommunication was passed against his family. This led to a split in the community, many of the members of which were against the unjust order passed in the matter. This led to the formation of what might be called the "Purbia Panch Bhais." At that time Sarju Das was the Chaudhri and not the defendant, but it is the plaintiff's case that the latter was at the bottom of it all and that his own father and others asked him to apologise to the defendant and all would be well. This he refused to do. The split continued for some years, but finally the matter was either settled or compromised itself and the Purbia Panch Bhai community became dormant or ceased to exist shortly before the present dispute arose in the caste. In regard to the excommunication order passed over the Sauri matter, the defendant has sworn that he was, as a matter of fact,

not in Benares when it was passed and had no hand in passing it. He may have taken sides in the matter and probably did do so, supporting the party which stood out for strict observance of all rules. The plaintiff, who is a man of advanced ideas, thinks nothing of the formalities which are observed strictly by members of the old school. At the utmost this matter was a dispute very much like the present one over the question of sea voyage, though not of such general importance to the community. It evidences the clash of ideas between the progressive and the conservative parties in this as in other communities. It is hardly evidence of enmity and ill-feeling. It has been attempted to show the state of defendant's feelings by the production of a few witnesses who have stated that the latter boasted to them of what he had done and that he had done it out of revenge. Kalka Prasad, a Khatri by caste, has stated that the defendant had told him that he had had his revenge on Gobind Das, and when questioned refused to state what the old enmity was. The witness is a man of by no means great position and is considerably indebted. No other witness has been called to support his statement and Bishambar Das has denied the truth of it on oath. His, Kalka Prasad's, evidence (*vide* his examination-in-chief) is vague and wanting in detail and singularly unconvincing. He pretends to be a friend of the defendant, but his cross-examination shows that he has fully identified himself with the plaintiff and his party.

The witness, Narain Dass, the plaintiff's own first cousin, also states that the defendant said to him: "I have to day wreaked old vengeance upon B. Gobind Dass and have excommunicated him," and that this was uttered in the presence of others just after the Panchayat. The witness cannot give the names of the others who were present and no other witness is called to corroborate him. This witness also would have us believe that the defendant used to openly say that the plaintiff in his pride at being an Honorary Magistrate had fined his brother Rs. 5 without any reason and that God would some day give him an opportunity of taking his revenge. The witness is one of those who signed the declaration of faith though he says he did so because he feared excommunication if he refused. The fact that he signed it and even amended its wording shows that the matter was not a secret. This evidence does not impress us favourably. It is easy for a witness to make statements of this sort and leave little scope for cross examination, as no other witnesses are called to corroborate him. This witness, though he testifies that the Sah family, *i.e.*, his and the plaintiff's family, are exempt from the Panchayat, states that he does not know whether or not matters relating to the brotherhood are decided by the Panchayat. In fact he stated that he did not know what a Panchayat was, an obvious untruth. When asked if he had actually attended the very Panchayat in question at the house of the defendant, he said he could not remember. He says he thinks he went to the house of Rai Krishnaji, where the Panchayat of the Pacham met, to see the fun. He pretends that he does not know the meaning of the term "*khaij*" and that he is not a friend or enemy to the plaintiff. He says in his evidence that he has been on bad terms with his cousin for seven years because of the Chaudhri, yet pretends that he has recently been attempting to obtain wives for the plaintiff's sons. No one who reads the evidence of this man in cross-examination could for a moment designate him a straightforward, candid witness on whose word any reliance could be put.

The third witness on this point is one Sankata Prasad, a Khatri. He is a person who has been working jointly with the plaintiff in advocating broad views on social matters, and his story is that the defendant once, some nine or ten months before his evidence was given, exultingly told him that he had excommunicated the plaintiff who had in consequence become infamous ("*nakku*"). He is the sole witness to the fact. His evidence is of little value to show that in this matter the defendant had been moved by feelings of ill-will and malice. The defendant has denied on oath the alleged conversation. The plaintiff's brother, Sita Ram, does not testify to the alleged enmity. The other brother, Bhagwan Das, however, mentions the fining of the defendant's brother and the dispute over the Sauri affair and alleges that his own deceased Gumashta, Ganesh Das, had told him that the defendant was annoyed because the witness' family did not show

proper submission to him and make presents to him as to previous Chaudhris. This latter portion of his evidence was quite inadmissible.

Another method in which the plaintiff has attempted to show the bad faith of the defendant is the adducing of a good deal of evidence to show that some twenty-five years or more ago, the defendant himself in his younger days held broader views on the subject of the sea voyage in that he used to dine not only with Nanne Babu but also with Musalmans and others. Even granting this we fail to see that it shows bad faith on the defendant's part in the present matter. It is open to a man to change his views in perfect good faith as many a celebrated man has done before, and we cannot accept this fact, even if true (it has been totally denied by the defendant), as indicating that in the present dispute the defendant has been actuated by some ulterior motive or by personal ill-will towards the plaintiff and his family. The evidence does not convince us that the defendant has been actuated by ill-will arising over the fining of his brother (a very old and trivial circumstance) or because he has not been subsidized as Chaudhri by the plaintiff's family. The alleged subsidizing of former Chaudhris, the relatives of the defendant, has by no means been established. The fact that the defendant in the Sauri dispute took a view hostile to the plaintiff's interest is not a sufficient indication of ill-will, for it is clear that the caste was divided on the point.

But it is urged that the defendant has shown considerable bias in his conduct of the present dispute in the caste which indicates the state of his feelings; that the plaintiff and his family are exempt from all appearance before the Panchayat; that it was the defendant's duty as Chaudhri either to attend in person on the plaintiff or to depute some one else to take his answers to the charges preferred against him, that he not only did not do this but did not even give the plaintiff an opportunity of appearing before the Panchayat to answer the charges. This brings us to the question of the alleged exemption and whether the defendant has been guilty of any breach of duty in the matter in his capacity as Chaudhri.

The Court below has held that the alleged exemption has been proved *prima facie* from the very nature of the constitution of a caste, every member whereof is subject to the authority of a Panchayat and would be bound to appear either in person or by a representative to answer any charge of a caste offence brought against him. The plaintiff's plea is that all members of the Sah family are exempt from attendance to answer a charge. He says, "I have no first-hand knowledge of Panchayat procedure." Further on he says: "I have been told that when a member of the Sah family is accused, then either the Chaudhri himself comes over or sends a duly accredited representative from the Panchayat or sends a letter to make inquiries and get an explanation. It has never happened to me so. I can give no instance. I heard this from my elders. I heard this from my father and from the late Chaudhri Ganesh Das Khazanchi, who used to be a constant visitor at my father's (house).....My father told it me several times during the last thirty years."

He, nowhere in his evidence, gives any reason for this exemption and in the plaint the only reason given is that it has arisen by reason of the high status of the family. It is nowhere explained why or how the family has such a high status. It is wealthy no doubt, but in this country a family may be of "high status" even though it be comparatively poor. The basis for the plaintiff's knowledge is that his father and Ganesh Das told him and that Ganesh Das used to visit his father. His brother, B. Bhagwan Das, has also stated that Ganesh Das used to consult his father in caste matters. This Ganesh Das is the Chaudhri to whom the plaintiff has given so bad a character and who had money dealings in the way of business with his father.

An examination of the evidence of the plaintiff's witnesses on the point will show that they have stated merely that the exemption is well-known and that they have heard of it. B. Baleshwar Prasad has stated that he thinks he heard of it from the plaintiff's father. None of them can give the cause of exemption nor do they attempt to state how or when it arose. No resolution of the community on the subject is quoted and there is no documentary evidence on the point. Vague evidence of this description

is of no value. The lower Court has not attempted to discuss the nature of this evidence. It contents itself by saying that the volume is large and outweighs that given by the defendant, even that of one member of the Sah family itself, who has testified that there is no exemption. Their non-attendance does not give a right to exemption nor could the subservience of Ganesh Das Chaudhri on his mere dictum do so. As for its being the duty of the Chaudhri to attend upon the accused member of the Sah family and take his explanation there is a still less feeble basis for such an assertion. No rule or order of the caste is quoted and no instance.

On 8th July 1910 the plaintiff and his brother sent a registered letter to the defendant after the decision of the Panchayat. In it they asked what explanation was required from them and where and when and in whose presence they were to submit it. There is no complaint that they were exempt from appearance and that the Chaudhri had failed in his duty in not attending on them and taking their explanation. In our opinion the so-called exemption has not been established nor has it been satisfactorily established that the Chaudhri has failed in his duty in this respect.

Next comes the question as to whether the plaintiff had an opportunity of appearing before the Panchayat and whether in this respect the defendant has acted in an irregular and improper manner. The plaintiff has, it must be remembered, treated the Panchayat as a bogus meeting of the defendant's friends, but we have held that it was a genuine Panchayat duly and regularly called.

There can be little doubt that on the date of the Panchayat the plaintiff himself was not in Benares and could not personally have attended it. His brother Bhagwan Das had gone to Ghazipore on that date, but could easily have returned that same evening. It is alleged by witnesses that he had returned and was in a neighbour's house while the Panchayat was being held. He has not denied that he did return to Benares that evening. The Panchayat lasted from about 8 P. M. till past day-break the next day. Babu Sita Ram, the third brother, was in Benares on that day. He has stated that he received no information of the meeting. It is difficult to believe this. It is proved to our satisfaction from the defendant's evidence and that of Mahadeo barber that the latter was sent round in the morning to the registered address at Lakhi Chabutra and that he gave full information to Lala Debi Prashad, the family Gumashta. It is clearly proved that Lala Debi Prashad attended the Panchayat. Though he is the plaintiff's own servant he has not been called to state that no such notice was given. We have no hesitation in holding that it was given and no doubt that B. Sita Ram knew of the meeting and it is probable that Bhagwan Das was informed of it on his return.

The plaintiff pleads that notice ought to have been separately sent to him. The question is whether the defendant acted in bad faith and in an irregular manner. The evidence of the plaintiff's own witness B. Baleshwar Prashad shows that he acted in accordance with the regular custom and gave notice at the family residence. The community deals with the families which constitute it and a list is maintained of families with their addresses, and no irregularity or bad faith in this respect is established.

In the result we hold that the defendant is not shown to have been actuated by any ill-will or ulterior or improper motive, that he has acted in good faith in the execution of his duty as a Chaudhri according to the recognised rules and customs of the community, that the resolution of the Panchayat was passed by a meeting of the community duly and regularly convened and that in communicating the resolution to others in fulfilment of his duties as Chaudhri the defendant made a statement that was true in fact.

But it is urged on behalf of the plaintiff that the order of *amanat* or temporary exclusion from social intercourse was quite illegal, in that the plaintiff had not committed any caste offence and the Panchayat had acted contrary to natural justice, in not giving the plaintiff an opportunity of defending himself, that, therefore, the expulsion being illegal, plaintiff was still legally in caste and to say that he had been expelled was to defame him, and though the defendant may have acted in good faith still he

had published the defamatory statement and was legally liable in damages to the plaintiff.

In regard to whether the charges preferred against the plaintiff at the Panchayat are or are not caste offences, *i.e.*, whether the Panchayat would have jurisdiction to expel from caste one who had been guilty of them, we are unable to hold that they were matters outside the jurisdiction of that body. They were two in number, (1) that the plaintiff had in conjunction with others issued the leaflet of the 16th May 1910 and (2) that he had refused to sign the declaration of faith.

The former the Panchayat looked upon as bringing the community into disgrace in the public eye in that it imputed that it mixed socially with persons who were unfit to remain in caste.

In regard to the latter, there was a momentous question for decision, some members wished to follow one rule and some, the other. Declarations of faith had been circulated by both sections of the community. They contained the views of the old orthodox party. Those who refused to sign it were of the opposite view and the community had to see which view it would accept. That it was a vital and important matter and closely concerned the social affairs of the community no one can doubt. It is still a burning question in many of the caste communities in India to-day. If a majority of the caste wished to adhere to the old view it clearly was open to them to refuse to mix socially with those who refused to follow the rule laid down by the Panchayat for the conduct of its members in this matter of sea voyage. It is a social question closely concerning the community and one well within their jurisdiction. It is pleaded that the plaintiff was not guilty of either charge, in that he had no intention of bringing the community into contempt in the public eye and because he had had no opportunity of signing the declaration of faith. He has admitted that he would not have signed it even if it had been put before him. Evidence has been adduced by the defendant of witnesses who state that they took it to him for signature and that he refused. Be that as it may the Courts of this country have always refused to interfere with the autonomy of the caste, provided that it does not act in a manner contrary to natural justice and we do not propose to sit as a Court of Appeal from the decision of a Panchayat on the pure question of fact before it. The Courts cannot interfere, provided the matter was one within the jurisdiction of the Panchayat and the latter has not acted in a manner contrary to natural justice. We find it impossible to hold that the Panchayat had no jurisdiction to consider the conduct of the plaintiff and his brother in the matter.

The lower Court has held, and we agree, that notice was issued according to the rule and custom of the caste to the family of the plaintiff, and that B. Sita Ram at least could, according to the rules of the Panchayat, have attended and represented the family and applied for an adjournment pending the plaintiff's return. It, however accepted Sita Ram's statement that he received no information. With this we are unable to agree. It is impossible to believe that he was ignorant of the fact that both sections of the community were meeting that evening of the 19th June 1910. There can be no doubt that the barbers had been sent round and that Mahadeo had delivered his message at the family house.

The Court below, however, has held that even assuming that B. Sita Ram was well aware of the meeting, though the rule of the Panchayat which deals with family units and not with individual members of a family, is a most reasonable and practical rule and a notice to any member of the family is sufficient for ordinary purposes, still in the present case a particular member of a family was accused of having done wrong and personal notice should have been served on him.

The learned Subordinate Judge loses sight of the fact that in all cases it is some one or more particular member or members of a family who are guilty of a breach of rules or of caste offence and that in each case it is the family which is called upon to explain the actions of its members. The Panchayat deals with the family as a unit and any member of the family can appear on its behalf and defend. It is difficult to say that this procedure is contrary to natural justice. In the present case it is

not the plaintiff personally with whom social intercourse has ceased. It is the family of B. Madho Das.

The lower Court has held that by reason of this absence of personal notice to the plaintiff, the proceeding was contrary to natural justice and the order, therefore, illegal and improper. I thas gone into the question of the plaintiff's guilt or innocence and has found him innocent. It has held that the order of "*amanat*" is really a permanent exclusion from caste, because one of the conditions on which the caste has agreed to take back the plaintiff's family is impossible of execution. It has concluded that the plaintiff having been illegally excluded from caste, the defendant has been technically guilty of malice and libel and has awarded a trivial sum as damages.

Now the communication made by the defendant to the members of the caste was that the Panchayat had resolved that until B. Gobind Das and his brother did appear before the Panchayat and explain their conduct, all social dealings with the family of B. Madho Das should be suspended.

This on the face of it is nothing more than a temporary conditional order of suspension. It admits the right of the plaintiff to be heard in his defence. We have seen the attitude which the plaintiff and his brothers have taken up towards the Panchayat and its authority by their claim for exemption from attendance.

The above resolution was passed on three grounds:

(1) because the plaintiff and others had signed and published the leaflet of 16th May 1910 among members of this and other castes, (2) because no appearance had been made on their behalf or by them though notice had duly issued, (3) because they had failed to *sign* the declaration of faith.

The Panchayat had before it evidence of the service of notice and that Sita Ram was present in Benares, *i.e.*, that an appearance could have been made. It, no doubt, considered that its authority was being flaunted and it temporarily suspended the family pending the appearance of the plaintiff and his brother before the Panchayat to explain their conduct. There was no denial of justice in this. As the lower Court has pointed out and as the evidence proves, (even of the plaintiff's own witnesses) the plaintiff could have demanded an immediate convention of the Biradri and placed his case before them. The resolution distinctly contemplates this. But this he did not attempt to do. He sent a registered letter ostensibly asking what the charges were and to whom and at what time and place he had to submit his explanation. This was placed before the Punchayat which decided that no reply should be sent to it as the plaintiff and his brother could, if they liked, appear before the Panchayat. One thing is clear, and that is that the plaintiff and his brother did not intend to submit to the Panchayat.

The Court below has held that the order passed was virtually one of complete expulsion because one of the conditions for reinstatement was impossible of fulfilment. It refers to an incident mentioned in the evidence of the witness, Colonel Bindeshri Prashad Singh, Chief Secretary to the Maharaja of Benares, who was deputed by his Master to try and bring the parties to terms. Certain members of the caste, of whom the defendant was one, met him and discussed the matter. It was not a meeting of the Panchayat. Feelings apparently ran high and one person present suggested that the plaintiff would be forgiven if he vowed not to eat with those of the caste who had gone to England and if the marriage contract between the daughter of B. Bhagwan Das and the son of Rai Bahadur Ramnaj Diyal were broken off. It is this latter condition which could not be fulfilled. But this was not a condition laid down by the Panchayat. It was the suggestion of one member and it cannot be said that the Panchayat's decision had been in any way amended or altered by this suggestion made by a single member at an informal meeting between a few members and the Colonel. The matter has not, as a matter of fact, been yet placed before a Panchayat. The first resolution was, no doubt, passed because the family of Madho Das had been guilty of contempt of the Panchayat by not appearing but it distinctly, as we have already said, offered an opportunity to the plaintiff to appear and defend and the lower Court has distinctly said that it would have been wiser and better if he had demanded a fresh meeting of the Panchayat.

We are unable to hold in the circumstances that the Panchayat acted contrary to natural

justice and that, therefore, the temporary exclusion from social dealings was a permanent exclusion or an illegal order and that the defendant in publishing the order, in execution of his duties as Chaudhri, has rendered himself liable to damages for libel or defamation. We have already held that he has acted throughout in good faith. We, therefore, hold that he is not liable to the plaintiff in damages.

While we sympathise with the plaintiff in his attempt to broaden the views of his fellow castemen and to improve his caste socially and mentally, we consider that the present suit was misconceived unless it was his main object (which it appears to have been) to get the pronouncement of the learned Subordinate Judge, who is a Sanskrit scholar of great reputation, on the vexed question of sea voyage. If this were his object he has attained it at the cost of a great deal of public time and money. It was an issue that did not arise in the case.

We allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts including in this Court fees on the higher scale.

The objections are disallowed with costs including fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1003 OF 1912.

November 12, 1913.

Present:—Sir Arthur Reid, Kt., Chief Judge.

ISHAR—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL COMMITTEE, LAHORE—DEFENDANT—RESPONDENT.

Punjab Municipal Act (XX of 1891), s. 38—Declaratory suit against Municipal Committee—No notice necessary.

The previous notice of one month, required under section 38 of Act XX of 1891, is not necessary for bringing against a Municipal Committee a suit for a declaration that the plaintiff is the owner of a certain plot of land and the Municipal Committee who refused the plaintiff permission to build on it alleging that it was their property had no right to do so.

Patel Panachand Girdhar v. *Ahmedabad Municipality*, 22 B. 230; *Kashi Nath Keshav Joshi* v. *Gangabai*, 22 B. 283; *Manohar Ganesh Tambekar* v. *Dakor Municipality*, 22 B. 289; *Harilal Ranchodlal* v. *Himat Manekchand*, 22 B. 636 and *Municipality of Porala* v. *Lakshmandas*, 25 B. 142; 2 Bom. L. R. 857, followed.

Second appeal from the decree of the Divisional Judge, Lahore, dated 15th April 1912, reversing that of the Munsif, 2nd Class, Lahore, dated 19th December 1910, decreeing plaintiff's claim.

Lala *Hukam Chand* and Khwaja *Zia-ud-Din*, for the Appellant.

JUDGMENT.—This is a suit for a declaration that the plaintiff-appellant is the owner of a certain plot of land and that the Lahore Municipal Committee, who refused the appellant permission to build on it, alleging that it was their property, had no right to it. The lower Appellate Court held that the suit was barred by section 38 of the Punjab Municipal Act, 1891, notice of suit not having been given to the Municipal Committee, *Patel Panachand Girdhar* v. *Ahmedabad Municipality* (1), *Kashinath Keshav Joshi* v. *Gangabai* (2), *Manohar Ganesh Tambekar* v. *Dakor Municipality* (3), *Harilal Ranchodlal* v. *Himat Manekchand* (4) and *Municipality of Parola* v. *Lakshmandas* (5) are authority for the contention that section 38 does not apply to this suit, and no authority to the contrary has been cited. The Pleader for the Municipal Committee, indeed, has not taken the trouble to appear, though the appeal was not called on until after eleven o'clock.

The slight difference in the terms of section 38 and the corresponding section of the Bombay Act considered in the rulings does not affect the decision.

I decree the appeal, set aside the decree of the lower Appellate Court and remand the appeal under Order XLI, rule 23, for decision in accordance with law.

Court fee on the memorandum of appeal will be refunded and other costs of this Court will be costs in the cause.

Appeal accepted.

(1) 22 B. 230.
(2) 22 B. 283.
(3) 22 B. 289.
(4) 22 B. 636.
(5) 25 B. 142; 2 Bom. L. R. 857.

FAKIRA MAHTON *v.* LEAKUT HOSSAIN.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 865 AND 1046 TO 1084 OF 1911.

January 27, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

FAKIRA MAHTON—PLAINTIFF—APPELLANT

versus

LEAKUT HOSSAIN—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 54, 106, 107, 116—Lease from year to year—Successive leases for one year each, difference between—Oral lease for one year accompanied with delivery of possession—Subsequent one year's oral leases, if valid—Possession, when lessee already in possession, transferable—Registration.

In 1313 a valid lease was given to the plaintiffs, being an oral lease for one year accompanied by delivery of possession. After the expiry of the year temporary settlements for one year each were given for some years including 1316. The plaintiffs brought a rent suit against certain *raiyats*:

Held, that although the result of the successive leases may be very similar to the ultimate effect of a lease from year to year for the whole period, yet a series of successive leases for one year each is quite different from a lease from year to year, inasmuch as successive leases for one year each are terminable without notice and are not registrable while a lease from year to year is only terminable by six months' notice and registrable; that if the subsequent leases are invalid owing to possession not having been given to the lessees as they were already in possession, yet the lessees remaining in possession with the assent of the lessor after the expiry of the valid lease for 1313 became lessees from year to year under section 116 of the Transfer of Property Act; and that the plaintiff would be entitled to recover.

Sibendrapada Banerjee v. *Secretary of State for India in Council*, 34 C. 207; 5 C. L. J. 390, doubted.

Kannan v. *Krishnan*, 13 M. 324, approved.

Appeal from the decrees of the District Judge of Bhagalpore, dated December 21st, 1910, reversing those of the Munsif of Jamui, dated July 30th, 1910.

Dr. *Rash Behary Ghose* and Moulvi *Muhammad Ishfaq*, for the Appellant in No. 865 only.

Moulvi *Muhammad Ishfaq* and Babu *Chandra Sekhar Pershad Singh*, for the Appellant in Nos. 1046 to 1084.

Babu *Gonesh Dutt Singh* for Moulvi *Syed Enayet Karim*, for the Respondent in No. 865.

Moulvi *Syed Enayet Karim*, for the Respondents in Nos. 1054 and 1055 only.

Babu *Biraj Mohun Majumdar*, for the Deputy Registrar, the guardian of the minor Respondents.

JUDGMENT.

COXE, J.—These appeals arise out of suits for rent. The plaintiffs claim to be the landlords of the whole property. With regard to two annas of it they say that they are *thikadars* under one Nisar Ali Khan who leased it to them for the year 1316, which is the year in suit, by a verbal agreement and that "previous to this also, temporary settlements for one year all along used to be obtained from the *motwali* under a verbal agreement." The words "all along" mean, we are informed, the period from the year 1313. The Munsif found that a "*thika*-lease" of these two annas had been given to the plaintiffs for the year 1313. But he held that it was invalid because it was not accompanied by delivery of possession, and that there was no delivery of possession because the plaintiffs had been in possession of this interest of two annas from a long time before. The plaintiffs appealed to the District Judge on the ground that the finding of the Munsif that the lease was invalid was incorrect. But the learned District Judge agreed with the Munsif on the strength of the decision of *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1). It was held in that case that section 54 of the Transfer of Property Act must be construed strictly and that it could not be presumed that there was any delivery of property when the vendee had been in possession of it for a long time before the date of the sale. It has been argued before us that that was a decision under section 54 and has, therefore, no application to the present case which comes under section 107 of the Transfer of Property Act, 1882. But, in my opinion, there is no real or substantial difference between the terms of the two sections and if the view taken in that decision is right it must be held that the oral lease of the two annas in 1316 was not accompanied by delivery of possession and was, therefore, invalid. This is not the view which was taken by the Madras High Court in the case of *Kannan* v. *Krishnan* (2) and I feel some difficulty in agreeing with the view of the learned Judges of the practical consequences of so strict a construction of the section. It does not appear to me, however, that this decision need

(1) 34 C. 207; 5 C. L. J. 390.
(2) 13 M. 324.

be discussed further, because accepting it as a correct statement of the law, the plaintiffs would still, in my opinion, be entitled to succeed. For, if this lease of the two annas is invalid I do not see how the defendants can escape the effect of section 116 of the Transfer of Property Act. That section provides that if a lessee remains in possession after the determination of the lease, with the lessor's assent, the lease is deemed to be renewed from year to year. This section has, of course, no application when the lessee is holding under a subsisting lease, but when the existing lease goes out then the lessee, if he remains in possession with the assent of the lessor, is entitled to be regarded as a lessee from year to year under the section.

It has been argued that really this was all along a lease from year to year, that, therefore, it could be made only by a registered instrument and that section 116 would have no application. This, however, is not the case. It is stated in the plaint, and appears to be found by the Courts below, that temporary settlements for one year each have all along been given. The result of these successive leases may be very similar to the ultimate effect of a lease from year to year for the whole period, but a series of successive leases is evidently quite different from a lease from year to year. Successive leases for one year each are terminable without notice, but a lease from year to year is only terminable by six months' notice. It seems perfectly clear that in 1313 a valid lease was given to the plaintiffs, being an oral lease for one year accompanied by delivery of possession. Since then if the subsequent leases are invalid the plaintiffs must be regarded as entitled to the benefits of section 116. In this view of the case they are entitled to the whole of the rent and the other question raised by the District Judge does not arise, namely, whether a landlord who sues for the whole rent and fails to prove that he is the 16-annas landlord is entitled to succeed in part. All the other points have been found by both the Courts below in favour of the plaintiffs.

The result is that the appeals and the suits must be decreed with costs throughout.

D. CHATTERJEE, J.—I agree. I think that upon the facts found section 116 of the Transfer of Property Act is a complete answer to the defence.

Appeals accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1103 OF 1913.

November 20, 1913.

Present:—Mr. Justice Chevis.

ACHHAR SINGH—PLAINTIFF—APPELLANT

versus

NIKKU—DEFENDANT—RESPONDENT.

Limitation—Appeal—Failure to file copy of decree—Further time allowed for appeal—Sufficient cause—Limitation Act (IX of 1908), s. 9.

Failure to present a copy of the decree appealed against within the time allowed for an appeal amounts to not filing the appeal at all and time cannot be extended for the purpose of making up the deficiency, particularly when the appellant has already lost the opportunity once granted to him for doing so.

Masum Begam v. *Madan Mohan Lal*, 9 Ind. Cas. 222; 8 P. W. R. 1911, followed.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated 8th February 1913, affirming that of the Munsif, 2nd class, Hoshiarpur, dated 6th November 1912, dismissing plaintiff's claim.

Mr. *Badr-ud-Din Kureshi*, for the Appellant.

Mr. *Nihal Chand Mehra*, for the Respondent.

JUDGMENT.—For the respondent a preliminary objection is raised that the appeal is time-barred, as no copy of the decree has been filed. *Masum Begum* v. *Madan Mohan Lal* (1) is quoted.

Counsel for appellant urges that as the appeal was dismissed by the Divisional Judge at a preliminary hearing as time-barred, it was not necessary to draw up a decree sheet; in fact he goes further and says a decree sheet should *not* have been drawn up. I fail to see why a decree sheet should *not* have been drawn up when an appeal has been disposed of, no matter whether the disposal is on the merits or on a technical point. A decree sheet *was* drawn up in the Divisional Court and when the appeal to this Court was presented accompanied only by copy of judgment and not by

(1) 9 Ind. Cas. 222; 8 P. W. R. 1911.

copy of decree, the office returned the appeal to Counsel with a note that copy of decree should be also filed. The appeal was again presented with the note by Counsel that no decree had been framed. This was quite incorrect, as inspection of the record would at once have shown. In my opinion there has been gross carelessness in not filing a copy of the decree, even after this office had returned the appeal for the purpose, and I decline to extend time for the purpose of filing a copy now.

Following the above quoted ruling I dismiss this appeal as time-barred, but I pass no order as to costs of this appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 100 OF 1913.

February 23, 1914.

Present:—Mr. Justice Ryves.

KESHO DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MORAT PANDEY—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), *s.* 180 (2)(*b*)—*Second appeal to District Judge--Question of jurisdiction.*

A suit was instituted in the Court of an Assistant Collector of the second class. The Collector held on appeal that the suit was triable by a Civil Court, but the District Judge on appeal, overruling the Collector's contention, remanded the case for trial on the merits. On remand the first Court dismissed the suit. The Collector upheld the decree. A second appeal was preferred to the District Judge, but he dismissed the appeal on the ground that no appeal lay as no question of proprietary title or of jurisdiction was raised within the meaning of section 180, clause 2, of the Agra Tenancy Act:

Held, that an appeal to the District Judge lay, as a question of jurisdiction had already been decided at a previous stage of that suit.

Application for revision against the order of the District Judge of Ghazipur, dated the 28th of September 1912.

Mr. *Harendro Kishen Mukerjee*, for the Appellant.

Mr. *Damodar Das*, for the Respondent.

JUDGMENT.—The history of this litigation is fully given in the judgment of Mr. Justice Piggott, dated April 30th, 1912, and I need not recapitulate what was stated there. The suit which had been instituted in the Court of an Assistant Collector of the second class was remanded by the District Judge for trial on the merits, on his finding that the Revenue Court had jurisdiction to try the suit, overruling the Collector who held that the suit was triable by a Civil Court and not by a Revenue Court. A question of jurisdiction, therefore, was decided in the suit. On remand, the first Court dismissed the suit. On appeal, the Collector upheld that decree. From the Collector's decree a second appeal was taken before the learned District Judge. He dismissed the appeal on the ground that it raised no question of proprietary title or of jurisdiction within the meaning of section 180, clause 2, of the Agra Tenancy Act, and that, therefore, no second appeal lay. This application in revision is against that order. It has been argued on behalf of the opposite party that under section 180 ,clause (2) it is necessary that the judgment appealed from should have decided a question of jurisdiction, and as that question had already been decided by the District Judge himself on a former occasion no further second appeal lay to him on the merits. It seems to me, having regard to the marked difference of language between clause (*a*) and clause (*b*) of section 180 (2), that a second appeal will lie in any suit of the kind mentioned in that section to the District Judge, in which a question of jurisdiction has been decided at any time. This was the view taken in the case of *Salamat Ali Khan* v. *Musammat Taba* (Second Appeal No. 513 of 1908) decided by a Division Bench of this Court, which ruling was followed in Second Appeal No. 78 of 1910 decided on the 31st October 1910 by a single Judge of this Court. Although this decisions turns on the meaning to be attached to clause (*f*) of section 177 of the Tenancy Act, I cannot see any distinction in principle which would make them inapplicable to this case. I accordingly allow this application and setting aside the decree of the learned District Judge direct that he restore the appeal to its original number of pending appeals and dispose of it according to law. The costs of this application will be costs in the cause.

Application allowed.

CHURIYAYI KANARAN *v.* THATTARAI CHIRUTHA.

MADRAS HIGH COURT.
FULL BENCH.
LETTERS PATENT APPEAL No. 237 OF 1912.
January 7, 1914.
Present:—Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.
CHURIYAYI KANARAN—PLAINTIFF—APPELLANT
versus
THATTARAI CHIRUTHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Malabar Compensation for Tenants' Improvements Act (Mad. I of 1900), ss. 3, 5—Mortgage by Jenmi—Land leased after mortgage—Improvements by tenant—Compensation on eviction by purchaser.

Where, after mortgaging his land, the mortgagor leases it out to a tenant, and that tenant in the *bona fide* belief that he is in possession as a "tenant" effects improvements on the land, he is a "tenant" within the meaning of that term in section 3 of the Malabar Compensation for Tenants' Improvements Act; and, therefore, is entitled to claim compensation under section 5 of Act I of 1900, even from a purchaser in execution of the mortgage decree who tries to evict him from the land.

Appeal under clause 15 of the Letters Patent, presented against the judgment of the Hon'ble Mr. Justice Sundara Aiyar and the Hon'ble Mr. Justice Sadasiva Aiyar, in Second Appeal No. 1271 of 1911, preferred against that of the District Court of North Malabar, in Appeal Suit No. 361 of 1910, (Original Suit No. 563 of 1909 on the file of the Court of the District Munsif of Tellicherry).

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *V. Ryru Nambiar*, for the Respondents.

JUDGMENT.—The question for decision is whether the defendants, tenants holding under the mortgagor, the 1st defendant, are entitled to get the value of improvements made by them on eviction by the purchaser in execution of the mortgage-decree obtained by the plaintiff. We proceed on the footing that the lease to the defendants is subsequent to the creation of the mortgage. The plaintiff's case is that it was not open to a mortgagor to create any right in derogation of his mortgage. The defendants claim the value of improvements under the Madras Act I of 1900. Section 5 of that Act declares the right of "every tenant" to receive compensation for improvements on ejectment. It is argued that this section entitles the tenant to receive compensation only from his lessor. There is no such restriction in the section itself. The definition of the term (see section 3) shows that it includes persons other than those included in the word as defined in the Transfer of Property Act and includes persons who did not enter into possession under any agreement with, or with the consent of, the person entitled to obtain possession of the property. The Customary Law leaves no doubt on the point.

In Major Watkin's Report on the Land Tenures of Malabar (1801), a recognized authority, it is stated: "Should there be a *paramba* without any *known* owner and a *kudian* (tenant), believing that it was without a master settled on it and made considerable improvements, on the return of the *Jenmkar* or any one producing sufficient proofs that he was the owner of the *paramba*, the *kudian* must in that case, without dispute, accede to the demand, provided the *Jenmkar* pays *kuli Kanom* or the value of the improvements."

Accordingly the 'tenant' according to section (3) includes any person who enters into possession of waste land without the consent of the owner but with the *bona fide* intention of paying the customary rent to the owner when ascertained. Similarly, the holders of lands under *cowles* granted by Government received, before the passing of the Act, the value of improvements on surrendering the land to the *jenmi*: so also tenants holding under invalid *kanoms*, leases or mortgages granted by the *karnavan* when surrendering the lands to the *tarwad*; tenants let into possession by a person claiming *jenm* title on eviction by the person found to be the true *jenmi* of the land also received compensation. The section, accordingly, defines "tenants" to include mortgagees as well as persons who in good faith believed themselves to be mortgagees or tenants. It is clear, therefore, that the defendants, who are in possession as tenants under the mortgagor, are "tenants" within the definition and accordingly entitled to get compensation for improvements on eviction. It is not contended before us that the defendants are entitled to hold possession against the purchaser. The decrees of the lower Courts which direct the sale of the first defendant's interest in the property will be modified by ordering the sale of the property subject to the right

of the defendants to receive compensation for the value of improvements. With this modification the decree is confirmed and the appeal dismissed with costs.

Decree modified.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 28 OF 1910.
March 11, 1914.

Present:—Mr. H. S. Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

HARDANDOSS AND OTHERS—APPELLANTS

versus

RANI MOHORI BIBI AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 2—Offer—Acceptance—Lowest price telegraphed at request, whether offer to sell at that price—Invitation for offer—Completed contract—Specific performance.

In answer to a broker's telegram, "Have likely purchaser your three properties, telegraph lowest price for each," the defendant, the owner of the properties, telegraphed his lowest price for each property and added "reply by tomorrow." Upon receipt of this telegram the broker accepted earnest money for one of the properties and wired back to the defendant informing him accordingly and also asking him to "forward title-deeds". The defendant refused to sell only one of the three properties and at the same time repudiated the broker's acceptance of the earnest money as "without authority:"

Held, that

(1) the mere statement of the lowest price at which the defendant was willing to sell contained no implied contract to sell at that price;

(2) the words "reply by tomorrow" meant that, the defendant wished to be informed whether the broker's purchaser was willing to buy and that if the reply was in the affirmative then the defendant would decide whether he would sell or not;

(3) as the defendant's telegram was not an offer, the broker's reply thereto could not be treated as an acceptance;

(4) even if the defendant's telegram were taken as an offer, it was an offer to sell the three properties collectively and not singly.

FACTS.—The facts of this case are given in the judgment as well as in the judgment of Robinson, J., which is reported as *Handan Dass* v. Rani *Mohori Bibi* (1).*

Mr. *N. M. Cowasjee*, for the Appellant.

Mr. *Ormiston*, for Respondents Nos. 4 and 5.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The appellants sued the respondents to enforce specific performance of an agreement to sell 5th class lots Nos. 9 and 10 in Block D-1 in the town of Rangoon, together with the building thereon known as house No. 8 in 29th Street, for a sum of of Rs. 45,000. Their case is that Raja Shew Bux Bogla, now deceased, and whose representatives the first set of respondents are, agreed on the 18th September 1907, through Messrs. Balthazar and Son, to sell to them the aforesaid properties. The second set of respondents are made parties to the suit as the appellants state that they are informed and verily believe that after the institution of the suit Raja Shew Bux Bogla on the 21st August 1908 by a registered deed of sale purported to transfer the aforesaid properties to the second set of respondents for the consideration mentioned in the said sale-deed. The appellants put the second set of respondents to strict proof of their alleged purchase and assert that prior to their purchase they had notice of the purchase of the properties by them. In the alternative the appellants also asked for damages to the extent of Rs. 15,000 by way of compensation if they were not given a decree for specific performance. This was against the first set of respondents. This alternative claim was abandoned on appeal.

There is no ground for doubting that the properties were sold to the second set of respondents for Rs. 1,21,000 on the 22nd September 1907.

The first point for determination is whether there was an agreement to sell the properties to the appellants on the 18th September 1907. The appellant Paladroy went to Messrs. Balthazar & Son and employed that firm to negotiate the sale for his firm. Shew Bux Bogla not only had the properties in dispute for sale but two others, one being in Pazundaung and the other in Ahlon.

The following telegrams then passed between Balthazar and the firm of Sheo Bux:

1. From Balthazar to Shew Bux dated the 17th September, 1907.

"Have likely purchaser your three properties, telegraph lowest price for each".

2. From Shew Bux to Balthazar dated 17th September 1907.

"Pazandaung 55,000, Ahlon 25,000, No. 9 45,000. Reply by tomorrow."

3. From Balthazar to Shew Bux dated 18th September 1907.

(1) 8 Ind. Cas. 601; 3 Bur. L. T. 17.

* A similar decision of a Division Bench of the Punjab Chief Court is reported in *Bhawan Ram* v. *Sadullah Khan*, 20 Ind. Cas. 282; 169 P. W. R. 1913; 277 P. L. R. 1913.—*Ed.*

"Sold house 29th Street your limit. Received earnest money 5,000, forward deeds."

4. From Shew Bux to Balthazar dated 18th September 1907.

"Cannot sell No. 9 alone. Can sell 3 properties together. See our agent".

5. From Balthazar to Shew Bux dated 19th September 1907.

"Agent has no instructions. Earnest money with us, forward orders."

6. From Shew Bux to Balthazar dated 20th September 1907.

"Received wire nineteenth. Strange you have accepted earnest money without authority. Can't confirm sale, letter follows".

The telegrams passed between Rangoon and Calcutta.

On the authority of the case of *Harvey* v. *Facey* (3) the learned Judge on the Original Side has held that these telegrams do not amount to an agreement to sell the house and land in 29th Street and it is urged that he is wrong. I am unable to see that he was and the circumstances of the present case seem to me to be even stronger than the circumstances in the case of *Harvey* v. *Facey* (3) for holding that there was no completed contract for sale. The first telegram does not ask specifically whether Shew Bux will sell. It merely says: "Have likely purchaser your three properties." It then goes on "telegraph lowest price for each". Shew Bux did so and then says: "Reply by tomorrow." It is urged that there is special virtue in the words: "Reply tomorrow," and that Shew Bux's telegram is a firm offer to sell limited to time. I am unable to see that it was such an offer. It was a reply to Balthazar's telegram asking for telegraphic information as to the lowest price for each property. The words "reply by tomorrow" clearly mean that Shew Bux wished to know by the morrow whether Balthazar's likely purchaser decided to buy. Then, if the reply was in the affirmative, it would be for Shew Bux to finally decide whether he would sell or not. In the words of their Lordships who decided the case of *Harvey* v. *Facey* (3) I cannot treat the telegram from Shew Bux giving the lowest price for each property as binding him in any respect except to the extent it does by its terms, *viz.*, the lowest price. Everything else is left open and the reply telegram from Balthazar cannot be treated as an acceptance of an offer to sell to them. It is an offer that required to be accepted by Shew Bux. The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry. Again, in the present case when Balthazar telegraphed that he had sold the house in 29th Street and had received earnest money Shew Bux promptly replied that he could not sell the house alone but only the three properties together. Evidence is led to show why he desired to sell the three properties together, *viz.*, that he was closing his business in Rangoon. It seems very likely that he had no intention of selling the properties singly. The first telegram says: "Have likely purchaser your 3 properties". Even supposing that Shew Bux's first telegram was an offer to sell (and I have already held that it was not) the further consideration would arise whether it was an offer to sell the properties collectively or singly. Having in view the words of the first telegram I would hold that the appellants have not proved it was an offer to sell only one of the properties, supposing it was an offer at all.

It is urged that Shew Bux's telegram giving the lowest prices for each and asking for a reply constituted Balthazar his agent to sell—that Balthazar became the broker for both parties; but it was admitted that Shew Bux's telegram only constituted Balthazar his agent if it was an offer to sell. I have already held that it was not, and so the contention cannot prevail. The appeal must, therefore, in my opinion, fail, and it is unnecessary to consider whether the second set of respondents had notice of the contents of the telegrams that passed between Balthazar and Shew Bux which I have set out.

I would dismiss the appeal with costs to the second set of respondents.

TWOMEY, J.—I concur.

Appeal dismissed.

(3) (1893) A. C. 552; 62 L. J. P. C. 127; 1 R. 428; 69 L. T. 504; 42 W. R. 129.

MADURATHACHI v. CHOKALINGA PILLAI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 920 OF 1912.

February 13, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

MADURATHACHI BY HER AUTHORISED AGENT VAITHIALINGA PILLAI—DEFENDANT—PETITIONER

versus

CHOKALINGA PILLAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 12—Service, personal and substituted, when to be effected.

If a defendant is going about from place to place, it is not the duty of the plaintiff to go about seeking him in all the places through which he is travelling, unless the defendant has any other place of residence or business, in which case the plaintiff is bound to take out summons to that other place to which he has been directed.

Abraham Pillai v. *Donald Smith*, 29 M. 324, followed.

Vellayappa Chetty v. *Veerappa Chetty*, 22 Ind. Cas. 498; (1914) M. W. N. 79; 1 L. W. 1, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Subordinate Judge of Mayavaram, in Miscellaneous Appeal No. 408 of 1912 in S. C. S. No. 550 of 1912.

Mr. *T. Narasimha Aiyangar*, for the Appellant.

Mr. *G. S. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—In this case the summonses were taken out to the defendants to their usual place of residence at Melayur on two occasions. On the first occasion, when the serving officer went there, he made inquiries of one Pasupathi, who was said to be the agent or Kariasthan of the 2nd defendant, of the village Munsif of the place and of the neighbours. The serving officer was told that the three defendants had left for different places and it was not known when they might return. The plaintiff after waiting for about four months took out a second summons; and the serving officer again went to the usual place of residence of the defendants and he was told the same story over again. On both occasions full inquiries were made and the serving officer's endorsement shows that it was not practicable to effect personal service upon the defendants. Rule 12 of Order V, Civil Procedure Code, lays down that personal service should be effected if it is practicable. I am asked to hold that where on an inquiry the serving officer is told that the defendant has left for a particular place, it is the duty of the plaintiff to take out summons to the place mentioned to him on inquiry; and then if it is found that he has left that place also, further attempts should be made to follow him up wherever he may be told he has gone. I cannot accede to this contention. It would make it impossible for a plaintiff to get the defendant served if the condition is imposed that the moment that he is told that the defendant has gone to a particular village he is under an obligation to take out summons to that particular village to be told again that he has gone to some other village. If the defendant had any other place of residence or place of business, then the plaintiff was bound to take out summons to that other place to which he had been directed. But, if a defendant is going about from place to place, it is not the duty of the plaintiff to go about seeking him in all the places through which he is travelling.

My attention has been drawn to the decision of Sankaran Nair, J., in *Abraham Pillai* v. *Donald Smith* (1). The learned Judge on page 325 says: "It is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered." In this case I hold it was not practicable to serve the defendants in the ordinary way, because on two occasions summonses had been taken out to the only known place of residence of the defendants, and on both occasions the inquiries elicited the fact that they were in other places and that the time of their return was not known. The case of *Vellayappa Chetty* v. *Veerappa Chetty* (2) and another is an authority for the position that on the first failure of the plaintiff to find out the whereabouts of the defendant it is open to the plaintiff to ask for substituted service. That is not the case. After having ascertained that probably it would take some time for the defendants to return to their ordinary place of residence, a second summons was taken out. I must, therefore, regard that the plaintiff has done all that was practicable to find out the defendants and to serve them, and in the language of Order V, rule 12, Civil Procedure Code, it was not practicable to serve them in their

(1) 29 M. 324.

(2) 22 Ind. Cas. 498; (1914) M. W. N. 79; 1 L. W. 1.

usual place of residence. I hold that the Subordinate Judge was right in his conclusion that the service on the first occasion was a proper service.

One other fact should be mentioned, and that is, the agent of the second defendant was present on the occasion of the first inquiry, and it is found, and there is evidence to that effect, that on the day when the present suit came on for hearing this agent was in Court, though it was in connection with some other suit, and he was aware that the names of the defendants were being called out and that the defendants were being declared *ex parte*, still no steps were taken until the very end of the time allowed by law to present an application to set aside an *ex parte* decree to present this petition. Nor does the affidavit filed in support of the application to set aside the *ex parte* decree contain facts which would show that the delay was unavoidable and that defendants have an honest answer to the claim. It seems to me that this is an attempt to evade the realization of the decree which has been rightly passed against the defendants and that the suit was left undefended because the defendants had really no defence.

I dismiss the petition with costs.

Petition dismissed.

BOMBAY HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEAL NO. 220 OF 1912.
November 5, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, Mr. Justice Batchelor and Mr. Justice Davar.

KALYANCHAND LALCHAND—DEFENDANTS—APPELLANTS

versus

SITABAI DHANASA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908*)*, *s.* 11—*Evidence Act (1 of* 1872*)*, *s.* 41—*Probate and Administration Act (V of* 1881*)*, *s.* 83—*Contentious probate proceedings—Suit*—Res judicata—*Conclusive judgment.*

As contentious probate proceedings must take the form of a suit in accordance with the provision of section 83 of the Probate and Administration Act, such proceedings constitute a suit within the meaning of section 11 of the Civil Procedure Code and, therefore, the finding of fact of a Probate Court in such proceedings, that the testator was not of sound disposing mind when the alleged Will was made, would operate as *res judicata* between the parties to the proceedings although the judgment in such proceedings would not be a judgment such as is contemplated in section 41 of the Evidence Act inasmuch as such judgment does not confer upon or take away from any person any legal character.

First appeal from the decision of the first class Subordinate Judge at Nasik, in Suit No. 305 of 1910.

FACTS.—The facts appear fully from the following reference to the Full Bench by Beaman and Macleod, JJ.

BEAMAN, J.—Dhanasa died in September 1905. He is alleged to have made a Will within forty-eight hours of his death. The executors petitioned for probate in 1908. The widow Sitabai, plaintiff in this suit, opposed, alleging in general terms that there was no Will. To understand the vagueness of her caveat it is necessary to state that at the time of her husband's death she was a minor. The executors averred that the Will was executed in her presence. She, therefore, replies in her caveat that no such Will was ever executed in her presence, and that what is now propounded as the genuine last Will and testament of the deceased Dhanasa does not seem to be a genuine Will. In the circumstances I do not see how she could have been expected to be more explicit, and I think that her contention fairly raised all points upon which the genuineness of a Will can be disputed.

The learned District Judge refused probate, clearly on the ground that the deceased Dhanasa could not have been in a sound disposing state of mind even were the Will really made and signed by him. The executors appealed to the High Court, and the appeal was disposed of by Scott, C. J., and Batchelor, J. The appeal was dismissed and probate refused. No definite issue was raised—it very rarely is in appeal to this Court, but it cannot be seriously denied that the Appellate Court held that the evidence proved that the alleged testator was not, at the time the alleged Will was executed, of a sound disposing mind. This is as clear as though the learned Judges had raised the issue in so many words and answered it in the negative and against the executors. It is necessary to emphasize these points in the

statement of facts, to clear the way of a certain amount of irrelevant and untenable argument which might otherwise obscure the questions we propose to ask a Full Bench.

The widow Sitabai having come of age has now brought the present suit against the defendants as executors *de son tort*. They have again set up the Will and claim to be invested under it with all the legal character of executors.

Two questions then arise.

1. Whether section 41 of the Evidence Act is not applicable to the judgment of the Appellate Court and upon a right construction of its terms does not make that judgment conclusive against the present defence of the executors? It is admitted that had the judgment been in favour of the Will it would have fulfilled all the requirements of section 41 and conclusively established the legal character of the present defendants. But it is contended that a judgment of a Probate Court refusing probate does not, having special regard to the language of section 59 of the Probate Act, either take away any legal character of the defeated petitioners, or have the like conclusive effect against, which it would admittedly have had for, them.

2. Whether the finding of fact of the Appellate Court, that the testator was not of sound disposing mind when the alleged Will was made, is not *res judicata* between the same parties in the present litigation?

The need of reference to a Full Bench arises out of the decision of Farran, C. J., and Parsons, J., in *Ganesh Jagannath* v. *Ramchandra* (1).

We might, we think, have distinguished that case for the purposes of the second question without much difficulty. But it appears to have been extended since in this High Court by judgments which purport to follow it. One of these is an unreported decision of Chandavarkar and Heaton, JJ., in Suit Appeal No. 261 of 1910 which was cited in argument. It appears from the record that although the finding of the Probate Court was against the "genuineness" of the Will, the learned Judges of appeal found no difficulty, basing their decision on *Ganesh Jagannath Dev* v. *Ramchandra* (1) in holding that in a subsequent suit between the same parties the same question of fact might be raised and determined. We are unable to distinguish that case from the case before us. If it be a legitimate extension of *Ganesh's* case (1), then we find ourselves unable to agree with that decision either.

Both questions are of great general importance. Differences of opinion are likely to arise in answering either, and we have, therefore, thought this a suitable opportunity to invite an authoritative and final answer to both.

In my opinion the judgment of a Probate Court refusing probate is as much within the scope and intention of section 41 as a judgment granting probate. The distinctions sought to be drawn, though lying on the surface and easily made intelligible and plausible, will not, I submit, bear critical examination. I believe the true rule to be this. In any probate proceeding prosecuted to final judgment, that judgment, whether for or against the Will, is a judgment *in rem* and, if against the Will, takes away the legal characters of all those claiming to be executors and legatees under it, as conclusively as a judgment for the Will confers such characters upon them, and I further believe that that rule is universal and subject to no exception. Dismissals of petitions for probate for default may be distinguished and for the purposes of this reference neglected. The reasoning which appears to underlie that part of the decision in *Ganesh Jagannath* v. *Ramchandra* (1) and has been strongly pressed, with further elaborations, upon us by the Hon'ble and learned Advocate-General is this. Hindu Wills in the *mofussil* unless disposing of property in the town and island of Bombay are not governed by the Succession Act or the Hindu Wills Act. Executors of such Wills derive their rights direct from section 4 of the Probate Act and are under no obligation to apply for probate. Section 187 of the Succession Act has no applicability to them. If in the exercise of a mere option they do apply for probate and it is refused, the judgment even going the length of declaring that the testator was insane when the alleged Will was made, or that the alleged Will was a forgery, they may still continue to act under this alleged Will in the *mofussil* and set it up in any

(1) 21 B. 563.

suit as though the judgment of Probate Court had never been pronounced.

This appears to me, with all becoming deference, to be utterly fallacious. The fact that the executors of such Wills need not obtain probate to meet the requirements of section 187 of the Succession Act, ceases to have any bearing or even relevance upon or to cases in which they have availed themselves of their option and deliberately invited the judgment of the Probate Court. Once having done that, once the judgment has been given, it is there, a fact which has to be reckoned with and to which all the legal force and effect with which it is legislatively invested under section 41 of the Evidence Act must be given. The degree and extent of that force and effect must be determined solely with reference to section 41 and to the fact of the judgment, entirely irrespective of any such side consideration as that if the executors had not voluntarily invoked it, it never might have been given, never would have been a fact.

The learned Judges who decided *Ganesh Jagannath* v. *Ramchandra* (1) appear to have made this one of the main, if not the main, ground of their conclusion, that in all such cases refusal to grant probate, which is in effect an affirmative finding against the Will, no matter how worded or how arrived at (as I hope to show presently), has not the conclusive effect given to all such judgments which "confer or take away", etc., certain legal characters under section 41. With all proper respect I am unable to agree in that conclusion. Logically it might be extended to every case of litigation, if the ground of reason be confined to the option of the plaintiff to sue or not to sue. For no plaintiff is legally compelled to sue. But when a plaintiff does sue and invites the adjudication of the Court, the adjudication and its result is binding upon him. It may be urged that this is not quite a fair representation of the real argument. What is meant is that executors and legatees governed by the Succession Act *must* sue, if they are to obtain any benefit under the Will in the character of the executor or legatee (section 187), while executors who are not governed by the Act are under no such compulsion. That is perfectly true, but it does not affect, in my opinion, in the slightest degree the validity of the argument, that once having chosen to ask for probate they must be as bound, as any other persons who have asked for the same judicial aid, by the judgment whether for or against them. It is surely a *reductio ad absurdum* to contend that excutors, not governed by the Succession Act, may come in and invite the judgment of the Probate Court upon a Will, and when that judgment positivley declares upon evidence that the Will propounded is a forgery, may go back to the *mofussil* and continue to act as executors under it. Even the Advocate-General shrank from pushing his argument that length. Yet that length it must go if sound at all. For no true logical distinction can ever be drawn between the particular grounds upon which probate is refused. In every case without exception there is one question and one only for the Court to answer, *Will* or *no Will*? If it finds that there *is* a Will (by which, of course, I mean a Will legal and valid in all respects) it must grant probate. It can only refuse probate on the ground that in law there is *no* Will, and the refusal is logically tantamount to the affirmative proposition, founded upon evidence, that there is no Will. So that, in my opinion, it does not make the slightest difference whether probate be refused for failure to comply with the requirements of section 50 of the Succession Act or because the Probate Court held that the Will was a forgery, or the testator of unsound mind when it was made. (I may point out, merely as a curiosity of law, that in the particular case with which Farran and Parsons, JJ., were dealing, probate was refused for failure to have complied with the requirements of section 50 of the Succession Act, while, so far as I can gather from the fact that section had no applicability at all to the case.) But I am now entering upon another line of reasoning which does not properly belong to the ground that if an executor has an option to apply for probate or not and does apply the resultant judgment is on a different legal footing, has different legal consequences, from a like judgment given on the application of a person who is (virtually) compelled to obtain probate under section 187.

To say that in the former case the executor is in no worse position after asking and obtaining the final decision of a competent Court against the Will, appears to me to be logically untenable, to be radically unsound, regarded either theoretically or practically, and surely to involve absurd consequences.

2. It is next contended that since section 59 of the Probate Act expressly confers finality and conclusiveness upon a judgment in favour of the Will, while the Act is silent as to the effect of judgments against a Will, there is a plain and designed legislative distinction. The latter cannot be regarded as having the same legal effect as the former. The answer to this is short and decisive. What is wanting in the Probate Act is supplied in section 41 of the Evidence Act. As to that it is urged that the section, when it speaks of a judgment "taking away" any legal character, means doing so expressly as upon a revocation. I think that that is much too limited and technical a construction. In construing and applying the section we surely must look at what has actually been done. Holding that a Will is a forgery for example is, to all intents and purposes, as express a taking away of all rights rooted in it, as a declaration that the Will is genuine and, therefore, entitled to probate is an express conferring of such rights. In reason there is *no* distinction, nor can one be suggested if extreme cases like this are put. It is only in cases where the ground of refusal is less definite, confined, let us say, to formalities of execution, rather than to inherent turpitude that any room can be found for such arguments. But here again it is easy to trace and expose their radical fallacy. For I repeat, and without much fear of contradiction, that rightly analyzed what every Probate Court has to decide is one thing and one thing only, *Will or no Will?* A Will is just as much *not* a Will in the eye of the law, if essential formalities have not been complied with, as though it be found affirmatively to have been a forgery. So that the refusal to grant probate implies the affirmative finding on the evidence *no Will.* And that being found it follows that the Court by declaring that there is no Will takes away all legal characters which are referable exclusively to the Will.

Pushed to its logical conclusion the principle contended for by the defendants would warrant executors, not governed by the Succession Act, inviting the judgment of the Probate Court on the same Will year after year, thus offending against the universal principle of *res judicata.* And for all reason to the contrary I do not see why all executors should not be in the same case, that is to say, at liberty to try and try again, no matter how often the Probate Court had pronounced against the Will. Why should one judgment affirming a Will be final and conclusive against all the world, while a hundred judgments against a Will should have seemingly no legal effect whatever? The contention that judgments refusing probate do not take away any legal character from petitioning executors and legatees could hardly be used generally; in the exceptional case with which we are dealing, namely where the executors are not under the disabilities of section 187 and, therefore, need not take out probate at all unless they desire to get in debts, is shown, I hope, to rest upon reasoning equally unsound and untenable. Indeed looked at merely as a logical argument there is much more to be said for executors bound by section 187 than for those who are not. In the latter case the argument is that since they have rights as executors independently of probate, refusal to grant them probate cannot take away such rights. But that is exactly what it does. It would be a much more ingenious, and for the mere purposes of dialectic a much sounder, argument to say that executors and legatees bound by section 187 have no rights at all under the Will until probate has been granted, therefore refusal to grant probate does not take away any of their rights or characters under the Will, because they never had any. Which (as is the other argument but more so) is absurd. In my opinion where the question *Will or no Will* is submitted to the decision of a Probate Court, tried out and finally determined by that Court, its judgment either way is conclusive, within the meaning of section 41 of the Evidence Act. This too, in my opinion, is by far the most important of the two questions we are submitting to the Full Bench. For if my view be adopted we shall have a clear rule of universal applicability about which there will be no room for further argument or uncertainty, the most fruitful sources of litigation,

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Whereas if in all such cases, I mean where probate has been refused, the judgment is not within the scope of section 41, the parties relying on it have to fall back upon the general principle of *res judicata*, matters of difficulty and uncertainty are likely often to arise.

If, for example, in the present case the judgment of the High Court on the probate petition of the executors be held to be final and conclusive against them under section 41 (as with respect I submit it ought to be) there is an end of the matter. There is no Will, there are no executors, no legatees, and the present defence is not available to the defendants.

The point has recently been considered by a Division Bench of the Calcutta High Court (Mookerjee and Carnduff, JJ.,) in *Ramani Debi* v. *Kumad Bandhu Mookerjee* (2). I do not consider it necessary to examine cases in detail, where the point is, as it is here, one of simple construction and correct reasoning only. But while the tenor of Mookerjee J.'s judgment will be found, I think, strongly to support my view which also has the support of American Courts, all these judicial pronouncements seem to me to fall a little short of complete accuracy. Looking to such authorities it is fair to represent them as agreeing generally that judgments refusing probate, on the merits, are as much judgments *in rem* as judgments granting probate. But this will always leave room for a certain amount of foggy thought and argument. After all what *are* these judgments *in rem* but a part of the law of *res judicata*? Just as every judgment *inter partes* upon the same materials is *res judicata* between them and their representatives, so in a special class of cases the judgment is *res judicata* not only *inter partes* but *extra partes contra mundum*. Even so the judgments *in rem* are no more than *res judicata*. And we thus arrive at once at a simple general principle which will do away with all need to argue about particular exceptions on any other ground. It is this. In every case where the judgment is *in rem*, if it would have been *res judicata inter partes*, it is also *res judicata* against all the world. That disposes of all such cases as Mookerjee, J., was considering, and dispenses with the need of arguing them. What would not be *res judicata inter partes* (*e. g.*, dismissal for want of prosecution) cannot be *res judicata* against anybody. And this brings me back to the general rule I began by stating that where probate proceedings have been prosecuted to judgment (in other words where that judgment would upon the facts and contentions before the Court be *res judicata inter partes*), it must always be *res judicata contra mundum*. But until some clear view is thus obtained of the fundamental principles underlying any part of the law, its practical administration is almost sure to be complicated by drawing distinctions upon particular cases, most of which in the argument here can easily, I think, be shown to be no true distinctions at all.

I will now deal with the second question referred to the Full Bench. Since I would use the judgment of the Appellate Court in the probate proceedings under section 41 against the defendants, it follows from the principles I have stated that I consider the finding of fact arrived at by their Lordships the Chief Justice and Batchelor, J., a *res judicata* and binding upon the present defendants. What their Lordships found (it is merely idle to dispute this because no definite issue was framed) was this that having regard to the medical evidence, the testator Dhanasa was not of sound mind when the Will was alleged to have been made. Therefore there was no Will. If that be *res judicata* in the present case there is an end of the defence. Again, the defendants rely on *Ganesh* v. *Ramchandra* (1). But while the learned Judges did decide in that case that the finding of the Court against the Will on the probate proceedings was not *res judicata* against the executors, in a subsequent suit they did not find that no finding of a Probate Court could ever be *res judicata*. In the opinion of their Lordships there was no issue affecting the genuineness of the Will either raised or tried, and, therefore, no *res judicata*. With all respect I submit that that decision, even so restricted, is logically indefensible. The Court of Appeal deciding the probate application held that to make the Will, a Will legally, certain formalities prescribed in section 50 of the Succession Act were indispensable and had not been complied with. It is true that section 50 did not, as far as I can now

(2) 7 Ind. Cas. 126; 14 C. W. N. 924; 12 C. L. J. 185.

ascertain, apply at all, but that has nothing to do with the principle of the judgment in *Ganesh* v. *Ramchandra* (1). If it had applied, then the finding of the Appeal Court on the probate was in effect that its requirements had not been complied with, and that as a result there was no Will. That I submit is in all respects as much a finding of fact as a finding that the Will was a forgery. And, in my opinion, it ought to have been held *res judicata* in the subsequent suit. There can be little doubt having regard to certain passages in the judgment that had the finding been that the Will was a forgery or that the testator was insane when he made it, the learned Judges would have regarded that as *res judicata*. So that had the matter rested there we might have been content to distinguish that case and base our present judgment on that ground. But there is the later case decided by Chandavarkar and Heaton, JJ., in which apparently the finding of the Probate Court was that the Will was not genuine and yet their Lordships purporting to follow *Ganesh* v. *Ramchandra* (1) held that that finding was not *res judicata* in a subsequent suit. Now there could be no question at all, apart from two verbal technicalities which I must advert to in a moment, but that this finding of fact would be (and undoubtedly is) *res judicata inter partes*. The Advocate-General contends that it is not because the probate proceedings are not a suit. Section 83 provides that wherever contentious, probate proceedings shall as far as possible take the form of a suit. All appeals from them come to the High Court on the appellate side in the form of regular ordinary first appeals from decrees. To all intents and purposes these proceedings are suits. But, of course, I must admit the verbal difficulty which I pointed out at once, that what is made to conform as nearly as possible to another thing is impliedly *not* that thing.

The second difficulty which I also pointed out arises out of the wording of section 11. It may be argued that the Court deciding the fact sought to be made *res judicata* is not itself competent to try the subsequent suit. But let us look first at the reason of the thing. Why is this part of the law of *res judicata*? Obviously to prevent matters of great importance being decided incidentally, as they often are, in Courts of inferior jurisdiction, so as afterwards to exclude those matters from the cognizance of Courts of superior jurisdiction. That is the single reason for the rule. But it has no more than a verbal application to such a case as this. Here the District Judge, who first decided the question of fact, was himself competent to try the subsequent suit, in which that question of fact would arise; and *a fortiori* their Lordships who heard the appeal were competent, and no higher tribunal in this country could be found for the trial of the issue. In my opinion the objection has no real substance, though it lends itself to a great deal of technical argument. The District Judge remains the District Judge when exercising his probate jurisdiction; there is no separate Court. Similarly the Judges of this High Court are sitting in the exercise of their appellate jurisdiction as much to deal with these as with any other first appeals.

As to the first objection, it is met by the judgment of the Privy Council in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (3). True in that case the *res judicata* arose out of an execution proceeding which is normally part of a suit; but that was not the ground upon which the judgment proceeded. Broadly that ground was that section 11 does not contain the whole law of *res judicata*, which is general and of universal application. In other words, that in a proper case, Courts would be perfectly justified in neglecting the actual words of section 11, if the substance showed that the section ought to be applied. And that is certainly the case here. I mean, if there is any real difficulty in the words, I do not agree that there is, for I think that mere quibbling apart, these contentious probate proceedings are in effect suits. However that may be, I am emphatically of opinion that the substance and reason of the matter before us makes it as clear a case of *res judicata* as ever could be. Here is a simple question of fact offered for trial by the present defendants to the District Judge and found against them. They take it up on appeal to the High Court and again the finding is against them. Are they to be allowed now to ask a second District Judge, it

(3) 11 I. A. 37; 6 A. 269.

may be, and a second Bench of this High Court to try the identical question of fact between the same parties, on virtually the same materials? Surely not. In this suit the defendants have added three more witnesses, but that, in my opinion, does not make the slightest difference. The decisions of both the Courts in the probate rested solely on the medical evidence. That is as it was then, and, therefore, there is really no new material before us affecting the ground of the previous judgments. But even if there were, I should still remain of the opinion that no such evidence could be led, because no such issue could be raised again, no such question re-agitated. In my opinion, however, it is much more important to have the first question answered in the way I propose. For, if it be only on the ground of *res judicata* that the judgment of the Probate Court bars the defendants, it would still be open to legatees to re-open the question upon exactly the same materials, and if there were a dozen legatees and a dozen executors I see no reason in principle why there should not be two dozen suits all hinging upon the identical question of fact, namely, whether or not there ever was a Will.

I cannot bring myself to believe that such a result could be in the contemplation of the Legislature, or that it would be consistent with the administration of this branch of the law upon sound general principles.

In my opinion then the judgment of this Appeal Court on the probate, holding that the testator was not of sound disposing mind, is relevant and conclusive against the present defendants under section 41.

I am also of opinion that even if this be not so, the finding of fact arrived at by the learned Judges of Appeal in the probate suit, (I call it so intentionally) is *res judicata inter partes* in the present suit. The parties are the same.

MACLEOD, J.—For the reasons given by my brother Beaman I am of opinion that the two questions which we think should be referred to the decision of a Full Bench ought to be answered in the affirmative.

Mr. *Strangman* (Advocate General) and Mr. *Kanga* instructed by Messrs. *Motichand* and *Devidas*, (with him Messrs. *R. R. Desai*, *D. S. Yardc* and *M. V. Bhat*), for the Appellants.

Messrs. *Raikes* and *Wadia* (with him Messrs. *D. A. Khare* and *A. G. Desai*), for the Respondent.

JUDGMENT OF THE FULL BENCH.

SCOTT, C. J.—With regard to the first question referred we are of opinion that section 41 of the Evidence Act is not applicable to the judgment of the Appellate Court. The finding of a Court that an attempted proof has failed is not a judgment such as is contemplated in that section. The only kind of negative judgment which is contemplated is that which expressly takes away from a person the legal character which has up to that time subsisted. That is not the case with the judgment in question here.

With regard to the second question we are of opinion that the judgment operates as *res judicata* between the parties. The contention was advanced on behalf of the appellants that the probate proceedings, in which the previous judgment was pronounced, were not a suit within the meaning of section 11 of the Civil Procedure Code, but section 83 of the Probate and Administration Act provides for the form which contentious probate proceedings shall take. They must take the form as nearly as may be of a suit according to the provisions of the Civil Procedure Code, in which the petitioner for Probate or Letters of Administration shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant. There is no definition of the word 'suit' either in the Civil Procedure Code or in the General Clauses Act, and we are of opinion that as contentious probate proceedings must take the form of a suit, they constitute a suit within the meaning of section 11 of the Civil Procedure Code. The contention appears to be a novel one. It was not advanced, so far as we can gather from the reports, in the case of *Mirza Kurratulain Bahadur* v. *Nawab Nuzhat-ud-Dowla Abbas Hossein Khan* (4) nor has it, so far as we know, ever been advanced before in this Court.

(4) 32 I. A. 244; 33 C. 116; 9 C. W. N. 938; 1 C. L. J. 594; 2 A. L. J. 758; 15 M. L. J. 336; 7 Bom. L. R. 876.

MAHMUDA KHATUN CHOWDHURANI *v.* MAHOMED ELAHADAD KHAN PANI.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

October 31, 1912.

Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

Syedani MAHMUDA KHATUN CHOWDHURANI—PLAINTIFF—APPELLANT

versus

MAHOMED ELAHADAD KHAN PANI—DEFENDANT—RESPONDENT.

Gift—Issue general—Agent—Account—Relief—Pleadings.

P while going on a pilgrimage to Mecca executed a deed of gift of her properties in favour of *D* and the latter on the same day executed a Nirbandhapatra in favour of the former, providing that a four-annas share of the properties thus conveyed should remain in the possession of *P* till her death and after that it would come into the possession of *D*. *P* on her return sued *D* to get the deed of gift set aside on the ground of fraud and misrepresentation and to render an account:

Held, that the deed of gift executed by *P* was a deed which operated *in præsenti* in favour of *D* and that although there was a general issue as to whether *D* was liable to account, the Court was not justified in passing a decree directing *D* to render an account in respect of the four-annas share comprised in the Nirbandhapatra on the footing that in regard to such share *D* occupied the position of an agent.

Appeal against a judgment and decree of the High Court of Calcutta, dated 9th August, 1905, affirming a decree of the Subordinate Judge of Pabna and Bogra, dated 28th January 1902.

FACTS.—The facts appear from the following judgment appealed against which was delivered by Ghose and Geidt, JJ., on 9th August 1905.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff, a Mahomedan lady, Syedani Mahmuda Khatun Chowdhurani, sought to set aside a deed of gift dated the 15th *Sraban* 1303 executed by herself, upon the ground that it was obtained by the defendant by fraud and misrepresentation, and also sought for confirmation of her possession in respect of the properties comprised in the said deed of gift and for an account. The suit has been dismissed by the Subordinate Judge of Pabna and Bogra, and hence this appeal by the plaintiff. The parties to this action are closely related to each other. They were both born in the well-known Koratia family in the District of Mymensingh, the defendant being the nephew (brother's son) of the plaintiff. She, the plaintiff, was married to a certain *zemindar* in the District of Bogra, but, unfortunately for her, her husband died after some years of her marriage and, subsequently, her son also died. By reason of the deaths of her husband and her son, she became entitled to considerable properties both in the Districts of Bogra and Mymensingh, the bulk of the properties, as one gathers, being situated in Bogra. Shortly before the date of the transaction with which we are concerned, the defendant was induced to come over from Mymensingh to reside with the plaintiff; and he lived with her as if he was her son. In the Bengali year 1303 she made up her mind to visit Mecca on a pilgrimage, and naturally there was some discussion as to what arrangement should be made as to her properties; and it appears that both the plaintiff and the defendant came over to Bogra accompanied by the principal servants of the plaintiff one of them being a relation of her, with a view to take advice from Pleaders and Mukhtears as to what should be done. It seems to have been well understood between the parties that the plaintiff should execute a *hiba* in favour of the defendant in respect of some of her properties; and, the matter being put to the Pleaders and the Mukhtears assembled in her house at Bogra, the conclusion was come to that in respect of certain properties as were situated in Bogra, there should be a deed of gift in favour of the defendant; and that the latter should execute a deed of Nirbandhapatra in favour of the plaintiff under which a fourth share of the properties to be conveyed under the *hiba* should remain with the plaintiff during her lifetime and, on her death, it would revert, as it were, to the defendant. The plaintiff's case, however, is that what was agreed upon between her and the defendant was that a deed something like a Will should be executed by her, that the properties belonging to her should come to the defendant upon her death and that, during her lifetime, they would all remain in the ownership of the plaintiff. The defendant's case, on the other hand, is that it was fully understood between the parties concerned, and the advice of the Pleaders and Mokhtears assembled at the plaintiff's house at Bogra was to the same effect, that several of the properties belonging to the plaintiff should be conveyed over to him absolutely by a

gift and that he, the defendant, should execute a Nirbandhapatra to the effect to which we have already referred. It appears, upon the evidence, that at the assembly which gathered at the plaintiff's house at Bogra, and after it was settled that a deed of gift should be executed by the plaintiff and a deed of Nirbandhapatra should be executed by the defendant, one of the plaintiff's servants, namely, Kalimatuzzama who was her *Am*-Mokhtear, was asked to propose the necessary drafts. This person prepared the drafts and they were submitted to the Pleader Babu Beni Madhab Chaki who corrected them, and they being fair-copied by another servant of hers, Abdul Karim, who appeared to be a most trusted servant, the deed of gift in question was executed by her on the 29th July 1896, and in the usual course, it was presented for registration to the Sub-Registrar. The Sub-Registrar came over to the plaintiff's house and, after the document was either read or the purport thereof being explained to her, the document was registered on the 1st August 1896. Simultaneously with the presentation of the deed of *hiba* to the Registrar, the document, namely, the Nirbandhapatra, which bore date the 16th *Sraban* 1303 corresponding to 30th July 1896, was also presented for registration, and it was duly registered by the same Registrar on the same day, the 1st August 1896. In October 1896, corresponding to *Aswin* 1303, the defendant's name was registered in the Collectorate record as the *malik* in respect of the revenue properties comprised in the said deed of gift and it would appear upon the evidence, that upon such registration taking place there was some little rejoicing in the house of the plaintiff. There was a small gathering, and all parties concerned and the principal servants of the family accepted this registration of the defendant's name as an event of some consequence. The lady left for Mecca in *Pous* 1303, corresponding to January 1897, and she did not return to Bogra until June of the following year 1898. In the meantime, the defendant, who was apparently looking after the entire properties, both the 12-annas share as also the 4-annas share of the properties in question, sent remittances from time to time to the plaintiff at Mecca for the purpose of her expenses. It appears that there was some difficulty or other in remitting monies to her in proper time. There was some correspondence between the parties, and we have upon record one of the letters which the defendant wrote to the plaintiff and which, we may mention, is one of the documents upon which considerable reliance has been placed by the learned Counsel for the appellant in support of his contention that the deed which she meant to execute in favour of the defendant was not a deed of gift but a deed of a very different character. We shall presently refer to some of the terms of the letter as bearing upon the question at issue between the parties. We have already mentioned that the lady returned to Bogra in June 1898 corresponding to *Assar* 1305; and it would appear that shortly after her return, the parties practically fell out. The plaintiff called upon the defendant for an account. The defendant did not render such account upon the ground that he was the owner of the properties comprised in the deed of gift, the plaintiff saying that no such deed of gift had been executed in his favour. The result of this altercation was that the defendant was dispossessed, according to the plaintiff, in *Aghrayan* 1305 corresponding to October 1898, and, according to the defendant, in *Sraban* 1306 corresponding to July or August 1899. The fact, however, remains that the defendant was dispossessed by the plaintiff, he having been unquestionably in previous possession and enjoyment of at least a 12-annas share of the properties comprised in the deed of gift to which we have already referred. Subsequently, on the 14th May 1900, the present suit was instituted by the plaintiff for the purpose already mentioned. We have already said that the defendant's name was registered in the Collectorate as regards the *zemindari* properties, and there can be no question that so far as these properties are concerned, they were in the possession of the defendant during the time that the lady was absent from India. The letter to which we have already referred was written by the defendant to the plaintiff on the 18th *Chait* 1304. The defendant apparently was in difficulties in obtaining money for the purpose of sending to the plaintiff and, in this letter, he stated, amongst other matters, as follows: —"I do not find any means of sending you money. What I have stated above is, no doubt, too much for me to say. But if I

don't state the circumstances how will Huzur come to know of them? for this reason, I write to you. Huzur may give away your properties to whomsoever you like. I have no reason to object to it. I am stating to you that nowhere do I get money. No one wants to advance money on mortgage only, except on interest * * * *. In my time, I do not get the help from Koratia which you used to get. Remaining here in the hope that I would get the Pyekar estate, I have become deprived of the moveable and immoveable properties of the Koratia estate. Last year, you got me married. By the will of God, that wife died. On marrying for a second time, I had to spend Rs. 2,000 or 3,000. Owing to earthquake in last *Jaistha*, the entire house and rooms have become damaged. One cannot live in the house unless the rooms and doors are repaired. There is one easy way. Except that, there is no other way of raising money. If some properties be sold by *Kabala*, there will be no difficulty. Huzur is the *Murabbi*, the estate is yours; that is also not proper for me without your permission. So I refrain from doing it. To-day having taken a loan of Rs. 1,000 on interest, I send you Rs. 800 by *hundi* from Calcutta for expenses for your coming back and I keep with me the remaining sum of Rs. 200 for repairs of the house." No doubt, some of the passages to which we have just referred favour to some extent the contention of the plaintiff namely, that the ownership of the properties in question did not pass to the defendant; for instance, the sentences "Huzur may give away your properties to whomsoever you like. I have no reason to object to it." But it will be borne in mind that she had not given away the whole of her properties to him. It is only some of the properties, perhaps a great many of them, in Bogra that the deed of gift conveyed to the defendant. But there were other properties still remaining in her hands both in Bogra and in Mymensingh to which the sentences that we have referred to might as well be made applicable. There is, however, another passage which rather supports the theory set up by the defendant. That sentence is: "If some of the properties be sold by *kabala*, there will be no difficulty. Huzur is the *Murabbi*, the estate is yours; that is also not proper for me without your permission. So I refrain from doing it"; that is to say, he might sell the properties, but in deference to the plaintiff he ought not to do so, without her permission. Indeed the defendant could not, if the deed which the plaintiff had executed was not meant to operate as a deed of gift, sell any of the properties comprised in it without an express authority from her. The passage to which we have just referred is rather consistent with the idea that the deed which the plaintiff had executed was meant to operate as a deed of gift, than that it should operate as a Will.

Both the plaintiff and the defendant have been examined in this case as also some of the principal *amlas* still in the plaintiff's service. Our attention has been called to various portions of the evidence of those witnesses, and we think there can be no reasonable doubt that it was well understood between the parties concerned that the deed which the plaintiff meant to execute in favour of the defendant was a deed conveying to the defendant *in præsenti* some of her properties and that the deed was not meant to operate after her death. It is rather remarkable and almost incredible that while one of the plaintiff's principal servants was engaged in drafting the documents which were to be executed, and Abdul Karim? who was almost the *factotum* of the plaintiff, should have been employed in making fair copies of those documents, if the case set up by the plaintiff had any real foundation in it, that they should not have mentioned to her that the deed which was being drafted and which was being copied was in terms other than those which the plaintiff had agreed to. It will be remembered that the defendant was brought over from Koratia to Bogra to live with the plaintiff as if he was her son. Apparently, she was very much attached to him. He was that time a youth between 18 and 21. He was almost in a strange land. The servants of the plaintiff were her servants and in no way interested in the defendant, and is it probable that the defendant was able through the aid and instrumentality of the plaintiff's own servants (as it seems to have been the plaintiff's case) to perpetrate a huge fraud upon the plaintiff? One has only to state the proposition to obtain a satisfactory answer to it.

MAHMUDA KHATUN CHOWDHURANI v. MAHOMED ELAHADAD KHAN PANI.

We do not understand why the plaintiff's servants should have entered into a combination with the defendant; and one can hardly accept as true the statement that the defendant, who was quite a young person should have had the courage to bring about such a nefarious transaction as the one which is said to have been concocted in order to defraud the plaintiff.

We do not think it necessary to examine the evidence in detail. It is sufficient to say that we agree with the Subordinate Judge in the estimate of that evidence. He has found that the plaintiff was fully aware of the contents of the deed which she executed, and that, at the time that she conceived the idea of executing a deed in favour of the defendant, she really meant that it should be a deed operating *in præsenti* in favour of the defendant. We think that the Subordinate Judge has come to a right conclusion, and there is no just reason to interfere with his judgment.

The next question that has been urged before us by the learned Counsel for the appellant is whether the Court below should not have given the plaintiff a decree at least for an account in respect of the 4-annas share of the properties comprised in the Nirbandhapatra, which upon all accounts, was in the hands of the defendant during the plaintiff's absence from India. At one time we thought that the plaintiff was entitled to some relief or other in respect to this matter though her main case had failed; but on looking into it more carefully, we have arrived at the conclusion that, in the present case, no relief in the shape of an account can be awarded to the plaintiff. It will be observed, looking at the plaint and the relief sought for therein, that the action of the plaintiff was upon the footing that the whole of the properties comprised in the deed of gift were properties belonging to the plaintiff and that the defendant held the same as agent. It has been found that three-fourths of the said properties were not in the possession of the defendant as agent but as owner, and the only question that may possibly arise is whether in regard to the one-fourth share of the properties comprised in the deed of Nirbandhpatra, the defendant did not occupy the position of an agent of the plaintiff, and as such whether he is not bound to render to the plaintiff an account. If we were to award to the plaintiff a decree calling upon the defendant to render an account to the plaintiff in respect of the said 4-annas share, it would be upon a basis wholly different from that upon which the suit was founded; and we observe that beyond the general issue that was framed in the Court below, namely, whether the defendant was liable to render an account to the plaintiff, there was no precise issue directed to the 4-annas share of the properties comprised in the deed of Nirbandhapatra; and indeed the learned Counsel for the appellant, when at the conclusion of his argument he urged before us that a decree declaring the plaintiff entitled to an account against the defendant in respect of the 4-annas share of the properties comprised in the Nirbandhapatra should be passed, did not go into any evidence as bearing upon the question whether the defendant, as a matter of fact, occupied the position of agent to the plaintiff and as such was liable to render an account to her. But, however that may be, it seems to us that to allow the plaintiff a decree for account in respect of the 4-annas share of the properties comprised in the Nirbandhapatra upon the footing that, in regard to such share the defendant occupied the position of an agent of the plaintiff, would be giving her a relief upon a state of facts wholly different from those upon which the suit was based, and upon which the case was fought out in the Court below. For these reasons, we think that upon the plaint as it was presented in the Court below, the plaintiff is not entitled to any relief in the shape of account in regard to the 4-annas share of the properties comprised in the Nirbandhapatra in question. The result is that this appeal is dismissed with costs.

The plaintiff appealed to the Privy Council on the ground that she was entitled to claim from the respondent an account in regard to the 4-annas share of the properties which she had made over to him as her agent.

Messrs. *L. DeGruyther, K. C.*, and *Bhugwandin Dube*, for the Appellant.

Sir *E. Richards, K. C.*, and Mr. *Ross, K. C.*, for the Respondent.

JUDGMENT.

LORD MACNAGHTEN.—Their Lordships think this appeal must be dismissed and the appellant must pay the costs. They will humbly advise His Majesty accordingly.

Appeal dismissed with costs.

VASUDEVA REDDY *v.* NALLAPPA REDDY.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *W. W. Pox & Co.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 310 OF 1912.

February 17, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

VASUDEVA REDDY *alias* RAMASAMI REDDY MINOR BY GUARDIAN THE 2ND APPELLANT PRASANNA VENKATARAMA REDDY—APPELLANTS

versus

NALLAPPA REDDY—RESPONDENT.

Registration Act (III of 1877), s. 49, cls. 2 (7)—Unregistered lease cannot be used as evidence even of agreement to lease.

An agreement to lease is a transaction affecting immoveable property and should be registered.

Narayanan Chetty v. *Muthiah Servai*, 8 Ind. Cas. 520; 9 M. L. T. 142; 21 M. L. J. 44; 35 M. 63, followed.

An unregistered lease deed cannot be used as evidence of even an agreement to lease.

Civil Miscellaneous Appeal against the order of the District Court of Trichinopoly in Appeal Suit No. 412 of 1911, preferred against that of the District Munsif of Namakkal, in Original Suit No. 297 of 1911.

FACTS.—This is a suit for the enforcing of specific performance of an agreement to lease. The plaintiff is a lessee; the 1st defendant is the minor landlord and 2nd defendant is his guardian appointed by the Court. The plaintiff entered into an agreement with the 2nd defendant that he should lease out certain lands for five years at a rental of Rs. 160 a year. The terms were these:—The plaintiff shall be allowed to fell for his own use all the trees on the land, except tamarind trees, and in consideration thereof the plaintiff should remove at his cost the prickly-pears overgrown on the land. The terms were reduced to writing, but no stamp paper was purchased, and the deed was not executed or registered. The District Munsif construed this to be a sale, held the 2nd defendant as not authorised to effect it without the sanction of the Court and dismissed the suit. The District Judge on appeal held that there was merely an agreement to lease and the writing can be used as evidence for that purpose though neither stamped nor registered. The present appeal is against that decree.

Mr. *T. R. Venakatarama Sastri*, for the Appellants.

Mr. *M. O. Parthasarathy Aiyangar* (with him Mr. *C. Narasimha Chairar*), for the Respondent.

JUDGMENT.—We think that the learned District Judge was right in his view that the suit is based on the prior agreement to lease and not on the unregistered lease-deed, which is inadmissible in evidence to prove that the plaintiff has obtained an interest as lessee. The remand order passed by the District Judge is, therefore, right.

But the District Judge was in error in holding that the unregistered lease-deed is admissible as evidence of the prior agreement to lease. The decision of *Narayanan Chetty* v. *Muthiah Servai* (1) (by which we feel ourselves bound) shows that an agreement to lease is also a transaction affecting immoveable property. A document which requires registration and is not registered cannot be used as evidence of any transaction affecting immoveable property [section 49 clause (c) of the Indian Registration Act] and hence the unregistered lease-deed cannot be used as evidence of even an agreement to lease.

With these observations we dismiss the appeal with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 520; 9 M. L. T. 142; 21 M. L. J. 44; 35 M. 63.

NANDA KUMAR HOWLADAR *v.* RAM JIBAN HOWLADAR.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 47 OF 1913.

March 26, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice D. Chatterjee.

NANDA KUMAR HOWLADAR—PLAINTIFF—APPELLANT

versus

RAM JIBAN HOWLADAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Fraud—Impugning previous decree on ground of fraud—Mere general allegations, whether sufficient—Nature of fraud to be proved—Res judicata.

One who seeks to impugn a decree passed after contest takes on himself a very heavy burden, which is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit were erroneous.

A prior judgment cannot be upset on a mere general allegation of fraud or collusion, it must be shown how, when, where, and in what way the fraud was committed.

Shedden v. *Patrick*, 1 Macq. H. L. 535, followed.

The fraud must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining the decree by that contrivance.

Observation of Sir John Rolt, L. J., in *Patch* v. *Ward*, L. R. 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441, relied upon.

Where there is no suggestion that the decree in a previous suit between the parties was fictitious or that the plaintiff in the second suit was prevented by any contrivance from placing before the Court in the former suit any materials relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit:

Held, that the decree was binding upon the parties.

Appeal under section 15 of the Letters Patent from the following judgment of Mr. Justice Chapman, dated March 17th, 1913, in Second Appeal No. 182 of 1911.

CHAPMAN, J.—Defendant No. 1 appeals. The plaintiffs are the holders of a six-annas share of a tenure. The tenure has been partitioned. The plaintiff's case was that they were in immediate possession of all the lands allotted to their six-annas share, and that inspite of this the defendant No. 1 fraudulently obtained an entry in the Settlement Record to the effect that, he the defendant No. 1, held a sub-tenure under the plaintiffs and that the plaintiffs were in cultivating possession of the land as his, the defendant No. 1's, tenants. After obtaining this entry in the Settlement Record the defendant No. 1 sued the plaintiffs for rent and obtained a decree. The present suit was for a declaration that the rent decree obtained by defendant No. 1 was inoperative and that the plaintiffs were in possession of the land not as the tenants of defendant No. 1 but in their own right as tenure-holders. The learned Subordinate Judge has decreed the plaintiffs' suit.

Defendant No. 1 appeals and contends that the suit was barred by reason of the previous decision in the suit for rent. The contention must, in my opinion, prevail. The question at issue in the rent suit was whether the present plaintiffs held the lands as the tenants of defendant No. 1 or in an independent capacity. That is exactly the same issue that was raised in the present suit. I am aware that the Court has always been slow to treat the decision in a suit for rent as a *res judicata* upon a question of title and I have endeavoured to distinguish the question decided in the rent suit from the question raised in the present suit but have been unable to do so.

It is then contended that the plaintiff was entitled in the present suit to assail the decision in the rent suit upon the grounds that that decision was based upon an entry in the Settlement Record which was obtained by fraudulent means. But the issue whether the entry was obtained fraudulently or not was expressly raised and decided in the rent suit and cannot, in my opinion, be re-opened. I hold this view quite independently of the principle which has been laid down in this Court that a decree cannot be assailed collaterally merely upon the grounds that it is based upon perjured evidence.

The result is that the judgment and decree of the learned Subordinate Judge are set aside and the suit dismissed with costs in all Courts.

From the above judgment the plaintiff appealed under section 15 of the Letters Patent.

Babu *Brojendra Nath Chatterji* for the Appellant.

Babu *Gunada Charan Sen*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—By this suit the plaintiffs seek to establish their title to land. The first defendant contends that the validity of this title had been decided adversely to the plaintiffs by the decree of a competent Court

NANDA KUMAR HOWLADAR v. RAM JIBAN HOWLADAR.

in a previous suit between the said parties, and so cannot now be tried.

The plaintiffs reply that the previous decree cannot support the plea of *res judicata* and, alternatively, that it was obtained by fraud. Mr. Justice Chapman, reversing the decree of the lower Appellate Court, held that the decree in the previous suit supports the plea of *res judicata* and that there is no evidence that the decree was obtained by fraud. From this judgment the present appeal has been preferred. The jurisdiction to impugn a previous decree for fraud is beyond question; it is recognised by section 44 of the Evidence Act and is confirmed by a long line of authority. But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated: Mitford on Pleadings 113. Decrees may be (1) by consent, (2) *ex parte* or (3) after contest, apparent or real; and though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case. One who seeks to impugn a decree passed after contest takes on himself a very heavy burden, and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous. A prior judgment, it has been said, cannot be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where, and in what way the fraud was committed. [*Shedden* v. *Patrick* (1)].

Sir John Rolt, L. J., in *Patch* v. *Ward* (2), discussing what is meant by fraud when it is said that a decree may be impeached for fraud, said: "The fraud must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance." And Lord Selbourne in *Ochsenbein* v. *Papelier* (3) quotes as sound law the dictum of Chief Justice DeGrey in the *Duchess of Kingston's* case (4) that a judgment, "like all other acts of the highest judicial authority is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled."

Both suits now under consideration turn on the existence or non-existence of an alleged *nim-howla*, a question of fact to be determined largely by the appreciation of evidence. The Munsif in the former suit affirmed the existence of the *nim howla*, and from his decision no appeal was preferred.

In this suit the Court of first instance came to the same conclusion on the evidence in this case. The lower Court of Appeal, however, for some reason did not agree with this appreciation of the evidence and, therefore, held the decree in the former suit fraudulent. There is, however, no suggestion that the decree in the previous suit was fictitious or that the plaintiffs in this suit were prevented by any contrivance from placing before the Court in the former suit any materials relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit. In effect, when analysed, the judgment of the lower Appellate Court is no more than a re-trial of the merits of the original suit and a determination that the Judge who decided that suit was mistaken. But the Court in this suit has no jurisdiction to decide on the merits of the former judgment; its function was to decide whether that judgment was vitiated by fraud.

There, therefore, was an error of law committed by the lower Appellate Court and Chapman, J., rightly reversed its decree, for, as fraud was not proved, the prior decree sufficiently supports the plea of *res judicata*.

The appeal must, therefore, be dismissed with costs.

D. CHATTERJEE, J.— The fraud alleged

(1) 1 Macq. H. L. 535.

(2) (1867-68) L. R. 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441.

(3) L. R. 8 Ch. App. 695 at p. 698; 42 L. J. Ch. 861; 28 L. T. 459; 21 W. R. 516.

(4) 1 Leach, C. C. 146; 1 East P. C. 468.

in this case was the wrongful procurement by the defendant of the entry of the *nimhowla* in the Record of Rights. The same allegation was made in the rent suit, and the matter was adjudicated upon in the presence of both parties. It was a matter substantially in issue in that case and I think it would be clearly offending against the rule of *res judicata* to allow the plaintiff to re-open that question.

I agree, therefore, in dismissing this appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 261 OF 1912.

March 16, 1914.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

BHAGWAN SINGH—DEFENDANT—APPELLANT

versus

MUHAMMAD MAZHAR ALI KHAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 82—Rateable contribution, principle of—Determination of proportionate liability by Court—Mortgage.

Where several properties belonging to different persons are liable under the same mortgage and the owner of one of the properties discharges the mortgage the owners of all the properties liable under the mortgage are bound to contribute their *quota* of liability for the mortgage-debt. The Court ought to determine the value of the several items of property belonging to different owners. The value to be so ascertained should be the value at the date of the mortgage. After ascertaining the value of the different properties, the Court should determine what is the rateable liability of each of the properties for the total amount of the mortgage-debt. The Court must then ascertain how much each party has contributed to the payment of the debt. In making this inquiry it ought to disregard the purchase-money which any of the purchasers have paid or retained. Having ascertained the amount each party has contributed, the Court should proceed to apportion the liability between the different properties. In so apportioning the liability, each property must be debited with its own share of liability.

Hariraj Singh v. *Ahmad-ud-din*, 19 A. 545; A. W. N. (1897) 168, referred to.

First appeal from the decision of the Additional Subordinate Judge of Moradabad, dated 20th May 1912.

Mr. *Sital Prashad Ghose*, for the Appellant.

Mr. *Mohan Lal Sandal*, for the Respondent.

JUDGMENT.—This and the connected appeals arise out of a suit for contribution brought by the plaintiff, Mazhar Ali Khan. The claim appears to have been brought on a wrong principle and the parties went to trial on a mistaken idea of the principle which governs suits of this description. It appears that on the 14th of March 1889, one *Musammat* Kundan made a mortgage of eleven items of property in favor of Muhammad Baksh and Khuda Baksh. On the 15th of March 1889 the mortgagees, whose mortgage was a usufructuary mortgage, granted to the mortgagor a lease of the mortgaged property and for securing the payment of the rent reserved by the lease, the mortgagors granted a second mortgage of their property to the mortgagees. A part of the mortgaged property, namely, the *zemindari* share in the village of Adampur, was taken away by a pre-emptor and it seems to be the common case of the parties that this part of the mortgaged property was no longer to be regarded as part of the mortgage security. The present plaintiff purchased one of the mortgaged villages, namely, Champauli, and Roshan Singh (the predecessor-in-title of the defendants Nos. 1—6) purchased Maharana and Milk Adampur. The total amount of consideration for these two purchases was Rs. 11,000, but this was not paid to the vendor. A suit for redemption of the usufructuary mortgage was brought by the purchasers and by *Musammat* Alimunnissa to whom the interest of the mortgagor had passed, and a decree for redemption was obtained on the 13th of September 1902, the amount of the mortgage money to be paid by the plaintiffs being declared to be Rs. 11,887-3-3. This sum appears to have been paid and the plaintiffs in the redemption suit apparently got possession. Subsequently the original mortgagees, under the *kabuliat* executed in their favour on the 15th of March 1889, brought a suit for arrears of the rent reserved by the lease granted by them and they prayed for sale of the property hypothecated under the *kabuliat* to secure the proper payment of the rent. A decree was passed by the Court directing the plaintiffs to that suit to pay into Court the amount of the

redemption decree, namely, Rs. 11,887-3-3, as a condition precedent to their obtaining a right to sell the hypothecated property. They paid that amount and were entitled to realise that sum as well as the amount due to them, the total of which was Rs. 18,289-5-4 by sale of the hypothecated property. Part of this sum was paid into Court in different amounts, but this did not satisfy the decree, and accordingly on the 20th of May 1909, the villages of Champauli and Maharana and mango groves in Tashtpur (that is, properties Nos. 5, 6, 8 and 9 specified in the judgment of the Court below) were sold by auction and were purchased by some persons who are outsiders to this suit. The plaintiff deposited the amount for which the property had been put up to sale as also the 5 per cent. required to be paid to the auction-purchasers under Order XXI, rule 89 of the Code of Civil Procedure, and the sale fee and the sale was set aside. Thereupon the plaintiff brought the suit, out of which these appeals have arisen, for contribution on the allegation that his property had to bear more than its proportionate share of liability. In putting forward these matters what he claimed was this. He said that out of the total amount which had been deposited in full satisfaction of the decree and the 5 per cent. paid to the auction-purchasers and the sale fee, he had paid Rs. 14,346-3-3. Out of this sum he gave credit for Rs 5,750, the amount of the consideration for the sale in his favour which he had not paid to his vendor, and he claimed the balance from the defendants, the owners of the other properties ordered to be sold by the decree in the suit for arrears of rent to which we have referred above. He left out of consideration the proportionate amount of liability of his property for the mortgage which was given effect to by the decree aforesaid. The Court below also in deciding the case declared the defendants liable for the amounts for which they had purchased parts of the property and has wholly, as it appears to us, failed to take into consideration the principles of the rule laid down in section 182 of the Transfer of Property Act. In a suit of this kind where several properties belonging to different persons are liable under the same mortgage and the owner of one of the properties discharges the mortgage, the owners of all the properties liable under the mortgage are bound to contribute their *quota* of liability for the mortgage-debt. Therefore, in the present case what the Court ought to have done was to have determined the value of the several items of propetry now belonging to different owners. The value to be so ascertained should be the value at the date of the mortgage and not necessarily the price which was paid for it by the present owners. After ascertaining the value of the different properties the Court should have determined what was the rateable liability of each of the properties for the total amount of the mortgage-debt, that is, of the amount payable under the decree. The Court must then ascertain how much each party has contributed to the payment of the decretal amount. In making this inquiry it ought to disregard the purchase-money which any of the purchasers have paid or retained. The purchase-money was money which belonged to the vendor, that is to say, the mortgagor, and it was only retained by the purchasers for the purpose of discharging the prior mortgage generally. Having ascertained the amount each property has contributed the Court should next proceed to apportion the liability between the different properties. In so apportioning the liability each property must be debited with its own share of liability. We may illustrate this by an example. Suppose three properties, A, B and C belonging to different owners are comprised in one mortgage for Rs. 20,000. Property A is worth Rs. 20,000. Properties B and C are worth Rs. 10,000 each. The owner of property A pays off the entire mortgage. He can recover Rs. 5,000 from each of the other properties. Again suppose the properties all belong to the same owner. Property A is sold to X for Rs. 20,000, X retaining Rs. 10,000 out of the purchase-money to meet his share of the mortgage. Properties B and C are sold to other persons. X then pays off the entire mortgage. X can only recover Rs. 2,500 from each of the other owners. The mortgage debt must be deemed to have been reduced by Rs. 10,000 by the mortgagor himself when he allowed X to retain Rs. 10,000 out of the purchase money. On this point

we may refer the Court below to the case of *Hariraj Singh* v. *Ahmad-ud-din Khan* (1). In the present case the Court has not charged the plaintiff with any portion of the amount for which his own property is liable, but has made the defendants and their property liable not only for their own *quota* of the debt but also for the plaintiff's own share. This is clearly wrong. We may mention here also that when the Court is ascertaining the amount which the plaintiff has contributed to the discharge of the mortgages, it will disregard the sum of Rs. 5,750 which the plaintiff himself admits he retained and has never applied in discharge of the mortgage.

Again, we find that the Court below has included a sum of Rs. 610 and also Rs. 37, in all Rs. 647, being the 5 per cent. which had to be paid to the auction-purchaser when the sale was set aside and the auction fees. These are not sums which would come under section 82 of the Transfer of Property Act, and they could only be awarded against the defendants upon the equitable ground of salvage. Under no circumstances could any portion of this sum be awarded against the defendants other than defendants Nos. 1—6 and 8 and 10 because their property was not sold. Again we find that defendant No. 10 pleaded that he had purchased part of the mortgaged property and that he had paid into Court a sum of Rs. 628-12 0 as the amount rateably due from him. If upon ascertaining the liability of this defendant in the manner which we have directed it is found that the sum of Rs. 628-12-0 is sufficient to cover his liability, the suit ought to be dismissed against him, and if it is not sufficient he ought at least to get credit for the amount so deposited or to be allowed to withdraw it. Similarly, if the amount paid by the plaintiff does not exceed the amount for which his property is rateably liable his suit should be dismissed. There are other matters to which, having regard to the order we intend to make, we do not think it necessary to refer. In our opinion there has been no proper trial of the suit and the case ought to be remanded for re-trial. We accordingly set aside the decree of the Court below and remand the case with directions to re-admit it under its original number in the register and re-try it bearing in mind the observations made above. The parties will, of course, be entitled to adduce further evidence. Costs of this appeal will be costs in the cause. We hope that as we have settled the principle upon which the case ought to be proceeded with, the parties will be wise enough to come to a settlement without incurring the expenses of a fresh trial. The costs in this Court will include fees on the higher scale.

Decree set aside; Case remanded.

(1) 19 A. 545; A. W. N. (1897) 168.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 152 OF 1912.
February 17, 1914.
Present:—Mr. Justice Robinson.
V. R. M. V. A. CHETTY FIRM—APPELLANT
versus
MAUNG PO SIN—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Suit to avoid—Frame of suit—Intent, must be to defraud creditors generally—One creditor securing payment of his debt—Purchaser for present consideration—Difference in their liability—Proof, required of each—Relationship—Presumption.

A suit founded on section 53 of the Transfer of Property Act must be framed as for or on behalf of all the creditors generally. An objection on this ground, to prevail, must be taken in the first Court, but if not so taken, cannot avail in the Appeal Court.

The intent, which gives a creditor the right to have a transfer by his debtor of immoveable property avoided, must be an intent to defeat or delay his creditors *generally*. Therefore, a transfer, made with intent to defeat or delay any one particular creditor, cannot be avoided against that particular creditor provided that there has been good consideration and the transaction is not a mere sham.

A transfer, with intent to defraud creditors generally, made in favour of a creditor securing payment of the debt due to himself by superior diligence cannot be set aside, even if he was aware of the vendor's intention to defeat his other creditors. In other words, in the case of such a creditor, proof of valuable consideration is ordinarily sufficient, but not so in the case of a purchaser for present consideration who must prove not only valuable consideration but also the further fact that he was not aware of the vendor's fraudulent intent and that he did not enter into the transaction for the purpose of aiding the fraudulent transfer.

Bhagwant Appaji v. *Kidari Kashinath*, 25 B. 202; 2 Bom. L. R. 986; *San Dun* v. *Mein Gale*, 3 L. B. R. 188; *Hakim Lal* v. *Mooshahar Sahu*, 34 C. 999; 6 C. L.

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J. 410; 11 C. W. N. 889; *Moung San* v. *Sit Twan*, 8 Ind. Cas. 965; 5 L. B. R. 195, followed.

Relationship alone between the transferor and the transferee is not sufficient to establish such aiding, but it is a circumstance giving rise to suspicion and one that must, therefore, be very carefully considered.

Mr. *Palit*, for the Appellant.

Mr. *Moosajee*, for the Respondent.

JUDGMENT.—This is a dispute between an attaching creditor and an alleged purchaser from the judgment debtor. Plaintiff obtained a decree for Rs. 1,400 and costs against one Mg. Ma Gyi, on the 25th June 1908. He applied for attachment of the property on the 10th November 1909. Mg. Ma Gyi then applied on the 13th December 1909, alleging that the decree had been satisfied. His application was rejected on the 12th February 1910.

Attachment was then affixed on the property on the 27th February 1910.

Then Mg. Po Sin applied for the removal of the attachment alleging that on the 22nd December 1909, he had purchased the property from Mg. Ma Gyi for Rs. 1,000 by a registered deed.

An *ex parte* order was passed removing the attachment on the 12th October, 1910.

The present suit was filed on the 4th August 1911 for a declaration that the property does not belong to Mg. Po Sin but at the date of attachment belonged to and was in the possession of Mg. Ma Gyi.

I have been referred to the following decisions. In *Bhagawant Appaji* v. *Kidari Kashinath*(1) it was held after a very full and complete examination of all the authorities that clause 2 of section 53 of the Transfer of Property Act did not apply as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration and also that although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors generally so as to render clause 1 of the section applicable.

In this case the transferee was another creditor and it was held that the onus lay on plaintiff in the first instance to prove that the consideration or part of it was illusory.

(1) 25 B. 202; 2 Bom. L. R. 986.

This case was followed by Sir Charles Fox, C. J., in the case of *San Dun* v. *Mein-Gale* (2) who held that the intent which gives a creditor the right to have a transfer by his debtor of immoveable property avoided must be an intent to defeat or delay his creditors generally. "If there has been good consideration, and the transaction is not a mere sham, a transfer by a debtor, even if made with intent to defeat and delay one particular creditor, is not impugnable by that creditor." In this case the purchasers were sons of the judgment-debtor.

In *Hakim Lal* v. *Mooshahar Sahu* (3) the same was held, the transferee being another creditor. This case was followed by Sir Henry Hartnoll, in *Maung San* v. *Sit Twan* (4). Mg San was also a creditor and the question considered was whether Mg. San's purpose was merely to secure his debt or his intention was also to aid Mg. Pa Si in defeating Mg. Sit Twan, in covering up his property, in giving him a secret interest therein and in locking it up for Mg. Pa Si's own use and benefit.

In the present case the transferee is Mg. Ma Gyi's son-in-law's brother according to the lower Appellate Court and he is his brother-in-law according to the plaint. He is, however, a volunteer in this matter and not a creditor securing payment of the debt due to himself by superior diligence. He purchased "for a present consideration; he had nothing at stake, no self interest to serve; he may with perfect safety keep out of the transaction" to use the language of *Lockrain* v. *Rastan* (5) quoted in *Hakim Lal* v. *Mooshahar Sahu* (3). In the case of a creditor securing himself, proof of valuable consideration would ordinarily be sufficient. He may be aware of his vendor's intention to defeat his other creditors and yet this would not be enough to cause the transaction to be set aside. In the case of a volunteer, however, the law would say that he enters into it for the purpose of aiding that fraudulent purpose. Relationship alone is not sufficient to establish such aiding, but it must be a circumstance giving rise to suspicion and one that must, therefore, be very carefully considered.

(2) 3 L. B. R. 188.
(3) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889.
(4) 8 Ind. Cas. 965; 5 L. B. R. 195.
(5) (1899) 9 North Dakota 435; 81 N. W. 60.

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The learned Divisional Judge had some doubt owing to the two rulings of this Court appearing to him to be somewhat in conflict and I think I should, therefore, state what I consider they lay down. Sir Charles Fox based his decision on what is a recognised rule, namely, that a suit founded on section 53 of the Transfer of Property Act must be framed as for or on behalf of all the creditors generally. If this objection be taken in the first Court and the suit is one on section 53, the contention must prevail. The report does not show whether objection was taken in the earlier stages or only in second appeal. If taken in second appeal for the first time, as has been pointed out in the cases cited above, it should not be allowed to prevail. It is so taken here and I cannot, therefore, enforce that rule. Moreover, the plaint here alleges it was to defeat plaintiff and other creditors. Sir Henry Hartnoll based his decision on another rule, the purchaser in his case being a creditor.

The questions to be decided in this case are in my opinion:

1. Was valuable consideration paid?
2. Did Mg. Ma Gale act with intent to defeat his creditor by removing the property out of his reach?
3. If so, was Mg. Po Sin aware of this intent and did he purchase in order to aid and abet Mg. Ma Gale?

If there was no consideration or no real consideration the transaction was merely a sham and must be void as against the creditor. If valuable consideration was paid then in the case of a pure volunteer that is not enough and the further questions, stated above, if answered against the purchaser, will avoid his purchase.

When Mg. Po Sin applied to have the attachment removed, Mr. Dhar appeared for plaintiff and opposed it and a day was fixed for hearing. The Court took the case up and was apparently informed that Mr. Dhar was coming. The note to this effect in the diary records that the person appearing for plaintiff was only a clerk and had no power-of-attorney and could not instruct Mr. Dhar. It is then erased and the case taken up *ex parte*, the attachment being removed. However, the onus is on plaintiff to start with.

Plaintiff alleged defendant was Mg. Ma Gyi's son-in-law. In evidence his witness stated he was his son-in-law's brother. The allegation in the plaint was not specifically denied in the written statement but Mg. Po Sin and Mg Tha Moung who was also said to be a son in-law denied the fact absolutely. Plaintiff has not proved any relationship.

As to consideration defendant states the land is worth Rs. 30 an acre and the area is nearly 42 acres. At this rate there is perhaps no very great inadequacy in the price, though Rs. 30 an acre does not seem to be much. No evidence of the value is, however, given and I must, therefore, hold that the consideration, if paid, was valuable. As to payment defendant alleges that Mg. Ma Gyi and his wife came to him and asked him to buy. This was two days before the deed was executed, that is, therefore, on 22nd December 1909. The land he says is near his house and he agreed to buy. On 22nd December, they came again and defendant went out and called in Mg. Tha Moung and Mg. Shwe Kyin Ket. In their presence he paid Rs. 700. They all adjourned to Mr. Power's house and the deed was drawn up and registered the same day, the balance being paid at the Registration Office. Tha Moung is called but not Shwe Kyin Ket. Tha Moung says he alone was present when Rs. 700 were paid. He had not forgotten Shwe Kyin Ket for he says he was at the Registration Office. The discrepancy is somewhat significant.

At Mr. Power's house Mg. Ma Gyi was questioned as to encumbrances. Plaintiff's claim was mentioned by Mg. Ma Gyi who said it had been satisfied by the transfer of his other land. Mg. Ma Gyi had applied on the 13th December alleging plaintiff's decree had been satisfied by transfer of the land. By this manœuvre he obtained postponement of the attachment and he employed it in selling the land to defendant. His application was dismissed.

Defendant says he had not owned any land before, but had worked other people's land and had made a profit of about Rs. 400 a year. Out of his earnings he had bought three pairs of buffaloes and one pair of oxen. His savings he kept in his house and had Rs. 1,700 in cash in a box at the time of purchase. Rs. 700 seems a large sum to have paid before the deed was drawn up but the matter was to be settled forthwith.

SHEO BALAK PATHAK v. SUKHDEI.

The land was said to have been sold as Mg. Ma Gyi did not want to live there any longer.

That Mg. Ma Gyi wanted to save what he could from the grip of the Chetty is clear. The Chetty had a mortgage but it was not registered and he only got a money decree. Then attachment is applied for on 10th November, and the judgment-debtors called upon to show cause. Mg. Ma Gyi appeared and alleged satisfaction and a few days later sells before orders were passed. Defendant knew admittedly all about this, but makes out that he believed what was told him. He made no inquiries. I am satisfied that he knew all about the facts and I cannot believe he did not know what Mg. Ma Gyi's real object was. His explanation of how he had the money to pay is far from convincing and his statement in proof of payment is contradicted by his only witness. The alleged price paid is Rs. 250 less than the value of the land on his own figures.

On a careful consideration of the whole case it is clear that defendant was a pure volunteer. At best, I can only hold that it has not been proved that he did not pay nor that the price was quite inadequate though it, even if paid, possibly was. I am satisfied that Mg. Ma Gyi intended to remove his property out of the reach of his creditor fraudulently and that defendant knew of his intention and by his conduct aided him in doing so.

The claim for the costs of the miscellaneous case is not now pressed.

I accept the appeal and declare the sale void as regards the plaintiff who may attach this land in execution of his decree. Respondent must pay plaintiff's costs in all Courts.

Appeal accepted.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 77 OF 1913.

January 24, 1914.

Present:—Mr. Justice Tudball.

SHEO BALAK PATHAK—APPLICANT—APPELLANT

versus

SUKHDEI—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 152—Clerical error in relief claimed—Decree—Amendment.

A person sued for possession of a two-anna share. He described the property in the plaint as a two-anna share and paid the Court-fee on that share. In the prayer for relief, however, at the end of the plaint, the word "pie" was written in place of "anna", but the parties knew all along that the dispute was with regard to the two-anna share. The decree was prepared in accordance with the relief claimed:

Held, that the error in the plaint was a clerical one, due to an accidental slip and that the Court had power under section 152, of the Civil Procedure Code, to amend the mistake throughout the record beginning with the plaint down to the decree.

Civil revision against an order of the Munsif of Basti, dated 11th of January 1913.

Mr. *Jang Bahadur Lal*, for the Appellant.

JUDGMENT.—This application in revision arises out of the following circumstances. The applicant, Sheo Balak Pathak, is the plaintiff decree-holder in a suit, which he brought to recover a two-anna share in a certain village. That suit was brought in the following circumstances. There were two brothers, Satti Pathak and Dharkan Pathak. Each of these persons owned a two-anna share in the village. Dharkan died leaving a widow, *Musammat* Sukhdei, who got possession of her husband's two-anna share. Then Satti died leaving a widow, *Musammat* Har Dei. Har Dei took possession of her husband's two-anna share. She then died and was succeeded in her possession by *Musammat* Chaurasi, the mother of Satti. *Musammat* Chaurasi then died whereupon *Musammat* Sukhdei, widow of Dharkan, took possession of Satti's two-anna share. The plaintiff, thereupon, sued as a reversioner of Satti to recover his two-anna share. He distinctly stated in his plaint that he was the owner and entitled to possession of the "two-anna share." He paid Court-fee on five times the revenue of the two-anna share. But unfortunately in the relief at the end of the plaint the word "pie" was written in place of "anna", so that the relief read as if he were suing for a two-pie share instead of a two-anna share! This clerical error was clearly a slip. It has led to the subsequent trouble. The suit was contested. The Court found that the plaintiff, as the reversioner of Satti, was entitled to his estate. But by reason of this slip at the end of the plaint the Court described the property in suit in its judgment as a two-pie share. The decree likewise has the same error. Sheo Balak Pathak, when he obtained the copy of the decree, discovered the mistake. He then applied to the Court

below pointing out the error and asking the Court to amend the mistake. That Court has rejected the application on the ground that the decree is not at variance with the judgment, and that the error sought to be amended was brought about by the plaintiff himself and he could not go behind the judgment. It seems to me that section 152 of the Code of Civil Procedure covers the present case. There has been a clerical error in the plaint which was due to an accidental slip, and it has found its way right through the judgment and the decree. The parties were not ignorant of the fact that it was the two-anna share of Satti which was in dispute and in regard to which the suit had been brought. In my opinion section 152 of the Code of Civil Procedure clearly applies to the case, and the clerical error should be amended throughout the record beginning with the plaint down to the decree. As the error was made by the applicant himself and the present application has not been contested in this Court I pass no order as to costs.

Application allowed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL NO. 38 OF 1913.

September 10, 1913.

Present:—Mr. Justice Twomey and Mr. Justice Parlett.

A. T. K. P. L. MUTHIA CHETTY AND OTHERS—APPELLANTS

versus

L. A. R. ARUNACHALLAM CHETTY AND ANOTHER—RESPONDENTS.

Civil Procedure Code Act (XIV of 1882), s. 20—Venue of suit—Plaintiff's option—Transfer, causes of—Preponderance of convenience.

Though section 20 of the old Civil Procedure Code, which required that a Court must be satisfied that justice is more likely to be done by the suit being instituted in some other Court before it requires the plaintiff to do so, is dropped in the new Code and the Court's discretion is thus left unfettered, very strong reasons must be shown under the new, as required in the old Code for depriving a plaintiff of the right to bring his suit in any Court in which the law allows.

Geffert v. *Ruckchund Mohla*, 13 B. 178; *Tula Ram* v. *Harjiwan Das*, 5 A. 60; A. W. N. (1882) 164; *Khatija* v. *Taruk Chunder Datt*, 9 C. 980; 13 C. L. R. 182; 8 Ind. Jur. 143; *Church* v. *Barnett* (1871), 6 C. P. 116; 40 L. J. C. P. 138; 23 L. T. 705; 19 W. R. 411, followed.

Mr. *Giles*, for the Appellants.

Mr. *N. M. Cowasjee*, for the 1st Respondent.

Mr. *A. B. Banerji*, for the 2nd Respondent.

JUDGMENT.

PARLETT, J.—L. A. R. Arunachallam of Rangoon filed two suits for dissolution of partnership in the District Court of Bassein. In one case the alleged partnership business was carried on at Ngathaingyaung and there were ten partners; in the other it was carried on at Athok and there were five partners; all of them, however, were also partners in the Ngathaingyaung firm. Eight of the defendants in the Ngathaingyaung suit and four of those in the Athok suit desire the suits to be tried at Sivagunga in the Madras Presidency and have filed applications under section 22 of the Civil Procedure Code asking this Court to determine in which Court the suit shall proceed. Subramanian Chetty, the 2nd defendant in each of the suits, desires the hearing to be in Bassein, and he is the 2nd respondent in these applications. It will be convenient and sufficient to deal with the Ngathaingyaung suit only, as the remarks made on that case apply, so far as may be, to the Athok suit, and nothing has been said which applies only to the latter suit. Valliyama Achi, 5th defendant and 4th petitioner, originally filed an affidavit supporting the application, but she has now withdrawn it and desires the case to proceed in Bassein. The other seven defendants have filed affidavits in practically identical terms, that of the 1st petitioner and defendant, Muthiya Chetty, however, containing some additional matter and it alone, therefore, need be referred to. The petition sets out that the alleged partnership was dissolved at Sirugudalpatti by mutual consent about 1909 and that thereafter seven of the original partners, being also seven of the defendants, together with three fresh persons formed a new partnership with which the plaintiff has not and never had anything to do, that the main issue in the suit is whether there was a dissolution of partnership at Sirugudalpatti, and that the suit has been purposely instituted in Bassein with a view to prevent it being fairly and properly tried, that all the defendants reside at Sirugudalpatti; that all the account books of the partnership are there; that the members of the new firm,

the agents, who can speak to the account books, and the agents of the dissolved firm during its subsistence are there, and as these latter persons are no longer in petitioner's employ their attendance at Bassein cannot be produced; that all the evidence necessary for the determination of the suit is at Sirugudalpatti, and that a hearing at Sivaganga will be less expensive, and more convenient and expeditious than a hearing at Bassein. These statements are repeated in all petitioner's affidavits, and Muthiya further alleges that the suit is wholly vexatious and instituted at the instance of Subramanian, the 2nd defendant and 2nd respondent. This the plaintiff, 1st respondent, denies in the affidavit and 2nd respondent, who has the books of the partnership sought to be dissolved except those in current use, is prepared to produce them in Bassein whenever required to do so. The plaintiff in his affidavit denies that the plea of dissolution, for which no definite date is alleged by petitioner, is a *bona fide* one, and he files letters written to him by Karuppan, one of the defendants, from Ngathaingyaung on 1st December 1909 and 18th January 1910 indicating that the dissolution had not taken place then and also a copy of a letter written by himself to Muthiya on the 29th December 1911 indicating the same, of which letter the first acknowledgment was a telegram not sent till the 17th January 1912, and no detailed reply was sent till the 1st April 1912. Plaintiff asserts that this belated answer, to which he instructed his Advocates to reply at once, was the first intimation he had of the alleged dissolution. He points out the delay and expense, which in the event of a preliminary decree for dissolution being passed by a Court in the Madras Presidency, would be entailed over the realization of the assets and winding-up of the business by that Court in the Bassein District, where the assets are situated: and further that the account books of the business cannot be sent from Ngathaingyaung and Athok to India without dislocating the business, whereas there is no difficulty about bringing the old books from India to Bassein. He also alleges that a former agent of the Athok firm is now at Athok and a former assistant of the Nagathaingyaung agent is now manager at Nagathaingyaung, while the 1st defendant and petitioner himself has firms in Rangoon, Ngathaingyaung and Athok. He states that a large portion of the evidence in support of his case is in Burma and not, as the petitoners allege, in Sirugudalpatti; and that it will be impossible for himself to leave Burma without breaking agreements with his own employers and partners, thereby entailing heavy monetary losses on the former, damage to his own reputation, and dismissal of his son from a lucrative appointment. He also files a letter purporting to come from Muthurasappa, one of the petitoners, dated 2nd July 1913, expressing his willingness to come to Burma as soon as the fates are propitious.

In England it has been repeatedly held that the venue will not be changed from the place where the plaintiff has laid it unless it be shown that there will be a manifest preponderance of convenience in trying the cause elsewhere. *Church* v. *Barnett* (1), *Helliwell* v. *Hobson* (2) and *Durie* v. *Hopwood* (3), while in *Blackman* v. *Bainton* (4), 25 witnesses and a horse on one side against 10 witnesses on the other were held not such a preponderance of inconvenience as to induce the Court to bring back the venue from the place where the cause of action, if any, arose. Similar principles have been followed in India. *Geffert* v. *Ruckchund Mohla* (5) was a suit for defamation filed in Bombay, the defendant having previously sued for damages for wrongful dismissal in Wardha, and the defendant applied for the defamation case to be tried in Wardha. The learned Judge said: "We find it laid down in the second clause of section 20, that the Court may make such an order as is now asked for if it 'is satisfied that justice is more likely to be done by the suit being instituted in some other Court.'..... It would, no doubt, be much more convenient to the defendant to have the case against him tried at Wardha. Nearly all his evidence and probably a large portion of the plaintiff's

(1) (1871) 6 C. P. 116; 40 L. J. C. P. 138; 23 L. T. 705; 19 W. R. 411.

(2) (1860) 3 C. B. (N. S.) 761; 140 Eng. Rep. 942; 111 R. R. 829.

(3) (1860) 7 C. B. (N. S.) 835; 29 L. J. C. P. 151; 6 Jur. (N. S.) 705; 141 Eng. Rep. 1044; 121 R. R. 740.

(4) (1863) 15 C. B. (N. S.) 432; 137 R. R. 590.

(5) 13 B. 178.

evidence is only obtainable there. But is that a ground for depriving the plaintiff of his right to bring his suit in this Court? The injury and damage of which he complains have been inflicted in Bombay, and many of his witnesses (he says) are resident here. He desires to vindicate his character in the place where he alleges it has been defamed. I can find no authority for preventing him doing so. I am not satisfied (to use the words of the section) that justice is more likely to be done at Wardha or elsewhere than in this Court." The present Code omits section 20 of the Code of 1882 which required that the Court must be satisfied that justice was more likely to be done by the suit being instituted in some other Court, but though it leaves unfettered the Court's discretion to determine in which Court the suit shall proceed, strong reasons must certainly be shown under the new as were required under the old Code for depriving a plaintiff of the right to bring his suit in any Court which the law allows. In *Tula Ram* v. *Harjiwan Das* (6) the defendants in a suit instituted at Mainpuri applied under section 24 of the Civil Procedure Code, 1882, that the suit might be tried at Surat on the ground that it would be tried with greater convenience to them at that place, it was held that there being no balance in favour of either justice or convenience on the side of the Surat Court the suit should proceed at Mainpuri. The Court said: "We next have to see whether the defendants, applicants, have made out a case to justify us in closing the doors of the Court of the Subordinate Judge of Mainpuri to the plaintiffs and leaving them to seek their remedy in another jurisdiction. We do not think that they have, or that any sufficient cause has been shown for depriving the plaintiffs of the right given them by law to select in which of the Courts they will carry on their suit." In *Khatija Bibi* v. *Taruk Chunder Dutt* (7) it was held that parties desirous of obtaining the transfer of a case from one forum to another should satisfy the Court that either on account of expense or convenience or otherwise the place of trial ought to be changed. In the course of the judgment it was said: "*Prima facie*, the plaintiff as the *arbiter litis* has a right to bring his suit in any Court which the law allows; and section 23 is only intended, as we consider, to provide for those cases, where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed. If, for instance, in this case, the defendant could have shown us that great expense could have been saved, or that the balance of convenience was strongly in favour of the case being tried at Furridpore."...I consider these principles should be the more strictly applied, where, as in the present case, we can only determine that a subordinate Court shall not proceed with the suit and cannot direct another Court to proceed with it. The allegations that the suit was purposely instituted in Bassein with a view of its being prevented from being fairly and properly tried, that it is wholly vexatious and instituted with ulterior objects and at the instigation of Subramanian, have not been substantiated and no grounds have been shown for supposing that justice is not likely to be done in the Bassein Court. As regards the balance of convenience, it does not appear why all the defendants need appear in person; and though their evidence in support of the plea of dissolution is in India, it would appear probable that rebutting evidence to show the continuance of the partnership up to the date of suit would be most likely to be obtainable in Burma, as the plaintiff says it is. It was said that plaintiff might appoint an agent to conduct his affairs in Burma while he went to India for the case, but unless for very strong reasons he ought not to be compelled to do so. Stress was laid on the advantage to the Court of the witnesses being examined before it instead of on commission, but some at least of the evidence on one side or the other must probably in any case be taken on commission. As regards the books, it would appear more convenient for the old books to be sent back to Burma than for the current ones to be sent to Madras. No grounds were shown for the allegation that the proceedings in Bassein would be more expensive and protracted than in Sivagunga, except that more translation might be necessary than in a Court where the language of the accounts was understood;

(6) 5 A. 60; A. W. N. (1882) 164.
(7) 8 Ind. Jur. 143; 9 C. 980, 13C. L. R. 182.

but in a suit of this sort a certain amount of translation will be necessary in any case and as in the event of a preliminary decree being passed a Commissioner will probably be appointed to take accounts, it should be possible even in this country to appoint as Commissioner some one with the necessary knowledge of the language, while it is clear that the winding-up can be more easily effected in the locality where the partnership business was carried on, and in the event of a Receiver being appointed, that he should be under the supervision and control of a local rather than of a far distant Court.

In my opinion no sufficient grounds have been shown for declaring that the suit shall not proceed in the Court in which the plaintiff is by law entitled to institute it, and I would dismiss both applications, and award each of the two respondents two gold *mohurs* costs as Advocate's fees.

TWOMEY, J.—I concur.

Application dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 818 OF 1911.

March 2, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

UDIT SINGH—PLAINTIFF—APPELLANT

versus

AMAR KUAR—DEFENDANT—RESPONDENT.

Succession Act (X of 1865), ss. 35, 87—Gift to mistress and her sons by unmarried person—Provision that property "shall be no concern of mine"—Illegitimate sons, whether meant—"Intimation to the contrary"—Man, whether father of illegitimate children.

One *T* who was unmarried gave certain property to his mistress *S* and to her sons by him in these terms: "The property is given to *S* for her life and after her death, the sons and heirs of me shall come in possession of the said property. It shall be no concern of mine":

Held, that (1) under section 87 of the Succession Act, there must be an intimation that the illegitimate sons were meant, and that such an intimation existed in the provision that the property was to be no concern of *T*; (2) the intention of *T* was that after the death of his mistress, the property should go to her illegitimate sons; and (3) the English view that a man is not the father of his illegitimate children applies also under the Succession Act.

Emma Agnes Smith v. *Thomas Massey*, 30 B. 500; 8 Bom. L. R. 322, relied upon.

Appeal from the decree of the District Judge of Mozaffarpore, dated January 3rd, 1911, affirming that of the Sub-Judge of that place, dated September 15th, 1909.

Babus *Umakali Mukherji* and *Lakshmi Narayan Singh*, for the Appellant.

Mr. *C. R. Dass*, Counsel with Babu *Shorashi Charan Mitra*, for the Respondent.

JUDGMENT.

COXE, J.—This is a suit to recover some land that originally belonged to one A. Tripe. A. Tripe gave it in 1863 to one Bibi Sarban, whom he kept, and after her death to his sons and heirs. At that time he had three sons and a daughter by her, but it is doubtful if his fourth son by her, J. R. Tripe, was then born. Bibi Sarban executed a Will before her death in which she left money and ornaments to her daughter and the rest of her moveable and immoveable property to the three sons by name. The Will recites the necessity of dividing the property acquired by the gift of 1863 though Bibi Sarban in that had only a life-interest. A. Tripe was appointed executor of the Will, and after Bibi Sarban's death, although it does not appear that he took out probate, he mortgaged the property in suit to the defendants, describing himself as executor of the Will of Bibi Sarban, ancestor of the three sons. The word 'ancestor' may refer to him or to Bibi Sarban. Thereafter the three sons died and finally A. Tripe died. He left a Will of which his brother J. T. Tripe took out probate. He did not mention the property in suit in his application for probate. When he died he left his property to Miss Delia Tripe, who sold the property in suit to the plaintiffs. They now sue for redemption of the mortgage and the defence is that the plaintiffs have no title. It is also pleaded that Bibi Sarban's property descended ultimately to J. R. Tripe who left it to his mistress Sara Indians D'Cruze. The suit has been dismissed and the plaintiffs appeal.

On their behalf it is first argued that there was no gift ever to the sons at all. The property was given to Bibi Sarban for her life and it was then provided that "after the death of *Musammat* Bibi Sarban aforesaid the sons and heirs (*pisaran warisan*) of me,

the declarant, shall come in possession of the said property. It shall be no concern of mine". It is argued that this means that A. Tripe's real heirs were to inherit, and reference is made to section 87 of the Succession Act, 1865. This argument would have had much more force if it had been put forward earlier. It was never suggested in either of the Courts below or in the grounds of appeal. It is quite clear that it never occurred to any one concerned, until this appeal was ready for argument, that the sons referred to in the gift were not the sons of Bibi Sarban, who were then living. Bibi Sarban, when she executed her Will 16 years later, clearly had no doubt that they were the sons who were to succeed her in the possession of the property, and A. Tripe, who may be presumed to have known what he intended, accepted that position when he mortgaged the property. If the point had been raised before, other evidence might have been forthcoming. It might, for instance, have been the case that A. Tripe had no expectation of further issue. No doubt, under section 87, there must be an intimation in the Will itself that the illegitimate sons were meant, but this, I think, is to be found in the provision that the property is to be no concern of A. Tripe. If really he had intended that after Bibi Sarban's death the property should go to his legitimate heirs, he being then unmarried, he must have foreseen the possibility that Bibi Sarban might die before the legitimate heirs appeared and he would not have inserted the provision that the property should be no concern of his. It seems to me, therefore, that the intention of A. Tripe was that after Bibi Sarban's death the property should go to the illegitimate sons, and as the plaintiffs do not claim through the illegitimate sons they have no title.

Next it is argued that the defendants must show that J. R. Tripe was alive at the time of the gift. It is unnecessary, however, in the view I take of the case to discuss J. R. Tripe's right.

It is also argued that as the three sons died in the life-time of A. Tripe, their property reverted to him and the plaintiffs are entitled, therefore, at any rate to redeem to the extent of their interest. Section 35 of the Succession Act is relied on. It seems, however, to be generally accepted, though I cannot find much support for the doctrine in the Act itself, that the English view that a man is not the father of his illegitimate children applies also under the Succession Act. This was the view taken in *Emma Agens Smith* v. *Thomas Massey* (1).

Finally it is urged that the defendants who took their mortgage from A. Tripe cannot deny that he was then the owner of the property. The answer to this contention is that A. Tripe did not mortgage the property to the defendants as his own but as executor for Bibi Sarban's estate. That may not be a very intelligible expression, but as he was appointed executor in Bibi Sarban's Will by which the property was left to the three sons, it is evident that he was not dealing with it or purporting to deal with it as his own.

The appeal, in my opinion, fails and must be dismissed with costs.

D. CHATTERJEE, J.—I agree.

Appeal dismissed.

(1) 30 B. 500; 8 Bom. L. R. 322.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 122 OF 1911.

July 11, 1912.

Present:—Mr. Justice Parlett.

CHANDI CHARAN SEN—APPELLANT

versus

RAM COOMAR CHAKRAVARTI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 11 (1)—Sureties for appearance of judgment-debtor on the day the time for appeal expires—Surety's bond not in accordance with Court's order—Construction—Court's intention in asking for sureties—Responsibility of sureties—Its extent.

D. M. Biswas was summarily arrested under Order XXI, rule 11 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs, the Judge ordered his release on his sureties furnishing security for his appearance on the 1st August 1909, the date when the period for appeal against the decree expired, failing which the sureties would be held liable for the decretal amount and the judgment-debtor would be re-arrested and committed to Jail. An appeal was duly preferred on the 27th July 1909 and dismissed on the 14th October 1909.

CHANDI CHARAN SEN v. RAM COOMAR CHAKRAVARTI.

The bond which the sureties actually signed was for the due performance of such decree as might ultimately be binding on the judgment-debtor and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing or about producing him before the Court on the 1st August 1909:

Held, that it was clearly not in accordance with the order of the Court.

Held, that what the Court ordered and the appellant agreed to was that the judgment-debtor's appearance on the 1st August 1909 should discharge the sureties and that it was then the Court's duty to re-arrest the judgment-debtor and commit him to prison.

The next question was whether the surety had fulfilled his obligation.

The proceedings showed that the judgment-debtor appeared before the Court between the 10th August 1909 and the 5th April 1911 (both inclusive):

Held, that not only did the judgment-debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of 2½ years and that, therefore, the purpose for which the appellant had been ordered to furnish security had been fulfilled and that the appellant had been discharged from liability.

Mr. *Maung Pu*, for the Appellant.

Mr. *B. Banerji*, for the Respondent.

JUDGMENT.—D. M. Biswas was summarily arrested under Order XXI, rule 11 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs, the Judge ordered his release on his sureties furnishing security for his appearance on 1st August 1909, the date when the period for appeal against the decree expired, failing which the sureties would be held liable for the decretal amount. The order explained that the judgment debtor intended to appeal, for which purpose he would be allowed to be at liberty for two months, but if he failed to appeal within that time he would be re arrested and committed to Jail. An appeal was duly preferred on 27th July 1909, and dismissed on 14th October 1909.

The bond which the sureties actually signed was for due performance of such decree as might ultimately be binding on the judgment-debtor, and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing, or about producing him before the Court on 1st August 1909. It was clearly not in accordance with the order of the Court. The Divisional Court held that it was binding upon the sureties in the terms in which they signed it, and ordered execution to proceed against appellant who is one of the sureties. It held that appellant as a man of ordinary prudence might be presumed to have understood and acquiesced in the terms of the bond which he signed. That presumption is under the circumstances but a weak one. Appellant from the first asserted that he was ignorant of its real terms and believed that he merely bound himself to produce the judgment-debtor on 1st August 1909, if he failed to prefer an appeal before that date. There was no evidence. The bond is printed in Burmese, which is not appellant's language, it is not stated that he could or did read or understand it or that it was read or explained to him. It is quite likely it was not, and that appellant not unnaturally took it for granted that the bond he was called upon to sign embodied the conditions laid down in the order which the Judge had just pronounced.

The Divisional Court presumed that appellant knew the contents of the bond but the Court did not, and that as a mistake of fact on the part of one party only to a contract did not, under section 22 of the Contract Act, render it voidable, it was valid and could be enforced against the appellant. I should be inclined to reverse the position. However, I think, if the Contract Act is to be invoked at all section 13 is more apposite, and that there is no consent between the Court and the appellant as they did not agree upon the same thing in the same sense. The appellant offered security for the judgment-debtor's appearance, failing which he bound himself to pay the decretal amount. The Court took his security to pay the decretal amount if and whenever the judgment-debtor failed to pay.

It is open to question whether the security bond, as actually taken, could be enforced at all, as it does not appear to be in accordance with any provision of law. Apparently the nearest analogy to any such bond would be that provided for in rule 2 of Order XXXVIII, where the surety must bind himself to pay the decretal amount in default of his principal's appearance.

To leave abstract considerations I consider it quite clear that what the Court ordered

and the appellant agreed to was that the judgment-debtor's appearance on 1st August should discharge the sureties: it was then the Court's duty to re-arrest the judgment-debtor and commit him to prison. It is, therefore, for consideration whether the surety has fulfilled his obligation. He says he produced the judgment-debtor on 1st August 1909, the proceedings do not show it: but they do show clearly that the judgment-debtor appeared before the Court in some or all of the following dates:—10th August; 6th, 10th and 24th September; 3rd and 8th November; 10th December 1909; 19th January; 4th March; 3rd and 28th May; 26th June 1910; and 3rd and 5th April 1911. It is obvious, therefore, that not only did the judgment-debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of over 2½ years. I hold, therefore, that the purpose for which the Sub-Divisional Judge on 31st May 1909 ordered appellant to furnish security has been fulfilled and that appellant has been discharged from liability. The appeal is allowed with costs in all Courts, Advocate's fees two gold *mohurs*, and appellant is declared to be discharged from liability under the bond signed by him on 31st May 1909.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 967 OF 1913.

December 15, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge.

GANDA MAL—DEFENDANT—PETITIONER

versus

RAMJI DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2(2)—Guardians and Wards Act (VIII of 1890), s. 43 (4)—Power of Court to demand security from guardian of person of female ward.

A District Court can demand security from the guardian of the person of a female infant ward to prevent his giving the infant in marriage to any person without the consent of the proper male relation of the girl, such an order does not abate by the death of the person upon whose application it is made.

Petition, under section 47 of Act VIII of 1890, for revision of the order of the District Judge, Lahore, dated the 1st of March 1913, ordering the petitioner to furnish security in Rs. 500.

Lala *Dharm Das Suri*, for the Petitioner.

Dewan *Mehr Chand*, for the Respondent.

JUDGMENT. (*December* 3, 1913).—The sole question for consideration is whether the District Court was justified in calling upon the guardian of the female infant to furnish security in Rs. 500, "to prevent his giving the infant in marriage to any person without the consent of the proper male relation of the girl."

In my opinion section 43 (1) of the Guardians and Wards Act, VIII of 1890, read with section 43 (4) of the Act and with Order XXXIX, rule 2 (2) of the Code of Civil Procedure empowers the Court to demand security.

There is, therefore, no ground for interference in revision and the application is dismissed with costs.

ORDER.—Judgment in this case was written before the Court re-opened after the Muharram vacation, but was not pronounced, the Court closing on the evening of the 3rd December. When the Court re-opened and before judgment was pronounced, Mr. Dharm Das Suri for the petitioner stated that the respondent had died and contended that the order of the District Judge, passed on the respondent's application, consequently abated, on the principle that a personal action dies with the person.

There is no force in this contention. The order impugned is, not that the respondent shall have a voice in the selection of a husband for a minor, but that the minor's "proper male relation" shall have a voice in the matter.

The death of the respondent consequently does not affect the matter. If there is no "proper male relation" of the minor in existence, the condition fails. I see no reason for further action by way of review or otherwise.

Appeal dismissed.

BHIWANI DAS *v.* JHANDA RAM.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 350 OF 1913.

November 26, 1913.

Present:—Sir Arthur Reid, Kt., Chief Judge.

BHIWANI DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JHANDA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Material irregularity—Second appeal on ground of lower Court refusing to take whole evidence—Party closing his case—Practice.

Where the first Court has recorded that a party has closed his case, that party cannot successfully urge in appeal that the Court refused to receive whole of his evidence without proving conclusively that the record is wrong, especially when the objector was represented by Counsel in the lower Court.

An Appellate Court ought to dispose of specifically the grounds of appeal urged before it.

Second appeal from the decree of the Divisional Judge, Attock Division, dated 25th November 1912, affirming that of Munsif, 2nd class, Bhakkar, dated 30th July 1912, dismissing the claim.

Mr. *Nihal Chand Mehra*, for Messrs. *Nand Lal* and *D. R. Sawhney*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The appellants were represented in the lower Appellate Court by Lala Kidar Nath and Lala Nathu Ram, Pleaders, and have not even yet filed an affidavit that the 4th ground taken there was pressed.

The Court of first instance recorded that Bhiwani Das stated that certain witnesses could not attend because they were busy ploughing after rain had fallen, and that he had closed his case. This record bears a signature purporting to be of Bhiwani Das.

The only point on which the appeal was admitted, therefore, fails, although the lower Appellate Court should have disposed specifically of the plea, and the appeal is dismissed with costs.

Appeal dismissed.

ARURA *v.* IMAM BAKHSH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 610 OF 1913.

November 25, 1913.

Present:—Mr. Justice Chevis.

ARURA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

IMAM BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884 as amended by Acts I and IV of 1912), s. 40—Appeal on question of custom without certificate—Granting permission to appeal—Revision.

Under section 40 of Act XVIII of 1884, as amended by Acts I and IV of 1912, no appeal regarding the validity or existence of any custom or usage is allowed from an Appellate decree without a certificate mentioned therein, even if questions of law are involved or material errors of procedure have occurred, so far as the finding on the question of that custom or usage is concerned.

It is not proper to interfere in revision with such an appellate decree as to the validity or existence of a custom.

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated 15th January 1913, reversing that of the District Judge, Sialkot, dated 21st June 1912, decreeing plaintiffs' claim.

Mr. *Shah Nawaz* and Khwaja *Zia-ud-din*, for the Appellant.

Mr. *Badar-ud-din Qureshi*, for the Respondents.

JUDGMENT.—This is a suit in which the collaterals contest the validity of the adoption of a daughter's son. The first Court held that such an adoption was contrary to the custom of the tribe and gave plaintiffs a declaratory decree. The learned Divisional Judge held a contrary view and dismissed the suit, but "in view of the divergent judicial decisions and the uncertainty surrounding these questions of custom," left the parties to bear their own costs.

Plaintiffs, having been refused a certificate by the Divisional Judge, have lodged this second appeal without certificate.

It is contended that the *onus probandi* has been wrongly placed. But even so, I fail to see how a second appeal can lie without a certificate. Counsel points to Punjab Courts Act, section 40 (1), and says points of law are involved and there have been errors of procedure. But the provisions of section 40 (3) of the Punjab

Courts Act, as amended by Act IV of 1912, are quite clear, *viz*, that notwithstanding anything in sub section (1), no second appeal shall lie from an appellate decree regarding the validity or existence of any custom or usage without a certificate. I hold that no second appeal lies.

Then Counsel asks me to interfere on revision under section 70. But when the Legislature has first provided a right of second appeal in cases generally, and then deliberately cuts it off in cases of custom, unless the petitioner can obtain a certificate from the lower Appellate Court as to the importance of the custom, I think the Legislature intended that unless the Judge of the lower Appellate Court thought fit to grant a certificate, his decision should be final, and there should be an end to the litigation. I do not consider that it would be at all right to interfere on revision in such cases. The appeal is dismissed, but I pass no order as to costs.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 206 OF 1912.

September 16, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

DINKAR HARI KULKARNI—DEFENDANT—APPELLANT

versus

CHHAGANLAL NARSIDAS—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19, Sch. I. Arts. 66, 116—Bond, Suit for money due under—Compensation—Breach of contract—Acknowledgment.

A suit in form a suit for money due on a bond is in substance a suit for compensation for breach of contract within the meaning of Article 116 of the Limitation Act and the period of six years provided in that Article applies if the bond is registered.

Ram Din v. *Kalka Parsad*, 12 I. A. 12;7 A. 502; 4 Sar. P. C. J. 619 and *Bulakhi Ganu Shet* v. *Tukarambhat*, 14 B. 377, discussed.

Ganesh Krishn v. *Madhavrav Ravji*, 6 B. 75. *Amritrav Vinayak* v. *Vasudev*, (1882) P. J. 291; *Husain Ali Khan* v. *Hafiz Ali Khan*, 3 A. 600; A. W. N. (1881) 33; 6 Ind. Jur. 142; *Naubat Singh* v. *Indar Singh*, 13 A. 200; A W. N. (1891) 5; *Umesh Chunder Mundul* v. *Adarmoni Dasi*, 15 C. 221; *Din Doyal Singh* v. *Gopal Saran Narain Singh*, 18 C. 506; *Srinivasa Raghava Dikshadar* v. *Rangasami Aiyangar*, 31 M. 452; 18 M. L. J. 477; 5 M. L. T. 211, referred to.

Where some years after executing a mortgage-deed the mortgagor passed a promissory-note to the mortgagee for an another debt and therein referred to the mortgage-debt as an extra or additional debt:

Held, that such reference amounted to an acknowledgment within the meaning of section 19 of the Limitation Act.

First appeal from the decision of the Additional First Class Subordinate Judge at Dhulia in Civil Suit No. 695 of 1910.

Mr. *Gadgil* with him Mr. *A. V. Lele*, for the Appellant.

Mr. *W. B. Pradhan*, for the Respondent.

JUDGMENT.

SHAH, J.—The present appeal arises out of a suit brought by the plaintiffs to recover money by sale of the mortgaged property described in the plaint and in the alternative, in case a decree for sale of the property cannot be passed, for a decree personally against the defendant. The bond is dated the 17th of June 1897 under which the defendant agreed to pay the amount of the mortgage-debt in three instalments, the first instalment being payable on the 5th June 1898, the 2nd on the 24th June 1899, and the 3rd on the 14th June 1900. The plaintiff relied also upon two acknowledgments contained in two promissory-notes, dated the 24th August 1903 and 11th August 1906 respectively. The suit was filed on the 6th August 1910. The bond being attested only by one witness is inoperative as a mortgage-bond. The lower Court has, however, passed a decree against the defendant personally, holding that the plaintiffs' claim is within time.

In appeal it has been contended on behalf of the appellant before us that though the bond sued on is registered, the claim

is beyond time inasmuch as Article 66, and not Article 116 of the Limitation Act, Schedule I, is applicable, and that the acknowledgments which have been held by the lower Court to be good acknowledgments are really not acknowledgments within the meaning of section 19 of the Limitation Act. It is also urged that the personal decree cannot be legally passed.

With regard to the first point, reliance has been placed upon two cases, *viz.*, *Ram Din* v. *Kalka Prasad* (1) and *Bulakhi Ganu Shet* v. *Tukarambhat* (2). On the strength of certain observations in these two cases, it has been urged that where the suit is in form a suit on a bond, Article 66 should be applied, and not Article 116, even though the bond may be registered. Several other cases have been cited at the Bar having reference to this particular point, and on a consideration of all the cases and the observations in the above two cases, I have come to the conclusion that the current of decisions, which is against the appellant's contention, is in no way disturbed by the observations relied upon by him. It has been held by all the High Courts in India that though the suit may be in form a suit for money due on a bond, still it is in substance a suit for compensation for breach of a contract within the meaning of Article 116 of the Limitation Act, and the period of six years provided in that Article would apply if the bond is registered. I need refer only to the cases of *Ganesh Krishn* v. *Madhavrav Ravji* (3), *Amritrav Vinayak* v. *Vasudev* (4), *Husain Ali Khan* v. *Hafiz Ali Khan* (5), *Naubat Singh* v. *Indar Singh* (6), *Umesh Chunder Mundul* v. *Adarmoni Dasi* (7), *Din Doyal Singh* v. *Gopal Sarun Narain Singh* (8) and *Srinivasa Raghava Dikshadar* v. *Rangasami Aiyangar* (9). It will thus appear that the Courts have consistently taken the same view both before and after the ruling in *Ram Din* v. *Kalka Prasad* (1). This view derives further support from the observations of the Judicial Committee in the case of *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (10) where, in a suit based upon a registered instrument, it was observed that the period of six years, and not a period of twelve years, would apply to the case. With regard to the observations in the case of *Ram Din* v. *Kalka Prasad* (1) I may say that, having regard to the facts of that case, the only point which arose for decision was whether for the purposes of personal liability the period of twelve years under Article 132 of the Limitation Act applied to the case. There was no point in that case as to whether the period of limitation applicable would be three years or six years. Therefore the observations in the case of *Ram Din* v. *Kalka Prasad* (1) about the shorter period of three years being applicable were not necessary for deciding the appeal. As the observations in the case of *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (10) are in consonance with the current of decisions of the Indian Courts and in conflict with the dictum in the case of *Ram Din* v. *Kalka Prasad* (1) I think that it would be proper to accept the view which has found favour with the Indian Courts. As regards the case of *Bulakhi Ganu Shet* v. *Tukarambhat* (2), having regard to the facts of the case, it is clear that it was not necessary to decide whether the period of limitation applicable was three years or six years. The observations of the learned Judges are based upon the dictum in the case of *Ram Din* v. *Kalka Prasad* (1) and upon two cases which on reference I find to have no bearing on the question as to whether to a suit on a registered bond Article 66 or Article 116 would apply. I think, therefore, that the lower Court has rightly applied Article 116 to the present case.

As regards the argument as to acknowledgments, I am of opinion that the words used in the two promissory-notes do amount to acknowledgments within the meaning of section 19 of the Limitation Act. I am unable to see why a personal decree cannot be passed. The only consideration urged by the learned Counsel for the appellant is that as the bond provides that the executant is to pay the balance

(1) 12 I. A. 12; 7 A. 502 (P. C.); 4 Sar. P. C. J. 619.
(2) 14 B. 377.
(3) 6 B. 75.
(4) (1882) P. J. 291.
(5) 3 A. 600; A. W. N. (1881) 33; 6 Ind. Jur. 142.
(6) 13 A. 200; A. W. N. (1891) 5.
(7) 15 C. 221.
(8) 18 C. 506.
(9) 31 M. 452; 18 M. L. J. 477; 5 M. L. T. 211.
(10) 19 I. A. 234; 20 C. 79.

personally after the proceeds of the sale should be credited to accounts, and that as no sale can be effected under the bond, there is no liability whatever. The words in the bond, however, "as stated above I shall re-pay the amount with interest", contain a distinct undertaking to pay, and the effect of these words is in no way limited by the subsequent undertaking to pay the balance in case of deficiency.

I, therefore, affirm the decree of the lower Court with costs.

HEATON, J.—I concur.

Decree confirmed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

February 6, 1914.

Present:—Lord Shaw, Lord Moulton and Mr. Ameer Ali.

Musammat BAKHTAWAR BEGAM—APPELLANT

versus

Musammat HUSAINI KHANAM AND ANOTHER—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 148—Mortgage by conditional sale—Term of mortgage fixed—Mortgage-debt re-paid within term—Redemption—Limitation, whether runs from end of term or from time of payment.

Ordinarily, and in the absence of a special condition entitling a mortgagor to redeem during the term for which he has created a mortgage, the right of redemption can only arise on the expiration of that specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property.

A certain property was mortgaged by way of conditional sale in 1830, with the stipulation that the mortgagor would be entitled to recover it back within the period of nine years on the liquidation of the debt with the usufruct of the property. It was alleged that the mortgage money was paid up by the usufruct in eight years, that is up to 1838. In 1899 the mortgagor sued to redeem the mortgage;

Held, that as the suit was brought sixty years after the satisfaction of the mortgage-debt, it was barred by time.

Consolidated appeals from a judgment and decree of the Allahabad High Court dated November 11th, 1907, passed on return of the findings on the two issues of fact remitted to the lower Court by the High Court's judgment dated 16th April 1907 and reported in 4 A. L. J. 375; A. W. N. (1907) 133; 29 A. 471, modifying a judgment and decree of the Subordinate Judge of Cawnpore, dated January 4th, 1904.

FACTS are sufficiently set forth in their Lordships' judgment.

Mr. *De Gruyther, K. C.* (with him Mr. *Dube*), for the Appellant, contended that under section 62 of the Transfer of Property Act in a usufructuary mortgage the right of the mortgagor to recover possession of the property accrued when according to the terms of the mortgage the mortgage money was paid up out of the rents and profits of the property. In the present case the period of limitation as required by Article 148, Schedule II, of the Limitation Act began running from the time the principal with interest was satisfied out of the rents and profits, that is to say, at the end of the 3rd year, *i.e.*, 1834. The suit was brought after the expiration of 60 years *i.e*, in 1899. By section 50 of the Code of Civil Procedure of 1882 the plaint ought to have shown the grounds on which exemption from the law of limitation was claimed and the plaint ought to have been rejected at the very outset on the ground of limitation according to section 54 of the Code of Civil Procedure.

Sir *E. Richards, K.C.*, and *Ross, K.C.*, (and Mr. *O' Gorman*), for the Respondents, argued that the mortgage could not have been redeemed before 1839 and, therefore, the period of limitation if at all would run from that date. That it was so was apparent from the plaint which stated that the mortgage was for nine years. This was confirmed by petition which was made to the Collector in 1830 for the mutation of names of the mortgagees in place of those of the mortgagors. In 1867 the defendant (Ali Hussain Khan, who created a mortgage of some of the properties in question,) laid down conditions as to the payment of mortgage-money. By an agreement of 1830 between the mortgagors and the mortgagees the mortgaged properties were

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to be redeemed only on payment of principal and interest. There were various proceedings between 1830 and 1899 which went to show that parties took the mortgage unredeemable unless the amount due was paid.

Reference was made to *Vadju* v. *Vadju* (1).

Mr. *De Gruyther* replied.

JUDGMENT.

MR. AMEER ALI.—The suit which has given rise to these consolidated appeals from a decree and judgment of the High Court of Allahabad was instituted by the plaintiff-respondent in the Court of the Subordinate Judge of Cawnpore for the redemption of a mortgage executed so long ago as the 6th of January 1830. The suit was brought on the 6th of January 1899, and the only and vital question presented at the Bar for determination in this case is whether the claim is barred by the Statute of Limitation (Indian Act XV of 1877.)

The plaintiff, Husaini Khanam, alleges that on the 6th of January 1830 her father, Aga Fateh Ali, in conjunction with another relative named Aman Ali, executed a mortgage by way of conditional sale in respect of 12 villages lying within the district of Cawnpore in favour of one Ata Ullah Khan, since deceased. The other plaintiffs are persons who have acquired title from Husaini Khanam. The principal defendant in the action was one Ali Husain Khan, who was the representative of Ata Ullah. He died since the decision by the High Court in the appeal from the decree of the Subordinate Judge, and he is now represented by his widow, Bakhtawar Begam, the appellant. The remaining defendants are assignees of interests created by the original mortgagee or his representatives in the mortgaged premises.

The mortgage deed is not forthcoming, but both the Courts in India have found that the contract between the parties to the transaction is, for all material purposes, substantially set forth in the proceeding of the Collector's Court dated the 18th of September 1830, on an application for mutation of names in the Revenue Register.

The contract of mortgage by conditional sale is a form of security recognised throughout India, and its incidents have been embodied in section 58 of Act IV of 1882 (the Transfer of Property Act). The form it usually takes is for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee who on his side executes an agreement covenanting that on the liquidation of the debt, according to the terms of the contract, the sale would be cancelled, and he would re-convey the property to the mortgagor. On the breach of the condition relating to re-payment the contract executes itself, and the transaction becomes one of absolute sale.

The proceeding which contains the contract in this case is set out in full in the judgment of the High Court. The only material part to which their Lordships need refer is the clause relating to re-payment, which runs as follows:—

"On being asked Sital Parshad, Attorney of Ata Ullah Khan, stated that his client had executed and made over to Mirza Aman Ali and Fateh Ali an agreement to the effect that the sale would be cancelled on payment of the amount of consideration in nine years, and that, therefore, the sale was not an absolute but a conditional sale."

The period of limitation under the Indian Statute for suits for redemption or for recovery of possession of mortgaged property is sixty years from the date of the accrual of the right to redeem or to recover possession (Article 148, Schedule II, Act XV of 1877). The Subordinate Judge was of opinion that limitation began to run from the date of the contract, and accordingly held that the suit was barred. The High Court of Allahabad on appeal have taken a different view. The learned Judges considered *inter alia* that the right to redeem in respect of the seven villages which were in the possession of the mortgagee's representatives accrued only on the expiration of the period of nine years for which the contract was made, but that as regards the five villages which had been transferred by the mortgagee to third parties the claim was barred. They accordingly decreed the plaintiff's claim in respect of seven villages and dismissed it with regard to the rest.

The defendants have appealed from the

(1) 5 B. 22.

first part of the High Court decree, against which there is a cross-appeal on the part of the plaintiff.

The first question to determine is whether the plaintiff's right to redeem is affected by 60 years' limitation, for in that case her claim must fail *in toto*. The learned Judges dealing with this point give expression to their opinion in the following passage in their judgment:—

"If the meaning of this contemporaneous agreement was that the mortgagors might redeem at any time within the period of nine years, the plaintiffs' claim is barred by limitation. If, on the other hand, the intention of the parties was that the debt should remain outstanding for a period of nine years certain, then the right to redeem only accrued at the expiration of that period. Ordinarily, a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and, therefore, it is not competent for either party to disturb that relation."

And they refer to a number of cases in support of their conclusion. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor. In the present case had the matter depended only on the construction of the contract as given in the proceeding of the Collector, much might be said in support of the High Court's conclusions. The expression that "the sale would be cancelled on payment of the consideration in nine years" is certainly ambiguous.

But here the plaintiffs' case is that the mortgagors were entitled to recover the property within the period of nine years on the liquidation of the debt with the usufruct of the property. In the second paragraph of the plaint the plaintiffs state as follows:—

"The terms of the mortgage as agreed were that the mortgagee should remain in possession of the said mortgaged villages . . . that the amount of profits, if any, which shall remain after paying the Government revenue, interest, and pay of the persons making the collections would be owned by the mortgagors and applied in the payment of the principal, and that whenever the mortgage money would be satisfied (out of the usufruct) or paid (by the mortgagors) before or after the stipulated time the mortgaged property should be redeemed."

And the fact is emphasised in paragraph 8, which is in these terms:—

"The whole amount of the principal mortgage money with interest mentioned in the mortgage-deed was paid up at the end of the year 1245 *Fasli*, according to the account which is annexed to this plaint and forms part of it. No portion of the mortgage-money, interest or any other demand is now due; on the other hand, there is a surplus amount due to the plaintiffs."

In their Lordships' judgment this is not a case of a wrong construction of a clause or condition in the contract. It is a distinct allegation of fact on which the right to recover possession is founded. But the matter does not rest there. The plaintiffs produced with the plaint a statement of accounts in respect of the 12 villages based on the Settlement Records to show the amounts realised by the mortgagee from 1830 to 1897. In this document it is clearly stated that the whole debt was satisfied in 1245 *Fasli* (4th September 1837—4th September 1838). From that time the balance of the realizations by the mortgagee after deduction of the legitimate outgoings is treated by the plaintiffs as sums retained by him without any right.

If the fact be, as the plaintiffs allege, that the mortgage-debt became satisfied under the contract in 1838, the right to recover possession accrued then, and the suit is clearly barred.

Their Lordships are, therefore, of opinion that the decree of the High Court partly decreeing the plaintiffs' claim should be set aside, and the suit dismissed, which will involve the dismissal also of the cross-appeal.

With regard to the costs, their Lordships think that Jamna Narain, who represents the original assignee of the five villages in respect of which the plaintiffs' suit has been dismissed by both the Courts in India, is entitled to the costs decreed in the Court of the Subordinate Judge and in the High Court, and to the costs of these appeals to His Majesty in Council. As regards the other parties, their Lordships think that the plaintiffs should bear the costs decreed against them in the first Court, but that each of the parties should bear their respective costs of these appeals and of the appeals to the High Court, including the costs incurred in the proceedings on remand.

And their Lordships will humbly advise His Majesty accordingly.

Decree set aside.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *T.O. Summerhays & Son* and *Ranken Ford, Ford & Chester.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 671 OF 1910.

July 12, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

NIADAR MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MESSRS. B. BORROOAH & CO.—DEFENDANTS—RESPONDENTS.

Landlord and Tenant—Landlord's failure to repair—Tenant's right to make deductions from rent—Conditions to pay enhanced rent in default of regular payments.

If a landlord fails to repair leased premises according to the terms of the lease and the tenant is thereby deprived of the use of a portion of it and is also put to loss and inconvenience, the latter is entitled to deduct from the rent a reasonable amount with regard to the non-use, loss and inconvenience.

A condition to pay enhanced rent in default of regular payments is penal.

Second appeal from the order of the Divisional Judge, Delhi Division, dated 21st March 1910, modifying that of the Additional District Juge, Delhi, dated 11th November 1909, decreeing plaintiffs' claim.

Mr. *Gullu Ram*, for the Appellants.

Mr. *M. N. Mukerji*, for the Respondents.

JUDGMENT.—Certain property at Delhi shown as the Northbrook Hotel came into the possession of plaintiffs-appellants as mortgagee on 4th April, 1903.

By a lease dated 18th April 1908, the hotel was let to the defendants-respondents' company for a period of one year, with effect from the 1st May 1903, on which date the defendants-respondents entered into possession.

Apparently some moveable property belong-to plaintiffs-appellants remained in building during the months of May and June and subject to a deduction made on this account, which is now not in dispute, the rent was paid for these two months according to agreement.

The dispute in this appeal relates to the rent for six months from July to December 1908 inclusive.

Under the terms of the lease the defendants-respondents were to pay a month's rent of Rs. 206 4-0, but in the event of failure to pay rent as stipulated, it was agreed that the plaintiffs-appellants could charge rent at the rate of Rs. 300 per mensem.

It was also agreed that the plaintiffs-appellants would maintain the building in a proper state of repairs and there was a provision enabling defendants-respondents to execute repairs and deduct the cost from the rent.

Plaintiffs-appellants claimed six months' rent at enhanced rate of Rs. 300 per mensem, and the defendants-respondents, not only pleaded that the rate was penal, but also urged that they were entitled to a deduction from the rate of Rs. 206-4-0 per mensem on account of damages due to the plaintiff-appellants' default in executing repairs.

The first Court decreed payment of six months' rent at Rs. 206 per mensem, *i. e.*, Rs. 1,237-8-0, but the lower Appellate Court has reduced this amount to Rs. 937-8-0, allowing a deduction in favour of defendants-respondents of Rs. 50 per mensem. It is admitted that at the time the lease began the roofs of four of the rooms had fallen in, and it is urged on behalf of plaintiffs-appellants that the defendants-respondents accepted the lease, knowing that these four rooms could not be used.

It is, however, obvious and is clear from the correspondence which took place between

the parties that defendants respondents entered into possession on the understanding that all the necessary repairs would be executed and that plaintiffs-appellants knew that defendants-respondents were entitled to have the building put into thorough order.

The fact is that plaintiffs-appellants as mortgagees did not want to spend money on the building but wanted by the mortgagor-owner, consequently, though a man may have been sent occasionally to stop a leak in the roof, nothing of any practical use was done.

It is very clearly proved that as a result of this neglect serious damage occurred in the rains and at the time when the defendants-respondents stopped paying rent, there were besides the original four roofless rooms other rooms which had fallen in or had become dangerous and otherwise useless.

There was clearly default on the plaintiffs-appellants' part, and the cost of repairing the damage was obviously more than defendants-respondents could be expected to pay by deduction from the rent. The defendants-respondents could not be expected to continue paying full rent when they were being put in loss by plaintiffs-appellants' neglect to repair the house, and there is no reason to suppose that they would not have paid regularly if plaintiffs-appellants had carried out their part of the bargain considering the number of rooms which became useless and the discomfort and inconvenience to defendants-respondents. We do not think that the lower Court in deducting Rs. 50 per mensem has deducted an excessive amount.

We accordingly affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 672 OF 1910.

July 10, 1912.

Present:—Mr. Justice Shah Din and Mr. Justice Beadon.

NIADAR MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MESSRS. B. BORROOAH & CO.,—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease of premises, portion of which is already in possession of another tenant—Relation of lessee and former tenant—Lessee giving up entire premises after termination of his lease, effect of—Sub-tenant.

Where a lessee accepts the lease of premises a portion of which is already in the occupation of a tenant, the latter becomes the sub-tenant of the former. But when the lessee gives back the possession of the premises in his actual possession to the lessor at expiry of the lease, this amounts to entire vacation of the premises and the former tenant again becomes the tenant of the lessor.

Second appeal from the order of the Divisional Judge, Delhi, dated 21st March 1910, modifying that of the Additional District Judge, Delhi, dated 11th October 1909, decreeing plaintiffs' claim in part.

Mr. *Gullu Ram*, for the Appellants.

Mr. *M. N. Mukerji*, for the Respondents.

JUDGMENT.—The suit to which this appeal relates is a continuation of the suit which is the subject of Civil Appeal No. 671 of 1910.* The parties are the same and the lease is the same, but the dispute has reference to the rent for the last four months of the lease, *i.e.*, January to April 1909.

For reasons given in the connected appeal we agree with the lower Appellate Court in fixing the rent at Rs. 156-4-0 per mensem and the only other point has reference to costs.

Owing to the condition of the building, the defendants-respondents vacated it in February 1909 and gave notice to plaintiffs-appellants that they had done so.

It is true that one such tenant was still occupying his rooms at the end of April when the lease expired, but he cannot be treated as a sub-tenant of the defendants-respondents at that time. This gentleman was occupying rooms in the hotel when defendants-respondents took it over and was occupying the same rooms at the end of the lease. Defendants-respondents merely left to the plaintiffs-appellants the same sub-

* *See* 23 Ind. Cas. 358.—*Ed.*

tenants whom they had taken over from the plaintiffs-appellants and this sub-tenant accepted this position and tendered rent to plaintiffs appellants.

We hold that defendants-respondents to the knowledge of plaintiffs-appellants had vacated the building before the end of the lease and before the suit was instituted and that costs were rightly not allowed on the unnecessary claim for ejectment.

We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 59 OF 1913.

November 18, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

C. M. APPAVU PILLAI—PLAINTIFF—APPELLANT

versus

Sheikh AMIR SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Presentation of plaint, out of office hours, to officer of Court, authorized to receive within office hours, whether proper presentation—Ratification.

A presentation, out of office hours, of a plaint to an officer of a Court authorized to receive plaints within office hours only is not a proper presentation, unless ratified by the Court on that very day.

Appeal under section 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Bakewell, in Civil Revision Petition No. 661 of 1912, preferred against that of the District Munsif of Coimbatore, in Second Civil Suit No. 12 of 1912, dated 26th February 1912.

Mr. *A. Sundaram*, for the Appellant.

JUDGMENT—Presentation of a plaint to head clerk after office hours, the head clerk being authorised to receive plaints only within office hours, cannot be treated as a proper institution of the suit in the Munsif's Court on that day, unless on that same day, the District Munsif ratified the receipt by the District Munsif himself.

We think that the order of the learned Judge of this Court (refusing to revise the Munsif's dismissal of the suit as barred) is correct, and we dismiss this Letters Patent Appeal. We make no order as to costs as respondents do not appear.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 404 OF 1911.

March 11, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice N. R. Chatterjea.

KALI DAS BHANJA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GIRIBALA DASI—DEFENDANT—RESPONDENT.

Specific performance—Agreement to grant permanent lease "hereafter"—Whether vague and uncertain—Postponement of grant of lease until promisor had paid off his debts—Whether putting off of execution of deed is refusal to perform contract—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 113—Allegation of new contract being substituted for old—No proof of new contract—Whether old contract may be enforced—Limitation not pleaded—Limitation not question of law—Suit whether to be dismissed on that ground.

An agreement to grant a permanent lease "hereafter" of a certain property to the plaintiffs, was executed by the defendant's predecessor, who also issued a notice on the day the agreement was executed to his tenants to pay their rents to the plaintiffs, stating therein that he had "let out the property in *ijara*" to the plaintiffs. Some time, about a year after this, he approached the plaintiffs to agree to the postponement of the grant of the lease, until after he had paid off his debts. The plaintiffs made no objection, as they had confidence in him and fully believed that he would act up to his words. The lease not having been granted by the defendant's predecessor, the plaintiffs brought a suit for the specific performance of the contract:

Held, (1) that the putting off of the execution of the deed could not be taken as a refusal to perform the contract, nor could the arrangement come to between the parties that the grant of the lease should be postponed until after the defendant's predecessor had paid up his debts be looked on as a rescission of the contract to grant the lease, nor did the plaintiffs give up their rights under the contract; the highest that it could be put to was that the plaintiffs gave the defendant's predecessor a reasonable time within which to execute the deed;

(2) that the plaintiffs' right to claim specific performance of the contract to grant a permanent lease was not barred by limitation under Article 113, Schedule I, of the Limitation Act of 1908;

(3) that because the contract to grant the lease provided that the lease should be executed "hereafter" the contract was not vague and uncertain, the word "hereafter" only meaning after the date of the contract.

The mere fact of one party alleging that a new contract had been substituted for an old one does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true.

Roushan Bibee v. *Hurray Kristo Nath*, 8 C. 926, relied upon.

KALI DAS BHANJA *v.* GIRIBALA DASI.

Where the question of limitation is not merely a question of law, and the point is not raised by the defendant, the Court ought not to dismiss the suit on the ground of limitation.

Appeal from the decree of the Sub-Judge of Alipore, dated July 17th, 1911.

FACTS.—The plaintiffs' case is that they, being already in possession of 12 annas share of a certain *taluq*, had arranged for the sale to them of the remaining four annas by Hari Charan Bose, the *malik* thereof, that Nayan Chandra Bose, the husband of defendant, requested the plaintiffs to get the share sold to him and agreed that if they did so, he would grant a *mourasi mokarari* lease of the same to them on a yearly rental of Rs. 840, that plaintiffs thereupon had that done and Nayan Chandra agreed to grant the lease and the plaintiffs were put in possession of the share, that the defendant's husband did not act up to his promise, and on plaintiffs' pressing him at last agreed to sell the four-annas share to them for Rs. 16,000, and that on the death of the defendant's husband, the defendant has repudiated the said agreements. The plaintiffs, therefore, bring this suit for specific performance of either the contract to give a *mourasi mokarari* lease or that to sell.

The defendant denied the contracts in question and said that the plaintiffs merely collected rents on behalf of her husband and herself.

The following were the principal issues settled on the pleadings:—

(1) Are the allegations of contract for a permanent lease and subsequently for sale made in the plaint correct?

(2) Are the terms of the alleged contracts vague and uncertain and not fit for being enforced specifically?

The Court below on the first issue said:—

"* * Nayan Chandra, however, did not act up to his word although repeatedly asked and finally said he could not execute the *ijara patta* until he had cleared off the debt which he had incurred for the purchase. This was one year after the purchase which would be November 1904. This suit was instituted on the 30th May 1910. Now, if what Nayan Chandra finally said in November 1904 amounted to a refusal to perform the agreement as originally made, the suit would be clearly barred by time. The question, therefore, is whether it did amount to such a refusal. I think it did. The original agreement dated November 21, 1903, was that he would execute a permanent *ijara* 'hereafter.'" It is clear that the agreement was not fettered by any condition. In 1904 November, Nayan Chandra, however, made the agreement conditional on the clearing off of his debt. There was, therefore, a refusal to perform the original agreement. The plaintiff Hem Chandra says that when Nayan said so he realised that he was wilfully avoiding the *ijara*. Hem Babu's deposition shows that plaintiffs too took it to be in reality a refusal to perform the agreement. I, therefore, find that in November 1904 Nayan refused to perform the original agreement, and so the suit which is to enforce that agreement is clearly barred. It might, however, be urged that plaintiffs might enforce the fresh agreement made in November 1904. * * But the new agreement would be conditional on the clearing off of the debt. The debt has not yet been cleared off admittedly So there can be no enforcement of that contract now. * * As regards the agreement to sell I do not think I can find that Nayan Babu entered into any decided agreement to do so."

Upon the second issue the learned Subordinate Judge said:—

"** Nayan Babu agreed to execute a permanent *ijara* 'hereafter.' I think the addition of the word 'hereafter' makes the agreement vague and uncertain, for Nayan Babu might, whenever asked to execute the deed, say that he would some time after, and he could not, therefore, be charged with a breach of contract. The way in which the parties conducted themselves would suggest that the agreement was not fit to be enforced. If the agreement had been fit to be enforced I think the plaintiffs would not have put up with such continual evasion on the part of Nayan Babu. In fact in November 1904, Hem Babu realised that Nayan Babu was wilfully avoiding the lease and still they did not take any action to enforce it. They agreed to what made the agreement a little less problematical, that is, dependent upon the clearing off of his debts by Nayan Babu. The plaintiffs evidently realised that they could not enforce the agreement to execute the *ijara* 'hereafter,' and so

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agreed to the fresh proposal. I think the agreement was not capable of enforcement."

The Court dismissed the suit.

The plaintiffs appealed.

Babus *Provash Chunder Mitter*, *Amarendra Nath Bose* and *Atul Chandra Bose*, for the Appellants.

Dr. *Dwarka Nath Mitter*, and Babu *Manmatha Nath Roy*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against the judgment of the learned Subordinate Judge dismissing their suit.

The suit was one for specific performance of agreements relating to immoveable property. Two contracts were in suit, *first*, a contract for the grant of a permanent lease of the property and, *secondly*, a contract for the sale of the reversion.

The learned Subordinate Judge found that the first contract was proved but not the second. He, however, refused specific performance of the first agreement on the ground that the plaintiffs' right was barred by limitation. The appellants were in possession of 12 annas of the property and the remaining 4 annas belonged to one Hari Charan Bose. On the 31st August 1901, Hari Charan entered into a contract for sale of his 4-annas share to the plaintiff No. 4. It would appear that for some reason or other the plaintiffs did not find it convenient to complete the purchase with Hari Charan.

The plaintiffs appear to have been on terms of friendship with Nayan Chandra Bose and they appear to have approached him and persuaded him to take over the purchase from Hari Charan. Accordingly by a conveyance, dated the 21st November 1903, Hari Charan conveyed the 4 annas to Nayan Chandra. It appears that the plaintiffs assisted Nayan Chandra to find a considerable portion of the purchase money payable to Hari Charan. Subsequently two documents, both dated the 21st November 1903, were executed by Nayan Chandra in favour of the plaintiffs:

One of them, Exhibit 12, being an agreement to grant a permanent lease of the 4-annas share, and the other, Exhibit 11, being notice to the tenants to pay their rents to the plaintiffs in which it is stated that Nayan Chandra had "let out the said *mahals* in *ijara*" to the plaintiffs.

The defendant has challenged Exhibit 12 stating that it is a forgery. The learned Subordinate Judge has found that the document was a genuine one and with this finding I agree. The learned Judge has, however, found that the plaintiffs' suit on the agreement to grant the lease is barred by limitation under Article 113 of the first Schedule to the Indian Limitation Act, 1908, on the ground that Nayan had refused to perform the contract.

It will be noticed, however, that the written statement did not raise any defence of limitation nor was any issue settled by the learned Judge in reference thereto. The question of limitation in the present case is not merely a question of law and, in my opinion, the learned Judge ought not to have decided the case on a point not raised by the defendant. However this point is not of great importance as I am unable to agree with the conclusion of the learned Judge that the plaintiffs' right is barred by limitation.

The refusal that is relied on by the defence is as follows: Sometime about a year after the giving of Exhibit 12, Nayan Chandra approached the plaintiffs with reference to postponing the grant of the lease until after he had paid off his debts.

What passed between the parties sufficiently appears from the cross-examination of the plaintiff Upendra as follows:

Q. Did you and your brothers agree to the putting off of the execution of the deed till after Nayan Babu's debts had been paid off?

A. Yes, we made no objection as we had confidence in him and fully believed that he would act up to his words.

How the putting off of the execution of the deed can be taken as refusal to perform the contract, I am at a loss to understand. Nor do I think that this arrangement come to between the parties can be looked on as a rescission of the contract to grant the lease or that the plaintiffs gave up their rights under that contract. The highest that it can be put to is that the plaintiffs gave Nayan a reasonable time within which to execute the deed. The plaintiffs were and have all along remained in possession of the property.

I am, therefore, unable to agree with the learned Judge that the plaintiffs' right to

claim specific performance of the contract to grant a permanent lease is barred by limitation.

As regards the agreement to sell the property the learned Judge found that the same was not proved. Nayan being dead and there being no independent evidence of this contract I am not disposed to interfere with the finding of the learned Judge in this respect, although, I think, that the story told by the plaintiffs seems an exceedingly probable one.

I confess I am unable to follow the learned Judge's reasons that because the contract to grant the lease provided that the lease should be executed "hereafter" the contract is vague and uncertain. The lease could hardly have been executed on the date of the contract and the word "hereafter" only means after the date of the contract.

One further objection has been raised before us, namely that as the plaintiffs set up the contract for sale and have failed to prove it, they cannot have specific performance of the agreement to grant a lease.

But the mere fact of one party alleging a new contract has been substituted for an old one, does not of itself put an end to the old contract even as against the party so alleging unless the allegation is proved to be true [*Roushan Bibee* v. *Hurray Kristo Nath* (1).]

In my opinion the present appeal ought to be allowed and in lieu of the judgment dismissing the plaintiffs' suit a decree ought to be passed for the specific performance of the contract to grant the lease (Exhibit 12). The respondent should pay to the plaintiffs their costs in this Court and in the Court below.

N. CHATTERJEA, J.—I agree.

Appeal allowed.

(1) 8 C. 926.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 154 OF 1911.

February 10, 1913.

Present:—Mr. Justice Parlett.

MAUNG KYA AND OTHERS—APPELLANTS

versus

V. P. L. V. N. FIRM—RESPONDENT.

Benamidar *and real owner—Transaction entered into by* Benamidar *alleged to be unauthorised by real owner —Estoppel —Fraud.*

Where property is held *Benami* and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act. So if the property is purchased in the name of a *Benamidar*, and the indicia of ownership are placed in his hands, the true owner can only get rid of the effects of an alienation by showing that it was made without his acquiescence and that the purchaser took with notice of that fact.

Colonial Bank v. *Cady*, 15 A. C. 267 at p. 273; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17, followed.

Messrs. *Palit* and *Harvey*, for the Appellants.

Mr. *A. B. Banerjee*, for the Respondent Firm.

JUDGMENT.—Plaintiff sued for a mortgage decree over, among other property, 38·71 acres of land now in the possession of 3rd and 4th defendants. It appears that on 12th May 1903 a conveyance was executed and registered whereby 1st defendant purported to purchase the land in suit from the former owner Maung Chan Nyein for Rs. 650. On 12th June 1903 1st defendant mortgaged this land together with 12·54 acres more and some other property to plaintiff without possession for Rs. 1,500 carrying interest at $1\frac{1}{2}$ per cent. per month. On 31st March 1904, a conveyance was executed and registered whereby 1st defendant purported to sell the land in suit to 2nd defendant for Rs. 650. On the same day the 2nd defendant mortgaged this and other land to 3rd and 4th defendants for Rs. 5,000 and on 29th April 1907 he sold it to them outright. First defendant did not appear but the defence of the others is that the real purchaser from Maung Chan Nyein was 2nd defendant who borrowed the money to pay for it from 1st defendant, who took the conveyance in his name until money was re-paid to him, but that 1st defendant was merely a *Benamidar* and was never in possession of the land, and had no rights in it to mortgage to plaintiff, and that 3rd and 4th

defendants are *bona fide* purchasers for value without notice of plaintiff's claim. The Court of first instance gave only a money-decree against 1st defendant. On appeal the Divisional Court held that 2nd defendant was estopped by his conveyance from saying that 1st defendant was not the owner, and that oral evidence to that effect was excluded by section 92 of the Evidence Act, and gave plaintiff a mortgage decree over both pieces of land. The 3rd and 4th defendants now appeal against all three decisions. The Divisional Court was clearly wrong in giving a mortgage decree over more than the 38 odd acres, since plaintiff had expressly relinquished his claim to a mortgage decree over the other holding.

I am inclined to think that the decision on the question of estoppel was correct, having regard to Dr. Gour's remarks in Article 611 of his Commentary on the Transfer of Property Act (3rd Edition, page 371) and in particular to the dictum of Lord Halsbury in *Colonial Bank* v. *Cady* (1) there quoted. The estoppel would extend to 3rd and 4th defendants who claim through 2nd defendant. In Article 619 (page 378) the same learned commentator quotes authorities to the effect that "where property is held *benami* and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act. So if the property is purchased in the name of a *Benamidar*, and the indicia of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence, and that the purchaser took with notice of that fact." The consideration of Rs. 650 admittedly moved from 1st defendant, the conveyance was in his possession and showed him to be the purchaser: he was recorded as in possession in the Revenue Registers. The only fact which can be alleged as existing which should have put plaintiff on inquiry is the 2nd defendant's claim that he was in possession of the land, but as at that season, 12th June, probably agricultural operations had not commenced, it may be doubted whether he, or anyone, was in actual occupation of the land. I do not think plaintiff can be fixed with constructive notice of the alleged defect in his mortgagor's title, and accordingly the mortgage is good.

I modify the decree of the Divisional Court to one granting plaintiff a mortgage decree over holding No. 23 of 1901-02 which corresponds to No. 27 of 1907-08 of Abnyet Kwin only. As this appeal has been partly successful each party will bear his own costs therein.

Decree modified.

(1) 15 A. C. 267 at p. 273; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 129 OF 1913.

March 6, 1914.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

RAJ KISHORE DAS—APPLICANT

versus

JAINT SINGH AND OTHERS—OPPOSITE PARTY.

Will—Legatee—Enlargement of devised estate by legatee—Lease, determination of—Possession of heir after determination—Full proprietary right acquired by heir—Sale of property—Remainder-man, right of—Occupancy right acquired in land by vendee before purchase—Re-emergence of occupancy right.

In 1844 *T* got from Government a farming lease of waste land for the fixed term of twenty years. In 1851 *T* executed a Will under which he left the land to his wife, *R*, for her life and on her death to his daughter, *G*, for her life, with reversion to the temple of Jagannath. *T* died in 1852 and after his death *R* continued in possession of the land till 1871 when the Government bestowed on her full proprietary title in the property. *R* then sold the land to the defendant *D*. *R* died and later on *G* died in 1904. *J*, the trustee of the temple of Jagannath, brought this suit

RAJ KISHORE DAS *v.* JAINT SINGH.

for possession of the land as the remainder man under the Will. *D* pleaded that *R* was the absolute owner of the property and had as such full power to transfer the same and that in case *J* was entitled to the estate, *D* was entitled under section 51 of the Transfer of Property Act to the expenditure incurred on improvements. *D* also pleaded that he had before the date of sale occupancy rights in the lands and if absolute title did not pass to him he was entitled to retain actual physical possession of the land as occupancy tenant or *khaikar*;

Held (1) that the estate of *T*, whatsoever it may have been in the village, came to an end in 1864 and the possession of *R*. from that time onwards was in her own right and as such the sale-deed operated to transfer full proprietary title to the vendee;

(2) that assuming the plaintiff's case to be a good one and he being entitled to possession, *D* could not rely upon section 51 of the Transfer of Property Act in such a case;

(3) that *J* as reversioner under the Will would be entitled only to proprietary possession and that any occupancy right previously acquired by *D* could not be affected in any way.

Where a legatee under a Will gets the enlargement of the estate, the enlargement would operate as an enlargement of the estate of the testator and enure for the benefit of the remainder-man under the Will.

Civil reference by the Local Government under the Kumaun Regulations.

The Hon'ble Dr. *Sunder Lal*, for the Applicant.

Dr. *S. C. Banerji*, for the Respondent.

JUDGMENT.—This is a reference under rule 17 of the Rules and Orders relating to the Kumaun Division. The facts of the case out of which this reference has arisen are as follows: In the year 1844 one Tula Ram Sah was a Government treasurer at Almora. The village of *Mauza* Nagar together with its appurtenant hamlet called Bajero, etc, was lying waste. At the Settlement of that year a farming lease of the same was offered to Tula Ram for a period of twenty years on payment of a sum of Rs. 3 per annum. Tula Ram appears to have been very unwilling to accept this generous offer of the Government. The completion of the matter was delayed for about two years until in 1846 he was finally forced to accept a *patta* and to execute an agreement. In 1851 he executed a Will under which he left the whole of his estate without specification of its details to his wife for her life and on her death to her daughter, *Musammat* Gangotri, for her life with reversion to the temple of Jagannath, the trustee of which is the plaintiff in the present suit. Tula Ram died in 1852. His widow *Musammat* Ratni sold all her right, title and interests in the above named village to the predecessors-in-title of the present defendants. They have been in possession since then ostensibly as owners. Prior to their purchase the vendees appear to have been *khaikars* or a class of occupancy tenants in possession of cultivated lands. *Musammat* Ratni died, but her daughter, *Musammat* Gangotri, remained alive till 1904. The present suit was brought soon after her death by the trustee of the temple of Jagannath to recover possession from the defendants, on the ground that the estate of *Musammat* Ratni was only one for her life and that the two life-estates having now vanished the plaintiff as remainder-man under the Will was entitled to the property and that *Musammat* Ratni had no power to transfer more than her life-interest under the Will. The defendants met the case by pleading that *Musammat* Ratni on the date of the sale was the absolute owner of the property and had power to transfer to them full right of ownership. There was a further plea that even if the plaintiff was entitled to the estate, still section 51 of the Transfer of Property Act applied in respect to those improvements which had been made by the defendants and the plaintiff would not be entitled to possession unless and until he made good to the defendants the expenditure incurred by the latter on the said improvements. It was also pleaded that the defendants were persons who had a right at the date of the sale to occupy and cultivate the said lands, and even if absolute title did not pass to them they have not lost that right and still are entitled to retain actual physical possession as *khaikars*. The suit was dismissed by the District Judge who held that *Musammat* Ratna was at the date of the sale an absolute owner of the property. He held that section 51 of the Transfer of Property Act would apply even if the widow had only a life-interest. He also held that the plaintiff's claim to possession was barred by the re-emergence of the previous occupancy rights of the defendants. This decision was upheld by the Commissioner on appeal and the Local Government have referred to us seven points for an expression of our opinion.

The first question and the most import-

ant is, "was *Musammat* Ratna's title previous to 1871 based on the Will of her husband, or on mere possession?" It should be noticed in the beginning that the Will of Tula Ram Sahu makes no special mention of the estate in the village now in suit. His exact right in this village is not absolutely clear. There can be no doubt from the Settlement Record of 1844 that a lease was granted to him, but no copy of this lease is forthcoming. It is not to be found on the Settlement Record, and his agreement dated the 8th of August 1846 does not set out the terms and conditions on which the lease had been granted to him. It is clear that the lease was for a fixed period which came to an end in 1864. Whether his rights as a lessee were transferable or not is by no means clear. A reference to the selections of the records of the Government of the North-Western Provinces, known as Mr. Thomason's Despatch, Volume II, at pages 202, 203 and 204, specially to paragraph 9 on page 204, goes to show that a farming tenure such as was granted to Tula Ram was not transferable. It shows clearly that such a lease, however, terminated on the expiry of the period for which it was granted. On behalf of the defendants it is urged that when Tula Ram died in 1852, the lease came to an end and if his widow *Musammat* Ratni continued to hold the property she could not possibly have held *qua* legatee under the Will, but only in her own personal right. It is further urged that even supposing that the lease continued to run for its full period and that she held the property during that period *qua* legatee under the Will, still the lease-hold came to an end in 1864, that is, some seven years before 1871, the date of the transfer and that when she continued to hold from 1864 to 1871, she held in her own right either as a lessee direct from the Government or as a trespasser. In the year 1871, the Government bestowed on her full proprietary title in the estate in dispute. On behalf of the defendants it is urged that this is an acquisition of her own and that she has, therefore, full power to transfer it by a deed of sale. On behalf of the plaintiff it is urged, however, that *Musammat* Ratni, from the date of her husband's death up to the year 1871, was holding this estate as a legatee under the Will having therein only a life-estate, that while she held in this capacity the estate was enlarged and that the enlargement is one which enured to the benefit of the estate and as such must pass over to the remainder-man. The decision of the point depends on the capacity in which *Musammat* Ratni was holding the village now in dispute in 1871 at the time when the Government, in pursuance of a general policy of not retaining proprietary possession in its own hands, bestowed proprietary title on many persons, some whose claims thereto were vague and some who as farmers had no claim at all. As we have pointed out above it is by no means clear on what terms this property was leased to Tula Ram. It seems highly probable that the rights of a lessee were not transferable. But it is impossible to come to a definite finding in the absence of clear evidence on the point. It is, however, quite clear that the term of the lease came to an end in 1864 and it was then in the option of the Government to grant a fresh lease to anybody to whom it might think fit to grant it. As a matter of fact it allowed *Musammat* Ratni to continue in possession and in the year 1871, finding her to be a person who had apparently brought the village under cultivation and settled tenants on it and, therefore, a fit person on whom to bestow proprietary rights, it made a free gift to her of those rights. The estate of Tula Ram, whatsoever it may have been in the village in dispute, came to an end at least in the year 1864 and, in our opinion, the possession of *Musammat* Ratni from that time onwards was the possession of herself in her own personal right and not possession of any portion of Tula Ram's estate under the Will. This is our answer to the first question.

The second question is, "If her possession up to 1871 was based on the Will did the enlargement of her legal estate, by settlement proceedings in 1871, operate to alter her title as legatee with a life-interest to a title of grantee with absolute interest?" It is quite clear that if her possession up to 1871 was based on the Will the enlargement of the legal estate could not operate to alter the capacity in which she held it. If she held it *qua* legatee under the Will the

enlargement of the estate must have operated as an enlargement of the estate of her husband for the benefit of the remainder-man under the Will. It could not in any way create in her a title as a grantee with absolute interest.

The third question is, "What interest in the property in suit did the sale-deed by *Musammat* Ratni in favour of the defendants operate to transfer?" In view of our reply to the first question the answer to this question is that the sale-deed operated to transfer full proprietary title to the vendees.

The fourth question is, "Was the Commissioner right in upholding the District Judge's decision that the right of the plaintiff as reversioner under the Will to possession was barred by the re-emergence of previous occupancy rights of the defendant transferees?" It is admitted on behalf of the plaintiff that as reversioner under the Will he would be entitled only to proprietary possession and that any occupancy right previously acquired by the defendants could not be affected in any way and they would be entitled to retain actual physical possession with such occupancy right, the proprietary title being in the plaintiff. This, in our opinion, is correct and our answer to the question is that the decision of the Commissioner is correct only to the above extent.

The fifth question relates to section 51 of the Transfer of Property Act. If the plaintiff's case be a good one and if he is entitled to proprietary possession of the property, it is quite clear to our minds that section 51 of the Transfer of Property Act has no application to the case at all. The defendants, if the plaintiff's case be a good one, were persons who purchased from a widow in possession of the estate either as a legatee under her husband's Will or in the ordinary way as a Hindu widow, and in such a case section 51 of the Act could have no application.

Our reply to the sixth question is that the decision of the District Judge as upheld by the Commissioner was correct on two points and incorrect on the third.

As to the relief, if any, to which the plaintiff is entitled we would hold that the plaintiff is entitled to no relief at all and his suit ought to stand dismissed with costs in all Courts.

Dismissal of suit advised.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 123 OF 1912.

July 22, 1913.

Present:—Mr. Justice Parlett.

MG. LU MG. AND OTHERS—APPELLANTS

versus

MAUNG PU AND ANOTHER—RESPONDENTS.

Specific Relief Act (I of 1877), s. 9—Suit for possession—Inference therefrom—Also from the fact that the suit was for possession only and not declaration of title—Appeal lies.

The second paragraph of section 9 clearly shows that no one, though entitled to sue under that section, is bound to do so, and that he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section.

A person by seeking his remedy early does not thereby alter the nature of his suit.

Ram Harakh Rai v. *Sheodihal Joti*, 15 A. 384; A. W. N. (1893) 163, distinguished.

Kalee Chunder Sen v. *Adoo Shaikh*, 9 W. R. 602, *Ramasawmy Chetty* v. *Paraman Chetty*, 25 M. 548; 11 M. L. J. 403, followed.

Where the plaintiff set up a title as mortgagee in possession of certain land of which defendants had taken possession and the defendants alleged that they had redeemed the mortgage and so extinguished the plaintiff's title on which his claim to possession was based and the Court of first instance held after framing issues on the question of title and taking evidence that the defendants had not redeemed the mortgage and that there was abundant evidence to prove the plaintiff's title to the land as mortgagee in possession.

Held, that both from the frame of the plaint and the course which the case took it was intended to be a suit based upon title and was never a suit under section 9 of the Specific Relief Act and that the plaintiff could not be heard to assert the contrary and that, therefore, an appeal lay to the Divisional Court.

Mr. *Lambert*, for the Appellants.

Mr. *Palit*, for the Respondents.

JUDGMENT.—The sole question in this appeal is whether the suit was in fact brought under section 9 of the Specific Relief Act. The Divisional Court has held that it was, because (*a*) the plaintiff was entitled to bring such a suit and (*b*) the suit was filed within six months of the dispossession. In this Court the finding is supported on the further ground that the prayer in the plaint asks

for possession only and not for a declaration of title. I consider none of these reasons to be sound. The second paragraph of section 9 shows clearly that no one, though entitled to sue under that section, is bound to do so, but he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section. As to the time when the suit was filed, because a man seeks his remedy early he does not thereby alter the nature of his suit. As to the prayer I see no reason why a plaintiff who claims possession relying upon title need do more than set out his title and ask for possession.

It is true that in *Ram Harakh Rai* v. *Sheodihal Joti* (1) it was held that a Court should, in all cases in which it applies, give effect to the provisions of the first paragraph of section 9 of the Specific Relief Act, whether that section is expressly pleaded or not, but that is no authority for refusing to entertain a suit based upon title merely because specific relief might be asked for and is not, as was ruled in the other case of *Kalee Chunder Sen* v. *Adoo Shaikh* (2). Section 15 of Act XIV of 1859 does not affect the general law on the matters to which it relates but provides a special remedy for a particular kind of grievance. In *Ramasawmy Chetty* v. *Paraman Chetty* (3), a case very like the present one, the Allahabad ruling was not followed. The plaintiff sued to eject defendants from certain land claiming title to it by purchase and alleging that he had been forcibly dispossessed by defendants. The defendants denied both plaintiff's title and possession and set up title in themselves and alleged that they had long been in possession. The lower Court found that plaintiff failed to prove title by purchase, and declared plaintiff entitled to possession under section 9, Specific Relief Act, but dismissed the suit in so far as it claimed to have plaintiff's title established. The High Court held that the issue concerning title should have been tried. In the present case plaintiff set up a title as mortgagee in possession of certain land of which defendants had taken possession. Defendants alleged that they had redeemed the mortgage and so extinguished plaintiff's title on which his claim to possession was based. Issues covering the question of title were framed and evidence taken, after which the Court of first instance held that defendants had not redeemed the mortgage and that there was abundant evidence to prove plaintiff's title to the land as mortgagee in possession and on the strength of that title granted him possession. It appears to me both from the frame of the plaint and the course which the case took that it was, and was always intended to be, a suit based upon title, and never a suit under section 9 of the Specific Relief Act and that plaintiff cannot be heard to assert the contrary. An appeal, therefore, lay to the Divisional Court. I reverse the decree of that Court and direct that the appeal be re admitted and disposed of according to law, costs to follow the result.

Appeal accepted.

(1) 15 A. 384; A. W. N. (1893) 163.
(2) 9 W. R. 602.
(3) 25 M. 148; 11 M. L. J. 403.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 479 OF 1912.
March 11, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

Chowdhury Babu MAHADEO PERSHAD—PLAINTIFF—APPELLANT

versus

Musammat DURGI SAHUN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Abandonment by tenant of holding—Question of intention.

The question, whether in any individual case there has been an abandonment by a tenant of his holding, is a question to be determined upon the facts of each case.

Dictum of Mr. Justice Mookerjee in *Ram Pershad Koeri* v. *Jawahir Roy*, 12 C. W. N. 899; 7 C. L. J. 72, relied upon.

Krishna Chandra Datta v. *Khiran Bajania*, 10 C. W. N. 499; 3 C. L. J. 222 and *Dina Nath Roy* v. *Krishna Bijoy Saha*, 9 C. W. N. 379, explained.

Appeal from the decree of the District Judge of Mozaffarpur, dated November 29th, 1911, confirming that of the Munsif of Mozaffarpur, dated June 17th, 1911.

Babus *Kerin Behary Ghose* (Junior) and *Bankim Chandra Mukherjee*, for the Appellant.

Babu *Lakshmi Narain Singh*, for the Respondents.

MAHADEO PERSHAD *v.* DURGI SAHUN.

JUDGMENT.—This second appeal arises out of a case in which one Dular Sahu, the father of the defendants second party in 1314 gave a usufructuary mortgage of the whole of his holding in village Madhubun to defendant first party for a term of seven years, and arranged that during this period Dular Sahu was to pay rent and if he did not the defendant first party was to pay and get receipts in his name. The plaintiff landlord sued for ejectment and *khas* possession on the ground that the defendants second party had abandoned their holding and that the mortgage is only a mortgage in name and is really a sale.

Both the Courts below have found as a fact that there has been no abandonment in law and that the mortgage is really a mortgage for a term and is not in any sense a sale. It seems to us that this is a finding of fact and we are fortified in this opinion by the various rulings which have been cited to us by the learned Vakil for the appellant. We have considered the rulings referred to by the learned Judge in *Rasik Lal Datt* v. *Bidhu Mukki Dasi* (1) and the cases of *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt* (2) and *Ram Pershad Roeri* v. *Jawahir Roy* (3). We would particularly refer to the dictum of Mr. Justice Mookerjee in the last-mentioned case, where he says that whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case. We have also been referred to the case of *Krishna Chandra Datta Chowdhury* v. *Khiran Bajania* (4) in which the head-note lays down in a very general way that by creating a usufructuary mortgage an occupancy *ryot* not authorised to transfer his holding makes himself liable to ejectment by the landlord. But on reading the judgment we find that the usufructuary mortgage in that case was not a mortgage for a term as in this case. It was a transaction known as *girbi* mortgage in which in consideration for a sum of money lent to them by another person they allowed him the enjoyment of their holding, agreeing that he should continue in it until the loan was re-paid. This, of course, is in the nature of an out and out transfer and it was on that ground that it was held that the landlord was entitled to eject. In the same way Mr. Justice Brett held in the case we have cited from 12 Calcutta Weekly Notes 878 that upon a consideration of the terms of the mortgage-bond and the circumstances connected with the transaction, although the document purported to be a usufructuary mortgage for 60 years, the transaction was really an out and out sale and the deed drawn up in that form in order to evade the provisions of law against the transfer of occupancy holding.

All these cases go to show as we have already said that the question whether there has been an abandonment or an out and out transfer is a question of fact, and in this case both the lower Courts have given good reasons for the finding of fact that there had been no such abandonment and no such out and out transfer. It is not held that Dular Sahu had abandoned his domicile in Madhuban. He had apparently erected a temporary structure in Bandhupatti. It is not held that he had transferred the *jote* indefinitely to the defendant first party, and it is found that in this very year 1914 he will, if he chooses, be able to re-enter upon possession on paying the *zarpeshgi* money. It is further found that he made arrangement for paying rent during the period of the seven years mortgage. Upon these findings of fact it is impossible to hold that the plaintiff can now sue to eject the defendants second and third parties.

In the last resort, however, we are asked to hold that the plaintiff can recover possession from the defendant first party by ejectment on the principle laid down in the case of *Dina Nath Roy* v. *Krishna Bejoy Saha* (5). That was a case where the *ryots* who had non-transferable holding sold it to the defendant No. 1 and took an under-lease of the same from the latter. It was, therefore, obvious that the plaintiff can sue to eject the vendee, and

(1) 33 C. 1094; 10 C. W. N. 719; 4 C. L. J. 306.
(2) 12 C. W. N. 878.
(3) 12 C. W. N. 899; 7 C. L. J. 72.
(4) 10 C. W. N. 499; 3 C. L. J. 222.
(5) 9 C. W. N. 379.

that is what he sought to do although he also sought to eject defendants Nos. 2 and 3; it was held that he could not eject defendants Nos. 2 and 3. In this case he clearly cannot eject his own tenants and the first party are not in possession as vendees of those tenants but are merely in temporary possession until such time as the usufructuary mortgage determines. There does not appear to be any very great hardship upon the landlord in this, inasmuch as in this very year there is open to him the simple remedy of suing his tenants for the rent of the holding. If the tenant then says that he has no further interest in the holding then, as the learned Judge in the Court below points out, the case will assume an entirely different complexion. But at present we think that the lower Courts are right in dismissing the plaintiff's suit and we also think that they are right in the order they have made that each party should bear his own costs.

This appeal is, therefore, dismissed without costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 76 OF 1912.

July 22, 1913.

Present:—Mr. Justice Parlett.

SWEYDALI—APPELLANT

versus

ESNALI AND OTHERS—RESPONDENTS.

Fraudulent transfer — Benami *transaction* — *Real owner suing for possession from* Benamidar *on the ground that the intended fraud was wholly inoperative —Burden of proof, real owner to prove that fraud was inoperative.*

The respondents sought to recover some land which they alleged they had transferred *benami* to the appellant and another by a registered deed in order to defeat the claims of their creditors. The first Court dismissed their suit, but the Divisional Court granted them possession, without, however, ordering the cancellation of the sale-deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative:

Held, that they were entitled to recover the land under the Privy Council ruling in *T. P. Pethepermal Chetty* v. *R. Muniandy Servai*, 35 C. 551 (P. C.); 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98.

Held, also, that it lay upon the plaintiffs to prove that no part of the intended fraud had in fact been carried out; that as they were alleging an intended fraud on their part and seeking to escape the consequences of it, they were bound to allege and to prove that the intended fraud was in fact wholly inoperative; and further that unless they alleged and proved that fact their suit must fail.

Mr. *Bilimoria*, for the Appellant.

Mr. *Ba Dun*, for the Respondents.

JUDGMENT.—Respondents sought to recover 24 acres and odd of land which they alleged they had transferred *benami* to appellant and one Lohman by a registered deed dated 31st December 1908, in order to defeat the claims of their creditors. The first Court dismissed their suit but the Divisional Court granted them possession, without, however, ordering the cancellation of the sale-deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative. If this be so they are, of course, entitled to recover the land under the Privy Council ruling in *T. P. Pethepermal Chetty* v. *R. Muniandy Servai* (1). The appellant contends that the finding of the Divisional Court was wrong. The first question is upon whom the burden of proof on the point lay, and I have no hesitation in saying that it lay upon the plaintiff to prove that no part whatever of the intended fraud had in fact been carried out. I think this placing of the burden might be referred to sections 101 to 103, 106 and 110 of the Evidence Act, but it will be sufficient to say that the plaintiff is alleging an intended fraud on his own part and seeking to escape the consequences of it, and in order to enable him to do so he is bound to allege and to prove that the intended fraud was in fact wholly inoperative. Unless he alleges and proves that fact his suit must fail and, therefore, the burden lies on him to prove it.

The evidence he offered was to the following effect. When the transaction was effected on 31st December 1903 he anticipated that three persons would obtain decrees against him, and subsequently they did so, namely, Baungaw for Rs. 500, Chinia Chetty for Rs. 400 and Dagu for Rs. 250 with costs in each case. Plaintiff says he paid off the

(1) 4 L. B. R. 266; 35 C. 551 (P. C.); 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 35 I. A. 98.

amount due to each about the time he filed this suit, 24th July 1911. One of his witnesses says he saw plaintiff pay Baungaw Rs. 100, but he admits that Baungaw accepted a smaller sum than was decreed to him. That is all the evidence on the point. Plaintiff admits that Baungaw and Dagu are still in the district, and though he alleged that Chinia Chetty had gone to Madras, there is evidence for the defendant that this is not so, and that he too is in the district. None of them is cited by plaintiff, nor does he produce any record of satisfaction of any of the decrees. On the other hand, the defendants call Chinia, a clerk, who states that his decree was obtained on 26th August 1903, *i. e.*, before the *benami* sale, and this, together with the admission as to Baungaw's compromise, would be ample to shift the burden to plaintiff even if it originally lay upon defendant to show that the fraud had been carried out. The Divisional Court held that as there had been no attempt by the decree-holders to attach the land and impugn the sale they cannot have suffered, and, moreover, that as the present suit was being decreed in plaintiff's favour the creditors could thereupon attach the land. As to the first point, it is merely speculation, it may well be that the creditors inquired and believed the sale to be a genuine one, or at any rate that they would be unlikely to be able to prove the contrary. As to the second, as the Divisional Court's decree was only passed on 1st February 1912, it is quite likely that execution of some or all of the decrees might be barred, and admittedly Baungaw had compromised his claim and, therefore, could not now attempt to execute his decree. In my opinion the testimony as to that compromise alone is strong evidence that in fact the fraud was not inoperative, for it is quite impossible to believe that he would not have got better terms if the land in suit had been available to realize his decree against. The burden which plaintiff took upon himself was, in my opinion, of the heaviest possible nature and he totally failed to discharge or even appreciably lighten it.

I reverse the decree of the Divisional Court and restore that of the Sub-Divisional Court, respondents to pay costs of appellant throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2053 OF 1912.

November 26, 1913.

Present:—Mr. Justice Ayling and Mr. Justice Oldfield.

MANDAVILLI SUBBA ROW AND ANOTHER —DEFENDANTS—APPELLANTS

versus

GUDLA LAKSHMAYYA AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF AND 1ST DEFENDANT—RESPONDENTS.

Damages, illegal levy of—Salvage—Rules framed by Government under G. O. No. 586 Rev., dated 3rd November 1896, validity of—Proprietary rights of Government—Floating drift-wood—Common law right of Crown.

In a suit by the owner of certain drift-wood floating in the river Godavari against the Secretary of State for India in Council and two other defendants for recovery of damages on account of salvage illegally collected from him under rules framed by Government under G. O. No. 586 Rev., dated 3rd November 1896:

Held, that the plaintiff was entitled to recover the sum from the Secretary of State for India in Council.

The drift-wood salvage rules contemplate full proprietary rights of Government in the drift-wood and as such the rules promulgated by Government under G. O. No. 586 are *ultra vires*, because the ownership of a river does not necessarily imply the ownership of the drift-wood therein. The Common Law rights of the Crown under English Law to all unclaimed wrecks including flotsam, jetsam, lagan, etc., in territorial or tidal waters are not more extensive in India than in England and do not apply in this respect.

Amriteswari Debi v. *Secretary of State for India in Council*, 24 C. 504; 24 I. A. 33; 1 C. W. N. 249, distinguished.

Second appeal against the decree of the District Court of Godavari, in Appeal Suit No. 174 of 1909, preferred against that of the District Munsif of Rajahmundry, in Original Suit No. 493 of 1907.

Messrs. *T. Rangachariar* and *M. Purushotam Naidu*, for the Appellants.

Mr. *T. Prakasam*, for the 1st Respondent.

The *Government Pleader*, for the 2nd Respondent.

JUDGMENT.—The plaintiff in this litigation was the owner of certain drift-timber which floated down the Godavari and was salved at Rajahmundry and taken to the Government depôt there. There are certain rules issued by Government for the collection of drift-wood on the Godavari in G. O. No. 586 Rev., dated 3rd November 1896; and under these rules a sum

of Rs. 806 is due to the salvers of the timber. This sum was collected from the plaintiffs by the Government official in charge of the depôt before the plaintiff was allowed to take possession of his timber; and was paid to the defendants Nos. 2 and 3 who claim to be the salvers. The plaintiff sued to recover this amount with damages from the Secretary of State for India (1st defendant) and defendants Nos. 2 and 3, as having been illegally collected. The District Munsif dismissed the suit; but the District Judge on appeal gave the plaintiff a decree for Rs. 806 with interest against defendants Nos. 2 and 3. He held, *inter alia*, that the Government rules above referred to were *ultra vires*; and that the defendants Nos. 2 and 3 were not shown to be the salvers of the timber. Defendants Nos. 2 and 3 present this second appeal. Their chief contentions are that the rules are valid, and enforceable and the sum of Rs. 806 legally collected; that apart from this they (defendants Nos. 2 and 3) were the salvers of the timber and as such entitled to the benefit of section 70 of the Indian Contract Act, and that even if the collection was illegal and section 70 does not apply, they were mere agents of Government and plaintiff's cause of action is only against the 1st defendant who levied the amount from him.

The first point for determination is the validity of the drift-wood salvage rules promulgated by Government. Both the lower Courts held them to be invalid. The District Munsif says that in his Court the Government Pleader was not prepared to support the validity of the rules; and the District Judge says that before him they were conceded to be *ultra vires*. It is now argued on behalf of appellants, with the support of the Government Pleader, that although the rules cannot be supported by any clause of the Forest Act, or any other Statute, yet they are valid as being passed under the general powers and proprietary rights of the Crown.

The argument adopted is that not only is the body of water forming the Godavari river the property of Government but also all articles found floating therein without an ostensible owner.

As regards the first proposition reliance is placed on section 2 of Act III of 1905 and the proprietary rights of Government in the Godavari river are not seriously disputed. The question is whether the ownership of a river necessarily implies ownership of drift-wood therein. If this be established there seems no reason to hold the rules to be *ultra vires*, but a reference to their terms will show beyond doubt that they can be supported on no smaller basis than full proprietary right of Government in the drift-wood to which they relate. No authority has been quoted before us for holding that the Crown possesses such a right. It is not a natural incident of proprietary right in the river itself, any more than the right to an article dropped or lost on a plot of land is incidental to the ownership of the land. Some reliance is placed on the Privy Council decision in *Amriteswari Debi* v. *Secretary of State for India in Council* (1). In that case, Government could claim the benefit of certain clauses (sections 45 and 51) of the Indian Forest Act (which does not apply to the Presidency) which specifically authorised the collections of drift-timber, and gave Government what was referred to as presumptive title to the said timber till the true owner made good his claim. But we can find nothing in the judgment of the Privy Council tending however remotely to suggest that any absolute title in drift-wood appertains to Government.

On the other hand there are passages in the judgment which clearly recognized the right of the original owner of drift-wood to make good his title as against Government and it is stated that the so-called presumptive ownership only exists in those cases where Government collects and holds the timber for the true owner.

Reference was also made to the Common Law right of the Crown under English Law to all unclaimed wrecks including flotsam, jetsam, lagan and derelict in territorial or tidal waters (*vide* 7 Halsbury's Laws of England 210). This right is said to be based partly on prerogative and partly on the Merchants Shipping Act. With the latter, of course, we are not concerned and we see no reason to suppose that the royal prerogative is more extensive

(1) 24 C. 504; 24 I. A. 33; 1 C. W. N. 249.

in India than in England or applies in this respect beyond the shores of the sea or tidal waters. It is hardly necessary to remark that the Godavari at Rajahmundry is not tidal.

In our opinion the drift-wood salvage referred to cannot be supported on any ground and must be treated as *ultra vires*. Whether any of the defendants could claim the benefit of section 70 of the Indian Contract Act, need not be considered here. The District Judge has found that there is no proof of the circumstances in which the plaint timber was recovered so as to justify a claim under section 70 and by that finding we are bound. This is equally the case whether defendants Nos. 2 and 3 are regarded as independent salvers or as the agents of Government.

The last contention of appellants must, however, in our opinion, be upheld. It is admitted on all sides that the timber after salvage was taken to the Government Depôt, and notified in the District Gazette; that plaintiff put in a claim to it which was admitted by the Government officials in charge: that he was directed by them to pay one-third of the value of the timber which was calculated at Rs. 806; that he did pay this sum to the Government officer in charge of the depôt and was then allowed to remove his timber: and that subsequently the money was paid over by Government to defendants Nos. 2 and 3. All this was done in pursuance of the procedure laid down by the rules already considered, and in so far as this is a suit to recover money illegally collected it seems clear that plaintiff is entitled to a decree only against the 1st defendant, whose agents collected the money from him.

The plaintiff's cause of action against defendants Nos. 2 and 3 can be based only on the tort alleged in paragraphs Nos. 4 and 5 of the plaint. This allegation was found against by the District Munsif on issue No. 3; and does not appear to have been pressed before the District Judge at all. There is no reference to it in his judgment, and we have not been asked to consider it in this Court. In our opinion the facts found by the District Judge justify a decree, not against the 2nd and 3rd defendants, but against the 1st defendant only, and we consider the case to be one in which we may fitly exercise our powers under Order XLI, rule 33. The fact that plaintiff's cause of action, if he had any, was only against the 1st defendant, was expressly put forward as one of the grounds of appeal to this Court (*vide* paragraph 5 of the appeal memorandum).

We set aside the decree of the District Judge and in its place give plaintiff a decree against the 1st defendant for Rs. 806 with interest thereon at Rs. 6 per cent. per annum from 13th April 1907 to date of payment with proportionate costs throughout. Three months from this date will be allowed for payment under section 82, Civil Procedure Code The suit as against defendants Nos. 2 and 3 will be dismissed. They will recover their costs from plaintiff in all Courts.

Decree set aside.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 545 OF 1913.

January 9, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

GANGAPPA REVANSHIDDAPPA HUNDEKAR—APPLICANT

versus

GANGAPPA MALLESHAPPA HUNDEKAR AND OTHERS—OPPONENTS.

Letters Patent (Bombay) (Amended), Cl. 39—Civil Procedure Code (Act V of 1908), ss. 109, 110—Application of legal representative to have his name recorded—Rejected by High Court—Order interlocutory—No appeal lies to His Majesty in Council.

A judgment or order in order to be final within the meaning of clause 39 of the Letters Patent must finally determine the rights of the parties.

An order by a High Court rejecting the application of the legal representative of a deceased party to have his name brought on the record is not final but interlocutory and as such no appeal lies to His Majesty in Council from such order under clause 39 of the Amended Letters Patent.

Civil application for leave to appeal to His Majesty in Council.

Mr. *Nilkanth Atmaram*, for the Applicant.

Mr. *K. H. Kelkar*, for Opponent No. 1.

Mr. *Setlur* (with him Mr. *G. S. Mulgaonkar*), for Opponents Nos. 2 to 4.

JUDGMENT.

SHAH, J.—This is an application for leave to appeal to His Majesty in Council,

arising under the following cricumstances:

A suit was brought by one Gangappa Rudrappa Hundekar in the Court of the first Class Subordinate Judge at Bijapur, substantially to have it declared that he was the adopted son of the deceased Rudrappa Hundekar against Chanbasava *kom* Rudrappa and others. The suit was decided on the 12th February 1909 in favour of the plaintiff. Chanbasava preferred Appeal No. 61 of 1909 to this Court against the decree in the said suit. On the 7th August 1909 an application was made by one Virupakshappa to be joined as a co-appellant with Chanbasava and to continue the appeal with her, alleging that he was adopted by Chanbasava on the 12th May 1909. The application was granted on the 13th August 1909 subject to any objections the respondents might have to urge at the hearing. Chanbasava is stated to have died about 15th October 1910; but apparently no application was made by any one to be brought on the record as her legal representative. Virupakshappa died on the 3rd July 1912.

One Gangappa Revanshidappa Hundekar made an application (No. 547 of 1912) to this Court to be brought on the record as the legal representative of the deceased Virupakshappa. He claimed to be his legal representative on the strength of a Will said to have been executed by Virupakshappa. An issue was sent down to the lower Court as to the factum and validity of the alleged Will. The lower Court recorded the evidence and returned its finding to this Court. The application was then heard by us with the result that the Will of Virupakshappa was held not proved. We accordingly rejected the application on the 29th August 1913. On the same day we granted the application of the natural heirs of Virupakshappa (Civil Application No. 572 of 1912) to be brought on the record as the legal representatives of Virupakshappa. The main appeal (No. 61 of 1909) is still pending in this Court.

The petitioner (Gangappa Revanshidappa Hundekar) now applies to this Court for leave to appeal to His Majesty in Council against the order dated 29th August 1913.

It is not disputed in this case that the value of the subject-matter of the suit, and the value of the subject-matter on the proposed appeal is far in excess of rupees ten thousand. The order, which is sought to be appealed from, involves questions respecting property exceeding rupees ten thousand in value. It is not suggested by the petitioner that there is any substantial question of law. But it is argued that as the order of this Court does not affirm any decision of the lower Court it is not necessary that the proposed appeal should involve any substantial question of law. So far I think the argument is good. In this case there is no decision of the lower Court, which this order can be said to affirm. The order is made on an application to this Court, with which the lower Court would have nothing to do in the ordinary course. An issue was sent down to the lower Court apparently for the convenience of the parties to have the voluminous evidence recorded by that Court and a finding was called for. This finding or opinion is clearly not a decision of the lower Court within the meaning of section 110, Civil Procedure Code. Under Order XXII, rule 5, read with section 107, Civil Procedure Code, it was the duty of this Court to determine the question. I am, therefore, of opinion that if the petitioner is otherwise entitled to appeal he has to satisfy only one condition under section 110, Civil Procedure Code, relating to the value of the property involved in the suit of the appeal and that the case fulfils that condition.

The important question that remains to be considered is, whether the petitioner is otherwise entitled to appeal to His Majesty in Council. It is conceded by the learned Pleader for the petitioner that the order complained of is not covered by section 109, Civil Procedure Code. It is clear that clauses (*b*) and (*c*) have no application and clause (*a*) does not apply, as the order is not passed on appeal at all. The appeal is still pending and no order is made thereon. This is only an order on an application in the appeal. But it is urged on behalf of the applicant that he has got a right to appeal to His Majesty in Council under clause 39 of the Amended Letters Patent. Under this clause any person may appeal

to His Majesty in Council from any final judgment, decree or order of any Division Court from which an appeal shall not lie to this High Court under the provisions contained in the fifteenth clause of the Letters Patent. The order, no doubt, is an order of a Division Court from which there is no appeal to this Court under the fifteenth clause of the Letters Patent. The question, therefore, that remains to be considered is whether it is a final judgment or order within the meaning of clause 39. I think that this is not a final judgment or order as contemplated by the Letters Patent. It is an order made in a proceeding incidental to the appeal. It is an order which the Court can make under Order XXII of the Code of Civil Procedure for the purpose of ascertaining the legal representatives of the deceased Virupakshappa. The order does not affect the merits of the appeal and it certainly does not decide any matter in dispute between the parties to the appeal.

A final judgment or order has been thus described in Halsbury's Laws of England, Vol. 18, paragraph 490:—

"A judgment or order which determines the principal matter in question is termed 'final'. An order, which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory.' * * * * The decisions on the question whether an order is 'final' or 'interlocutory,' therefore, must be grouped with reference to the particular purpose for which each was given."

If we apply this test in the present case—and I see no reason why it should not be applied—it is clear that the order in question is not final but interlocutory. It decides no matter in appeal. It is made before judgment in appeal and gives no final decision on the matter in dispute but is merely on a matter of procedure. Even Virupakshappa's status is not finally determined yet. He was brought on the record as a co appellant in 1909. In consequence of his death having occurred before any adjudication of his rights, it became necessary to determine as to who should be allowed to occupy his place in the litigation for the purpose of continuing the appeal on his behalf. The matter in dispute between the parties would be obviously the matter in appeal and not in an incidental proceeding of this kind: see *Bozson* v. *Altrincham Urban District Council* (1). The observations of Sargent, C. J., in *Aben Sha Sabit Ali* v. *Cassirao Baba Saheb Holkar* (2) lend support to the conclusion that the order in question is not 'final.'

It appears to me that the result of holding the order to be final within the meaning of clause 39 of the Letters Patent would be somewhat anomalous. If such a question had arisen during the pendency of the suit in the lower Court, and if an order, such as we have made, had been made by the trial Court, it is clear that no appeal could have been preferred against the order. This follows from the fact that no appeal is provided by Order XLIII, rule 1, against such an order under Order XXII, Civil Procedure Code; while, according to the petitioner's contention, there could be an appeal to His Majesty in Council, when such an order is made by the High Court in a proceeding in an appeal arising out of the same suit. I do not think that such an anomaly exists.

It is also clear that a judgment or order in order to be final within the meaning of clause 39 of the Letters Patent must finally determine the rights of the parties. In other words if it be not appealed from, the adjudication must be final. In the present case it is not denied that in spite of this order, the petitioner is entitled either to apply for the Probate of the Will or to enforce his rights under the Will by a separate suit. The adjudication is not, therefore, final. It may be that the question of petitioner's right to represent the deceased Virupakshappa in this litigation is finally decided. But that is a matter of procedure. So far as the substantial rights of the petitioner are concerned it cannot be suggested that the adjudication is final.

For these reasons, I refuse to grant the certificate prayed for, and discharge the rule with costs.

HEATON, J.—I concur.

Leave refused.

(1) (1903) 1 K. B. 547; 72 L. J. K. B. 271; 51 W. R. 337; 67 J. P. 397; 19 T. L. R. 266; 1 L. G. R. 639.
(2) 6 B 260.

YURUVA VENKATA REDDY *v.* MADDI VEERANNA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1668 OF 1912.

November 13, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

YURUVA VENKATA REDDY *alias* MOOGI REDDY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MADDI VEERANNA—PLAINTIFF—RESPONDENT.

Lease-deed—Registration.

A compulsorily registrable lease is inadmissible without registration to prove the nature of lessee's possession.

Kannuparti Subbayya v. *Kurnani Madduletiah*, 17 M. L. J. 469, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Kurnool, in Appeal Suit No. 118 of 1911, preferred against that of the District Munsif of Nandyal, in Original Suit No. 257 of 1910.

FACTS.—This is a suit for the recovery of a house site from the defendants and for a perpetual injunction restraining them from interfering with his building a *kottam* on the same, alleging that the site belonged to him and was in his enjoyment but the defendants forcibly took possession of the same. The defendants pleaded that it belonged to them and that the plaintiff was in possession of the site under an unregistered rental agreement alleged to have been executed by the plaintiff in 1905. The Subordinate Judge held that the rental agreement required registration and under section 107 of the Transfer of Property Act was inadmissible in evidence following *Vairananda Nadar* v. *Uriyakan Rowter* (1) and decreed the plaintiff's claim.

Mr. *S. Swaminathan*, for the Appellants.

Mr. *P. Venkataramana Rao*, for the Respondent.

JUDGMENT.—The lease relied upon requires registration and is not admissible to prove the nature of the plaintiff's possession. See *Kanuparti Subbayya* v. *Kurnani Madduletiah*, (2).

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 21 M. 109.
(2) 17 M. L. J. 469.

MA NGWE YIN *v.* MAUNG PO TAW.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 224 OF 1911.

April 3, 1913.

Present:—Mr. Justice Parlett.

MA NGWE YIN—DEFENDANT—APPELLANT

versus

MAUNG PO TAW—PLAINTIFF—RESPONDENT.

Marriage—Breach of contract of marriage—Damages—Suit maintainable.

Damages for the breach of a contract of marriage may be awarded to a man.

Purshotamdas Tribhovandas v. *Purshotamdas Mangaldas*, 21 B. 23, followed.

Between Burman Buddhists a suit by the man will lie, unless it can be shown to be forbidden by the Burmese Buddhist Law.

Manug Hmaing v. *Ma Pwa Me*, S. J. 533, followed.

The respondent sued appellant for damages valued at Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for injury to his reputation in public.

Both sides appealed and the District Court increased the damages to Rs. 20 for the furniture and Rs. 30 for injury to his social standing and reputation.

The defendant on second appeal urged, *inter alia*, that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation:

Held, that there was no evidence of actual loss having been sustained by reason of the purchase of the furniture, much less of what the amount of that loss was, and that, therefore, there was nothing to base the finding of either Rs. 13 or Rs. 30 upon.

Held, also, that there was nothing on the record to indicate that the plaintiff had suffered injury either to his social standing or to his reputation, nor any evidence indicating any measure of damages for such injury.

Held, further, that the fact that a man had merely become the butt of his acquaintances' jests, or had experienced a feeling of shame, did not constitute an injury for which damages could be awarded in a suit of this nature.

Mr. *Maung Thin*, for the Appellant.

Mr. *Tha Din*, for the Respondent.

JUDGMENT.—Respondent sued appellant for damage for Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for "injury to his reputation in public." Both sides appealed, and the District Court increased damages to Rs. 20 for the furniture and Rs. 30 for "injury to his social

standing and his reputation." The defendant now appeals on the grounds (1) that the suit did not lie, and (2) that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation.

The case of *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (1) is authority for damages for breach of a contract of marriage being awarded to a man, and, as the District Court points out, the ruling of *Maung Hmaing* v. *Ma Pwa Me* (2) is authority that between Burman Buddhists a suit by the man will lie unless it can be shown to be forbidden by the Burmese Buddhist Law. Section 63, Vol. 2, of the late Kin Wun Mingyi's Digest was quoted as forbidding such a suit. In my opinion that section deals with only the particular circumstances therein set forth. Section 74 appears to be direct authority that under other circumstances such a suit might lie.

I consider, however, that the second ground is one of substance. As regards the furniture the facts found by both Courts are that in consequence of appellant's promise to marry him respondent bought furniture and household effects to the value of some Rs. 128 which apparently he still has. One witness only says that no Burman Buddhist would take them off his hands as they would be regarded as unlucky. The respondent never alleged this, nor did he either in his plaint or in his evidence claim to have suffered actual loss over the purchase of these articles. There is no evidence whatever that he has made any attempt to re-sell any of them, or what amount he would be likely to realise for them from a person not a Burman Buddhist, or otherwise averse to buying them; nor is there any evidence that some if not all the articles are not such as to be of use to himself. Thus it cannot be said that there is any evidence at all of actual loss having been sustained by reason of his purchase, much less of what the amount of that loss was, and, therefore, there was nothing to base the finding of either Rs. 13 or 30 upon. As to the other item the plaint merely alleges that appellant's breach of her promise has caused great pain of mind and unhappiness to respondent, his parents and relations. In this suit obviously the effect upon respondent himself can alone be considered. In his evidence he merely says that his friends and associates jeered at him and he felt much shame on account of the matter. His witnesses do not speak to any other consequences of the breach than a feeling of shame on the part of respondent. I find nothing on the record to indicate that he has suffered injury either to his social standing or to his reputation, much less any evidence indicating any measure of damages for such injury. In my opinion that a man has merely become the butt of his acquaintances' jests, or has experienced a feeling of shame, does not constitute an injury for which damages can be awarded in a suit of this nature. I, therefore, reverse the decree of the District Court and dismiss the suit with costs in all Courts, Advocate's fee in this appeal two gold *mohurs*.

Appeal accepted.

(1) 21 B. 23.
(2) S. J. 533.

MADRAS HIGH COURT.
ORIGINAL SIDE APPEAL No. 40 OF 1910.
March 23, 1914.
Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.
N. DURAISWAMI CHETTY—APPELLANT
versus
N. GOVINDU CHETTY AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XIX, r.* 3 —*Affidavit, meaning of.*

A statement which merely recites facts to the "best of the information and belief" of the deponent, but does not state the source of his information, is not an "affidavit" within the meaning of Order XIX, rule 3, of the Code of Civil Procedure, and cannot be used as evidence in any judicial proceeding.

Young Manufacturing Company Limited, In re J. L., Young v. *J. L. Young Manufacturing Company Limited*, (1900) 2 Ch. D. 753; 69 L. J. Ch. 868; 83 L. T. 418; 49 W. N. 115, followed.

Appeal from the decree of the Hon'ble Mr. Justice Wallis, dated the 9th day

DURAISWAMI CHETTY *v.* GOVINDU CHETIY.

of August 1910, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in Civil Suit No. 6 of 1908.

Mr. *K. Ramachandran*, for the Appellant.

Mr. *W. V. Rangasvami Aiyangar*, for the Respondents.

This appeal coming on for hearing on 26th and 27th August 1912 and having stood over for consideration till 29th August 1912, the Court (Benson, Offg. C. J., and Sankaran Nair, J.,) delivered the following

JUDGMENT.—A preliminary decree for partition was passed on the 23rd July 1909 directing that an account should be taken of the assets and liabilities of the joint Hindu family to which the parties belonged. The decree also contained the following directions:—"Each party hereto for the purpose of taking the said accounts do, on or before the 23rd day of August 1909, file in Court his account of all the property, both moveable and immoveable, in his possession; and also of family credits and liabilities verified by the affidavit of himself or some duly qualified person; and that each party do, on or before the 6th day of September 1909, file in Court statements, surcharges and objections thereto; and all parties shall be entitled to inspect all books of account and papers and the said statements of accounts and objections." On the 23rd August the plaintiff filed his statement of accounts. There was no statement of objections or surcharges filed by the 1st defendant-appellant before us, before the 6th September. He, however, made an application on the 16th November for leave to file the statement. That application was rejected by the learned Judge and he proceeded to determine the case on the evidence before him. His judgment so far as it is material runs as follows:—"The plaintiff's account verified by affidavit is the only evidence before me. I find that the properties available for division are those set up in the affidavit filed by the plaintiff on 23rd August 1909." In the so-called affidavit referred to, the plaintiff stated as follows:—

"The particulars given below represent to the best of my information and belief the credits and liabilities of the said joint family." Among the particulars so given are mentioned the following items which form the subject-matter of this appeal:

	Rs.	a.	p.
Cash collections ...	1,370	0	0
Money paid as compensation to the husband of one Manikammal ...	250	0	0
Capital in rice and *maligai* business ...	3,000	0	0
Profits from the rice and *Maligai* business from the year 1902 up to date ...	7,000	0	0

This was accordingly held to be family property available for partition. In appeal it is contended before us that this statement filed by the plaintiff on 23rd August is not evidence against the 1st defendant and should not have been made, therefore, the basis of any decision against him. It is not denied that if it is an affidavit it would be evidence in the case. And the main question that is argued before us is whether this is an affidavit.

Order XIX, rule 3, of the Civil Procedure Code runs thus:—

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: *provided that the grounds thereof are stated.*" It is argued before us that this statement was not filed on an interlocutory application and, therefore, any affidavit to be received in evidence should be confined to facts within the plaintiff's knowledge; and *secondly*, even on interlocutory applications on which statements of belief may be accepted it is essential that the grounds thereof should be stated; and reliance is placed on the decision in *Young Manufacturing Company Limited, In re J. L, Young v. J. L. Young Manufacturing Company Limited* (1). This is a decision on Order XXXVIII, rule 3, of the English Rules of Practice of the Supreme Court which runs in the same terms. In that case the Lord Chief Justice said: "I notice that in several instances the deponents make statements on their 'information and belief' without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on 'information and belief' ought

(1) (1900) 2 Ch. D. 753; 69 L. J. Ch. 868; 83 L. T. 418; 49 W. R. 115.

not to be looked at at all, not only unless the Court can ascertain the source of information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice." Order XIX, rule 3, of the Civil Procedure Code is quite clear. We are, therefore, constrained to hold that the statement filed by the plaintiff is not an affidavit and, therefore, not evidence against the 1st defendant. It is conceded that there is no other evidence in the case. It appears, however, from the judgment of the learned Judge dated 15th December that his attention was not drawn to the fact that the statement of the plaintiff was based only on information and belief though the Pleader for the defendant may have argued that this statement is not evidence against him. We think, therefore, the plaintiff should be given an opportunity of proving his statements. We accordingly request the learned Judge to give the plaintiff an opportunity of adducing evidence to prove his allegations in his statement and return a finding on the question whether the plaintiff has proved that the amount aforesaid or any portion thereof is family property.

Seven days will be allowed for filing objections. The appellant prays that he may be allowed to call evidence before the learned Judge. We leave that question to be determined by him.

In compliance with the order contained in the above judgment the Hon'ble Mr. justice Wallis sitting in the Original Side of the High Court returned the following

FINDING.—This suit having been heard on the 11th October 1912, 12th November 1912, and 28th March 1913 and coming on this day (4th April 1913) on reference for the finding called for by the Appellate Court in the presence of Mr. W. V. Rungasamy Aiyangar, Vakil for the plaintiff herein, of Mr. K. Ramachandran, Vakil for the 1st defendant, and of Mr. T. Ethiraja Mudaliar, Vakil for the 2nd defendant, and upon reading the appeal judgment and order made herein and dated the 29th day of August 1912, the order made herein and dated the 12th day of November 1912, the report of the Commissioner appointed herein filed on the 15th day of January 1913, the statement of objections of the 1st defendant filed on the 28th day of January 1913, the order made herein and dated the 28th day of March 1913 and the further report of the said Commissioner filed herein on the 3rd day of April 1913: This Court doth find that in respect of items Nos. 1 and 2 referred to in the said appeal judgment the full amount of those two items are family properties and that in respect of items Nos. 3 and 4 of the said judgment there is only a sum of Rs. 777-5 3 belonging to the joint family as shown hereunder, *i.e.*, the total amount of assets in the rice and *maligai* business with the 1st defendant herein is Rupees two thousand one hundred and five, annas eleven and pies eight (Rs. 2,105-11-8), the sale price of the outstandings purchased by the 1st defendant is rupees three thousand five hundred and five (Rs. 3,505), and the amount allowed to the 1st defendant as per order of this Court dated the 28th March 1913 is rupees seven hundred and fifteen (Rs. 715), and that the balance due by the 1st defendant is rupees four thousand eight hundred and ninety-five, annas eleven and pies eight (Rs. 4,895-11-8), and that the net amount of assets in the hands of the 1st defendant divisible among the parties hereto, after deducting therefrom the sum of rupees four thousand, one hundred and eighteen, annas six and pies five (Rs. 4,118-6-5) the debts due by the irrecoverable business is rupees seven hundred and seventy seven, annas five and pies three (Rs. 777-5-3); and this Court doth order that the remuneration of Mr. R. Subramania Aiyar, the Commissioner appointed herein, be fixed at the sum of rupees four hundred (Rs. 400) and that the same be paid by the 1st defendant in the first instance and divided between the plaintiff and the 1st defendant herein.

This appeal coming on Friday, the 13th of February 1914, and having been posted to be spoken to this day for final hearing after the return of the above finding upon the issue referred by the Appellate Court for trial, the Court delivered the following

MAUNG KYAW YAN v. MA NYO U.

JUDGMENT.—We accept the finding and modify the decree in accordance therewith. Each party will bear his own costs in this appeal.

Decree modified.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 100 OF 1912.
July 22, 1913.
Present:—Mr. Justice Parlett.
MAUNG KYAW YAN—DEFENDANT—APPELLANT
versus
MA NYO U—PLAINTIFF—RESPONDENT.

Buddhist Law—Divorce—Cruelty — Caprice — Petty quarrels.

A divorce cannot be granted on mere caprice, and petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce.

Mi Po Du v. *Maung Shwe Bauk*, S. J. 607, followed.

Ma Ein v. *Te Maung*, 3 Ind. Cas. 715, 5 L. B. R. 87, referred to.

The parties had both been married before, the defendant being 53 and the plaintiff 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not as amicably as might be. On the 28th October 1911 the appellant missed rice, plantains and cocoanuts and accused his wife of taking them to give to her children and told her to go away from his house. She did so and went to her parents' house. She then attempted to get a divorce before the headman without success and on the 11th November 1911, the 14th day after the quarrel, she filed a suit. A decree as if by mutual consent was given for divorce and confirmed on appeal. Second appeal was lodged:

Held, that the facts stated above did not constitute such cruelty as entitled the plaintiff to a divorce, even as by mutual consent, and that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms.

Mr. *K. B. Banerji*, for the Appellant.

Mr. *Karaka*, for the Respondent.

JUDGMENT.—Respondent sued appellant for a divorce on the ground of ill-treatment and obtained a decree for divorce as if by mutual consent, which has been confirmed on appeal. This appeal is lodged on the ground that the decree was passed on grounds insufficient in law. Various rulings have been cited in the lower Courts and in this Court. As regards *Ma Ein* v. *Te Maung* (1) the question of the grounds on which a divorce as by mutual consent could be obtained by a wife after ill-treatment was not raised or decided. No doubt the Upper Burma case of *Maung Pye* v. *Ma Me* (2) lays down that misconduct on the part of a husband, which may not in itself be sufficient to entitle a wife to divorce under the rule of separation where the husband is the offender, may nevertheless be sufficient to entitle her to insist on a divorce as by mutual consent. I should be loth to question so high an authority nor is it necessary to do so, for it does not lay down that the ill-treatment to be sufficient for a divorce by mutual consent need not be of a substantial nature, where it is clear that in that particular case the ill-treatment was very severe, varied and protracted. So far as I am aware the dictum of the learned Judge in *Mi Po Du* v. *Maung Shwe Bauk* (3), that a divorce cannot be granted on mere caprice and that petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce, has never been dissented from, and becomes, it appears to me, of even greater weight as civilization and enlightenment progress.

The facts in the present case are that the parties had both been married before, appellant being now 53 and respondent 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not always as amicably as might be, and on 28th October 1911 appellant missed rice, plantains and cocoanuts, and accused his wife of taking them to give to her children, and told her to go away from his house. She did so, and went to her parents' house. She then attempted to get a divorce before the headman without success, and on 11th November 1911, *i. e.*, the fourteenth day after the quarrel, she filed this suit. Respondent asked her to return to him and she refused. The question is whether, in law, these facts constitute such cruelty as to entitle her to a divorce, even as by mutual consent. I have no hesitation in holding that they do not. It is a misuse of terms to say that appellant brought an unfounded charge of theft against his wife and turned her out of the house. He was, no doubt, annoyed at the loss of his things, and perhaps not

(1) 3 Ind. Cas. 715; 5 L. B. R. 87.

(2) 2 U. B. R. (1902-03) 6.

(3) S. J. 607.

unnaturally assumed that his wife's former family, who appear not to live with them, had had the benefit of them, and this he would naturally resent. Clearly telling her to leave the house was no hardship to her, as she had her parents' house to go to and was ready enough to go; while appellant was anxious to make amends. I consider that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms

I, therefore, reverse the decree of the District Court, and dismiss the suit with costs, Advocate's fee in this Court two gold *mohurs*.

Appeal accepted.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 957 OF 1911.

December 6, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Beadon.

MIR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Question decided against a* pro forma *defendant, when not* res judicata.

When in a previous suit, there was no contest between those defendants, who were merely joined *pro forma*, and the plaintiffs of that suit in regard to the claim made by the latter, the decision in that suit does not operate as *res judicata* in a subsequent suit brought by the *pro forma* defendants of the first suit against the real defendants as well as the plaintiffs of that suit, when in the subsequent suit there is no contest between the plaintiffs of the first suit, who thus assume the role of *pro forma* defendants in the subsequent litigation, and the *pro forma* defendants of the first suit, who are the plaintiffs of the subsequent suit.

First appeal from the decree of the District Judge, Hissar, dated the 24th April 1911, dismissing plaintiffs' suit.

Mr. *Nand Lal*, for the Appellants.

Mr *Akbar Umar*, for the Respondents.

JUDGMENT.—The present suit relates to $\frac{3}{8}$th share (*i. e.*, a share described as $7\frac{1}{2}$ *biswas* out of 20 *biswas*) of the entire village of Dadupur, *Pargana* Fatehabad, District Hissar.

Nadir son of Nanak was originally formal defendant No. 5, but he subsequently joined the plaintiffs and is now one of the plaintiffs-appellants. Rahman, Kamala, Piru and Punnu defendants (Nos. 1 to 4) who are the chief defendants-respondents at present hold $\frac{2}{3}$rds of the village, defendants Nos. 53 to 87 who at present hold $\frac{1}{3}$rd of the village are representatives of Ram Singh and Nidhan Singh, deceased, and are formal defendants-respondents and the remaining defendants-respondents are also formal having interests in the village such as those of tenants and lessees. The entire village having been purchased by one Narain Singh, the present chief defendants (Nos. 1 to 4), with a view to claiming pre-emption, entered into an agreement with Ram Singh and Nidhan Singh (represented by defendants Nos. 53 to 87) by which the latter in consideration of their paying a share of the expenses of the litigation and a share of the price were to get $\frac{1}{3}$rd of the village.

Accordingly the chief defendants (Nos. 1 to 4) instituted a suit against Narain Singh, and on 11th December 1908 they got a decree for pre-emption on payment of the sum of Rs. 25,500 which was duly deposited in the Treasury on 25th February 1909 within the fixed date.

On the 2nd March 1909, the chief defendants (Nos 1 to 4) executed a deed by which they sold $\frac{3}{8}$th share ($7\frac{1}{2}$ *biswas* out of 20 *biswas*) of the village to the plaintiffs-appellants for Rs. 12,500. This deed was duly registered on 3rd March 1909, and after a reference to the decree for pre-emption it sets forth that the price of Rs. 12,500 had been paid in full by the vendees in certain specified shares and that the money had been received from the vendees for payment of the pre-emption money.

On the strength of the agreement which the chief defendants (Nos. 1 to 4) entered into with Ram Singh and Nidhan Singh (represented by defendants Nos. 53 to 87) the latter sued the former for $\frac{1}{3}$rd of the village and made the present plaintiffs-appellants co defendants in the suit. The chief defendants (Nos. 1 and 4) contested the suit and their pleas, after an allegation that the representatives of Ram Singh and

Nidhan Singh had failed to pay their share when the sum of Rs. 25,500 was paid in the pre-emption suit, contained the following statement:—"Consequently we caused Rs. 12,500 to be deposited in the treasury by Mir Khan, Ibrahim, Kadir, Sultan, Nadir, Nura, Kamala, Nizam and Nihal, defendants (present plaintiffs-appellants), and they have been put in possession of $7\frac{1}{2}$ *biswas* share." The result of the suit was that the representatives of Ram Singh and Nidhan Singh by the decree obtained $\frac{1}{3}$rd of the village from the chief defendants (Nos. 1 to 4) on payment to them of a certain sum of money. It is not quite clear whether the sum was Rs. 8,000 or 8,500, but the exact sum is immaterial for the purposes of the present case.

The chief defendants (Nos. 1 to 4) now repudiate the right of the plaintiffs-appellants to a share of the village, and consequently in the present suit the plaintiffs-appellants claim the share covered by the sale-deed in their favour dated the 2nd March 1909.

The registered deed itself and the pleas of the chief defendants (Nos. 1 to 4) in the suit by the representatives of Ram Singh and Nidhan Singh establish beyond doubt that there was a completed sale for consideration to the plaintiffs-appellants and in fact the chief defendants (Nos. 1 to 4) do not really deny this. In their pleas in the present case they, no doubt, say that the consideration was fictitiously overstated by Rs. 3,000 in the deed but they admit that the alleged real consideration of Rs. 9,500 was duly paid.

In effect the defence of the chief defendants (Nos. 1 to 4) is that the land which is the subject of the present suit is the same as that which was the subject of the suit by the representatives of Ram Singh and Nidhan Singh; that in that suit in which the present plaintiffs-appellants were joined as defendants, it was finally decided that the representatives of Ram Singh and Nidhan Singh and not the present plaintiffs-appellants were entitled to this land; that the question of the plaintiffs-appellants' title cannot be re-opened; and that the present claim against the chief defendants (Nos. 1 to 4) cannot be maintained.

In accepting this defence and in dismissing the suit the lower Court appears to have entirely misunderstood the nature of the two transactions and the nature of the previous suit.

The chief defendants (Nos. 1 to 4) expected to get and did in fact get the whole village by pre-emption. By one transaction they transferred $\frac{1}{3}$rd (or 8/24th) of the village to Ram Singh and Nidhan Singh for consideration, *i.e.*, payment of part of the expenses of the pre-emption suit and payment of the lump sum which the representatives of Ram Singh and Nidhan Singh had to pay to the chief defendants before they could enforce their decree.

By the other transaction the chief defendants transferred $\frac{3}{8}$th (or 9/24th) share of the village to the plaintiffs-appellants for consideration, *i.e.*, the payment by plaintiffs-appellants of part of the pre-emption money. Thus after these two transactions the share of the village which remained for the chief defendants (Nos. 1 to 4) was 7/24th share and they are obviously not entitled to more than this share.

The representatives of Ram Singh and Nidhan Singh in their suit claimed the $\frac{1}{3}$rd share which had been transferred to them and did not claim the $\frac{3}{8}$th share or any part of it, which had been transferred to the present plaintiffs-appellants. There was thus no contest in that suit between the representatives of Ram Singh and Nidhan Singh and the present plaintiffs-appellants and the latter were merely joined as formal defendants because by reason of the sale to them they had acquired an interest in the village.

Similarly in the present suit the plaintiffs-appellants claim the $\frac{3}{8}$th share which was transferred to them and do not claim the $\frac{1}{3}$rd share or any part of it which was transferred to Ram Singh and Nidhan Singh. There is thus no contest in this suit between the plaintiffs-appellants and the representatives of Ram Singh and Nidhan Singh and the latter have merely been joined as formal defendants because they are co-sharers in the village.

Thus it is obvious that the plaintiffs-appellants' claim is in no way barred by

the previous suit and they are clearly entitled to take from the chief defendants (Nos. 1 to 4) the property which they claim in the plaint.

The chief defendants-respondents (Nos. 1 to 4) through Counsel have alleged in this Court that since the 29th July 1911, when the appeal was instituted, the consideration for the sale which was deposited in the treasury has been refunded to the plaintiffs-appellants. The plaintiffs-appellants deny this, and seeing that the money which was paid by the plaintiffs-appellants was deposited in the treasury for payment to Narain Singh, vendee, in the pre-emption suit and that possession was delivered to the chief defendants-respondents under the pre-emption decree it is *prima facie* improbable that any portion of it can have been refunded to the plaintiffs-appellants. No doubt, the plaintiffs-appellants on 31st October 1911 withdrew a sum of Rs. 7,613-10-0 from the treasury but, if (as appears to be the case, this money was a deposit made in connection with the suit by the representatives of Ram Singh and Nidhan Singh, it is not easy to see how it can have any connection with the consideration of the sale now in question. The chief defendants-respondents, however, assert positively that a sum of Rs. 9,500 which was deposited by the plaintiffs appellants in the pre-emption case on account of consideration for the sale now in question has been refunded to the plaintiffs-appellants, and, if this is so, the money so refunded must be re-paid by the plaintiffs-appellants before they can be given the property which they claim.

From the records before us we cannot decide definitely whether or not such a refund has been made but, as the point is one which can, without difficulty, be determined in execution of the decree, it is unnecessary to further delay the disposal of the appeal by a remand. We accordingly accept the appeal and setting aside the lower Courts' decree dismissing the suit we decree the plaintiffs' claim subject to the conditions:—

(1) That the share decreed to the plaintiffs will be taken from the chief defendants (Nos. 1 to 4) and not from the $\frac{1}{3}$rd share belonging to the representatives of Ram Singh and Nidhan Singh (defendants Nos. 53 to 87); and (2) that if the consideration of the sale-deed dated 2nd March 1909, which was deposited in the treasury on 25th February 1909, in connection with the chief defendants' pre-emption suit against Narain Singh or any portion of it has been refunded to the plaintiffs the sum so refunded must be re-paid by the plaintiffs into Court for payment to the chief defendants (Nos. 1 to 4) before the plaintiffs are given possession of their share under the decree. The chief defendants Nos. 1 to 4 will pay the plaintiffs-appellants' costs throughout.

Appeal accepted.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 180 OF 1911.

January 10, 1913.

Present:—Mr. Justice Parlett.

MAUNG THA DUN—APPELLANT

versus

S. S. CHOKALINGAM CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 91- Setting aside auction sale on ground that judgment-debtor had no saleable interest in part of property —Fraud of decree-holder—Purchaser not misled thereof.

Where an auction-purchaser of a certain land with two houses on it found that the judgment-debtor had interest only in the houses and not in the land and then sought to set aside the sale:

Held, that rule 91 of Order XXI did not apply where the judgment-debtor had no saleable interest in a portion only of the property sold at the auction:

Held, further that the contention that the decree-holder knew that the judgment-debtor had no interest in the land and fraudulently concealed that knowledge was not supported by the fact found in the case,and that even if fraud was resorted to the plaintiff was not misled by it.

Ram Coomar Dey v. *Shushee Bhushun Ghose*, 9 C. 626; 7 Ind. Jur. 603; *Shanto Chandar Mukerjee* v. *Nain Sukh*, 23 A. 355; A. W. N. (1901) 101, and *Muhammad Rahmat-Ullah* v. *Bachcho*, 27 A. 537; A. W. N. (1905) 99; 2 A. L. J. 244, followed.

Sonaram Dass v. *Mohiram Dass*, 28 C. 235, distinguished.

Mr. *Villa*, for the Appellant.

Mr. *A. B. Banerji*, for the Respondent.

JUDGMENT.—At an auction sale held in execution of a mortgage decree against the late Mg. Gale, appellant bought for

Rs. 2,490 two houses and the land they stood on. It has now been finally held that Mg. Gale had no right, title or interest at all in the land. The houses without the land are valued by appellant at Rs. 200, and there is evidence that their value does not exceed Rs. 600. The purchaser sues the decree-holder and the judgment-debtor's legal representative to set aside the sale altogether and to recover his purchase-money with interest, his claim against the judgment-debtor's legal representative being in her representative capacity and to the extent only of the surplus over and above the decretal amount which may come into her hands.

The main argument for the sale to be set aside is that the interests in the land and in the houses on it were separable, and that as the judgment-debtor had no saleable interest at all in the land, the entire sale can be set aside under rule 91 of Order XXI. There is abundant authority that this rule does not apply where the judgment-debtor has no saleable interest in a portion only of the property though the majority of the cases quoted [*Ram Coomar Dey* v. *Shushee Bhushun Ghose* (1); *Shanto Chandar Mukherji* v. *Nainsukh* (2); *Muhammad Rahmat-Ullah* v. *Bachcho* (3)] refer to sales of property in the whole of which the judgment-debtor had only a partial interest. But the Calcutta case of *Sonaram Dass* v *Mohiram Dass* (4) is exactly like the present case, inasmuch as there the judgment-debtor had an interest in a portion only of the land sold, and none whatever in the remainder, and it was held following an earlier Madras case *Sundara Gopalan* v. *Venkatavaradu Ayyangar* (5) that the sale could not merely on that ground be set aside, nor could the auction-purchaser claim a refund in proportion to the extent to which the judgment-debtor had no interest in the property sold.

The next ground advanced is fraud on the part of the decree-holder, the allegation being that he knew the judgment-debtor had no interest in the land and that his concealment of that knowledge and his bringing the land to sale constituted fraud, appellant being thereby induced to buy. Both the lower Courts fully set out the facts, and the Sub-Divisional Court decided that the decree-holder did not know the judgment-debtor had no interest in the land. The Divisional Court indeed was of opinion that he knew of Ma Ma Gyi's application, but whether that of 23rd October 1908, or that of 27th February or that of 24th March 1909 is not stated; neither is there evidence on which the opinion is based, and I find none: on the contrary, there is evidence that his Pleader knew nothing of her first petition when he filed his application for review of judgment on 29th October 1908. On the other hand, there is a good deal of evidence tending to show that he believed the judgment-debtor had an interest in the land as well as in the houses thereon. On the very day of Ma Ma Gyi's deed of gift to him, the land was changed from her name to his in the Revenue Registers. In the mortgage-deed of 19th November 1906 he mortgaged the land as well as the houses to the decree-holder: when he obtained a decree not covering the land he got his Pleader, who had no knowledge of Ma Ma Gyi's claim to it, to apply for a review, and obtained it. When Ma Ma Gyi sued to establish her right to the land both the decree-holder and appellant contested her suit up to the highest Court on the grounds that she had transferred the land as well as the houses. The finding of the Sub-Divisional Court on the point was clearly justified. At the hearing plaintiff endeavoured to prove that Solayappa Chetty assured him that if the land was not comprised in the property sold he would refund the money: the only support for this is the evidence of a man once in Jail, a rent-free tenant and former witness of plaintiffs, but there is evidence that Solayappa was not in this country at all during the suit or at the time of the sale. The allegation cannot be believed. In this appeal it was urged that on the authority of *Mohamad Kala Mea* v. *A. B. Harperink* (6) the sale should be set aside. In that case the purchaser was misled by an inaccurate statement as to the property being sold made at the sale by the Court's

(1) 9 C. 6261; 7 Ind. Jur. 603.
(2) 23 A. 355; A. W. N. (1901) 101.
(3) 27 A. 537; A. W. N. (1905) 99; 2 A. L. J. 244.
(4) 28 C. 235.
(5) 17 M. 228; 3 M. L. J. 293.

(6) 1 Ind. Cas. 122; 5 L. B. R. 25; 19 M. L. J. 115 36 C. 323; 11 Bom. L. R. 227; 9 C. L. J. 165; 5 M. L. T. 126; 13 C. W. N. 249; 6 A. L. J. 34 (P. C.); 36 I. A. 32.

Officer. In the present case there was nothing of the kind. That when the sale was ordered under the original mortgage decree the bailiff was expressly warned not to sell the land is immaterial. The Court reviewed that judgment including the land and expressly ordered the bailiff to sell the land as well as the houses. The bailiff explained and carried out those orders; it was his duty to do nothing more; nor would he have been justified in doing more. Appellant alleged in his evidence that the bailiff told him that the land was for sale and if there were any complications the Court would, or might, refund the money. This is denied and is improbable in the extreme and cannot be believed.

Apart, however, from all this there is an admission by plaintiff himself which I consider completely puts him out of Court as regards his pleas of fraud on the part of the decree-holder or misrepresentation by the bailiff. He swore before the purchase, I understood that the land, *i.e.*, houses and site, belonged to Ma Ma Gyi," in other words even if the decree-holder had concealed this knowledge and even if the bailiff made a misrepresentation, the plaintiff was not misled thereby. He bought the property knowing quite well that the title to the land was uncertain, and with his eyes fully open to the risk he was running.

His appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 858 OF 1911.

March 9, 1914.

Present:—Justice Sir Herbert Carnduff, KT., and Mr. Justice Richardson.

BUDHAI SIRDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

SONAULLA MRIDHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Pre-emption—Right of pre-emption, when arises—Whether right arises before transfer to stranger is completed.

A Muhammadan pre-emptor's right of pre-emption does not accrue until the transfer to the stranger has been completed by the registration of the *kobala*.

A, a co-sharer of *S*, offered to sell his share of a certain *jote* to *S* but *S* refused to buy. Subsequently *A* executed a *kobala* conveying the share to *B*, an outsider, for Rs. 300; but no consideration passed then, and there was no delivery of possession. Having become aware of the execution of *B*'s *kobala*, *S* approached *A* and obtained another *kobala* purporting to transfer the share to him for Rs. 400. The latter transaction fell through owing to *S*'s failure to produce the purchase-money at the time of registration; but the transfer to *B* was completed by the payment of the consideration by *B* and the registration of his *kobala*. *S* then duly performed the ceremonies prescribed by the Muhammadan Law and eventually brought a suit to enforce his right:

Held, (1) that *S*'s right did not arise when he heard of the execution of *B*'s *kobala* although that was sufficient under the Muhammadan Law to pass the share to *B*, but it arose when it came to his knowledge that the registration required by the general law to complete the transfer had been effected;

Janki v. *Girjadat*, 7 A. 482 (F. B.); A. W. N. (1885) 97; *Begam* v. *Muhammad Yakub*, 16 A. 344 (F. B.); A. W. N. (1894) 101 and *Najm-un-nissa* v. *Ajaib Ali Khan*, 22 A. 343; A. W. N. (1900) 102, not followed.

Jadu Lal Sahu v. *Janki Koer*, 35 C. 575 at p. 599, followed.

(2) that, as *S*'s right of pre-emption did not accrue until the transfer to *B* had been completed by the registration of *B*'s *kobala*, *S* could not have lost it by anything done or omitted by him prior to that date.

Appeal from the decree of the Sub-Judge of Faridpur, dated January 31st, 1911, modifying that of the Sudder Munsif of Faridpur, dated September 25th, 1909.

Babus *Baidya Nath Dutt* and *Purna Chandra Roy*, for the Appellants.

Babus *Mohendra Nath Roy* and *Lal Mohun Banerjee*, for the Respondents.

JUDGMENT.

CARNDUFF, J.—This second appeal has been preferred against an appellate decree declaring a right of pre-emption under the Muhammadan Law of Shufa. The facts found may, for present purposes, be thus succinctly stated.

The right is claimed by one Sonaulla in respect of the share of a *jote* which his co-sharer Ansaruddi has sold to an outsider, Budhai. Some time previously Ansaruddi had offered to sell the share to Sonaulla, and Sonaulla had refused to buy. But when precisely this offer was made, and what were its terms, do not appear. After Sonaulla's refusal Ansaruddi, on the 14th December 1907, executed a *kobala* conveying the share to Budhai for Rs. 300; but no consideration passed then, and there was no

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delivery of possession. Having become aware of the execution of Budhai's *kobala*, Sonaulla approached Ansaruddi on the 23rd December and obtained another *kobala* purporting to transfer the share to him for Rs. 400. The latter transaction fell through owing to Sonaulla's failure to produce the purchase-money at the time of registration; but the transfer to Budhai was completed by the payment of the consideration by Budhai and the registration of his *kobala* on the 3rd of the following January. Of this completion Sonaulla heard on the 6th January, and he thereupon duly performed the ceremonies prescribed by Muhammadan Law, and eventually brought the present suit to enforce his right.

The Court of first instance held that Sonaulla had forfeited the right, *first*, by his initial refusal to purchase the share, and, *secondly*, by his failure to pay the purchase-money stipulated for in the *kobala* executed in his favour on the 23rd December. The lower Appellate Court has reversed this decision and decreed the suit, holding that Sonaulla's right of pre-emption did not accrue until the transfer to Budhai had been completed by the registration of Budhai's *kobala* on the 3rd January, and that, therefore, Sonaulla could not have lost it by anything done, or omitted, by him prior to that date.

In so far as the earlier offer and refusal are concerned there seems to me to be no difficulty in accepting the Subordinate Judge's view. The appellants rely on *Toral Komhar* v. *Musammat Achhi* (1) and *Kooldeep Singh* v. *Ram Deen Singh* (2). In the former case it was held that where a pre-emptor, on being asked as such to purchase, deliberately refuses to exercise his right of pre-emption, he cannot be allowed, on the incidental rule of Muhammadan Law that the pre-emptor's title to purchase is not extinguished until the property has actually passed, to take the property away from a third party, who has purchased after having satisfied himself by careful inquiry that there is no other impediment. In the latter case it was laid down that a party must be deemed to waive his right of pre-emption when he declines the seller's offer and the property is afterwards sold to another with his knowledge. But the facts connected with these cases are not fully reported; the facts relating to the present case are, as I have already stated, but imperfectly known; and it is impossible to say whether the rulings referred to are or are not applicable. Moreover, these rulings are not consistent with the decision of the Full Bench of this Court in *Gurdial Mundar* v. *Rajah Teknarayan Singh* (3), or with the views expressed in *Musammat Ladun* v. *Bhyro Ram* (4), *Mussamat Soondur Koer* v. *Lulla Rughoobur Dyal* (5) and *Jahangeer Buksh* v. *Bhickaree Lall* (6). On principle, too, it would seem that the right cannot arise until there has been a sale to a third party; for the right of Shufa recognised by the Muhammadan Law is not the right of pre-emption known to the Roman Law, that is to say, the right arising out of an obligation on the part of an intending vendor to sell preferentially to the obligor if he offers as good conditions as any intended vendee, but rather the obligation attached to a particular status, which binds the purchaser from the person obliged to hand over the subject-matter to the other party to the obligation on receiving the price paid by him for it. And all the authorities appear to be clear on the point that the right accrues only when the property has passed from the original owner to a purchaser.

There remains the question whether Sonaulla lost his right of pre-emption by the course he took on the 23rd December when he had become aware of the execution of the *kobala* of the 14th in favour of Budhai and instead of proceeding to perform the preliminary ceremonies of *talab-i-mowasibat* and *talab-i-istishad*, entered into rival negotiations for the conveyance of the share to himself as an ordinary purchaser. The answer to this depends on whether Sonaulla's right arose when he heard of the execution of Budhai's *kobala*, which was, under the Muhammadan Law, sufficient to pass the share to Budhai or not until it came to his knowledge that the registration required by the general law to complete the transfer had been effected.

(1) 18 W. R. 401; 9 B. L. R. 253.
(2) 24 W. R. 198.
(3) 2 W. R. 215; B. L. R. Sup. Vol. 166.
(4) 8 W. R. 255.
(5) 10 W. R. 246.
(6) 11 W. R. 71.

For, so far as I can see, there is nothing in the facts found in this connection to raise any issue as to either estoppel or waiver.

The point whether or not the Muhammadan law, pure and undiluted, is to be applied is one of considerable difficulty. It would seem from the judgment in *Najm-un-nissa* v. *Ajaib Ali Khan* (7) to be accepted in the United Provinces, where cases of pre-emption are much more frequent than in the lower Provinces of Bengal, as settled by the ruling of the Full Bench of the Allahabad High Court in *Janki* v. *Girjadat* (8) and *Begam* v. *Muhammad Yakub* (9), that, in considering whether a right of pre-emption has arisen, the Courts should apply the Muhammadan Law alone and hold that, if and as soon as there is a complete sale under that law, although not under the general law, the right has accrued. But in one of the Full Bench cases referred to Mr. Justice Mahmood raised a dissentient voice; in the other Mr. Justice Banerjee also differed from his brother Judges; and in each the agreement for sale had been followed by delivery of possession as well as payment of consideration. In *Jadu Lal Sahu* v. *Janki Koer* (10) this Court has recently referred to the difficulties that are likely to arise in applying the principle that for the purposes of pre-emption it is necessary to follow the Muhammadan Law relating to sale, and refused to extend the Allahabad rulings to a case, such as this, in which there had been neither payment nor delivery of possession. And I confess that the weight of principle and logic seems to me to be on the side of the contention that the general law, which is paramount and has superseded the Muhammadan Law, should govern the incident of sae in applying the law of pre-emption.

On one point there seems to be absolute unanimity and it will be well to take it as the starting point. At the foundation of the Muhammadan Law on the subject lies the entire cessation of all right on the part of the original owner: for as I have already indicated, and as Mr. Justice Mahmood aptly put it in *Janki* v. *Girjadat* (8), the right of Shufa is a right of substitution, and it pre-supposes not only a sale, but the transfer of all the right of the vendor to a vendee, whose place the pre-emptor is entitled to take. That being so, it would seem to be contrary to the spirit of the Muhammadan Law itself to enforce the right in respect of a transaction which would be a complete transfer of the vendor's rights had that law continued to prevail, but is not so in fact by reason of the general law now in force. In other words, those used by Sir Roland Wilson at page 412 of his Digest of Anglo-Muhammadan Law, Edition 4: "Inasmuch as the general law embodied in section 54 of the Transfer of Property Act, 1882, confessedly supersedes the Muhammadan Law of sale on the question of what is necessary in order to transfer the ownership of immoveable property to the purchaser, while the Muhammadan Law itself requires that, for the purpose of pre-emption, there should be an entire cessation of ownership on the part of the seller, it would seem that we are defeating, rather than giving effect to, that law in the sphere in which we profess to preserve it, if we insist on ignoring a legislative change outside that sphere which has altered the legal procedure, for transferring ownership."

No doubt, difficulties may arise in practice whether the Muhammadan Law or the general law be applied strictly. If the latter, the pre-emptor must, where registration is required, wait for registration which may be deferred or dispensed with, and in the meantime he may be subjected to the evils which the Muhammadan Law of Shufa is directed against. If the former, his right might apparently—see *Musammat Ladun* v. *Bhyro Ram* (4)—be defeated by a rescission of the contract for sale at any time before delivery of possession. It is, however, hardly necessary to pursue the matter further or to say more than that this case is on all fours with *Jadu Lal Saha* v. *Janki Koer* (10) and that we follow our learned brothers in distinguishing the Allahabad cases and holding that, in circumstances such as those before us now, the right did not arise until the pre-emptor became aware of the registration of the *kobala* conveying the property to Budhai. In this view I would dismiss the appeal with costs.

RICHARDSON, J.—I agree that the appeal should be dismissed. The main contention

(7) 22 A. 343; A. W. N. (1900) 102.
(8) 7 A. 482; A. W. N. (1885) 97.
(9) 16 A 344; A. W. N. (1894) 101.
(10) 35 C. 575 at p. 599.

urged on behalf of the defendants-appellants was that under the Muhammadan Law the plaintiffs lost their right of pre-emption by waiting till the conveyance to the defendants was registered. In support of this contention the case of *Begam* v. *Mohammed Yakub* (9) was relied on. In that case the vendor sold the property, received the price and delivered possession to the vendee. When the pre-emptor came to assert his right, he was met by the objection that the claim was premature because the sale had not been completed by registration. It was held in effect that under the Muhammadan Law the sale had advanced to a stage when pre-emption might be claimed. It was urged at the time and might be urged now that to hold the contrary might lead in some cases to evasion and denial of the right of pre-emption. How long is the pre-emptor to wait for registration? If he waits too long might it not be said that he had waived his right; while he waits, he suffers the inconvenience which the right of pre-emption was designed to obviate. The decision of the Allahabad High Court, however, was distinguished in this Court in the case of *Jadu Lal Sahu* v. *Janki Koer* (10) where possession was not given and where the price was not paid till registration. Reference was then made to an earlier case [*Musammat Ladun* v. *Bhyro Ram* (4)]. In that case it was held in effect in part reliance on the authority of a passage in the Hedaya (Edition 1779, Vol. III, Chapter XXXVIII, page 598) that when possession was not delivered, the parties to the sale might rescind it so as to defeat a pre-emptor who asserted his right after the sale but before the rescission. A similar conclusion was reached in the case of *Musammat Ojheoonissa Begum* v. *Sheikh Rustum Ali* (11). The facts in these two last mentioned cases are sufficiently stated in the judgments. Apparently the price had not been paid in either case, but it is by no means clear that payment of the price would have affected the result. On the other hand if possession had been delivered the pre-emptor would probably have succeeded. No doubt, some of the observations made in *Musammat Ladun's* case (4) suggest that the Judges might have been disposed to consider registration essential to a complete transfer of ownership. But for the purposes of the decision it was unnecessary to go so far and, however that may be, these two cases show at any rate the importance of delivery of possession under the Muhammadan law and the uncertainty attending a claim of pre-emption made before possession is delivered. [(*Cf. Buksha Ali* v. *Tofer Ali* (12).] So, too, sales which are in their inception invalid under the Muhammadan Law are made valid and effectual by possession being given; [*Najm-un-nissa*, v. *Ajaib Ali Khan* (7)] and the right of pre-emption arises then and not before.

There is no difficulty in applying the Muhammadan Law where possession is delivered, but if it is to be applied where possession is not delivered inconvenience may be caused by the rule or supposed rule of that law that a sale is constituted by offer and acceptance unconditionally expressed. The Muhammadan Law of sale is not now administered in India except incidentally in connection with the subject of pre-emption, and it is doubtful to what extent and with what qualifications a principle so broad can ever have been accepted in practice. The question of the quantum of evidence reasonably necessary to prove a transaction as important as a sale of land cannot be altogether neglected. Inquiry might disclose the existence of general or particular rules of evidence, which would be important in this connection. In *Musammat Ojheoonissa Begum's* case (11) it was said: "A sale is a complete sale in the eye of the Muhammadan Law where the seller says orally, 'I have sold' and the purchaser says, 'I have bought.' In the present case when a bill of sale has actually been written out and signed by the seller, he, no doubt, has done his part towards the completion of the sale; he has in fact proclaimed in a more solemn and formal manner than by word of mouth that he has sold. But if the bill of sale is still in the seller's hands, and has never left them, and nothing has been done by the purchaser, such as the payment of the purchase-money or entry into possession, which would be tantamount to his acquiescence in the sale, one essential element for the constitution of a complete

(11) (1864) W. R. 219.

(12) 20 W. R. 216.

sale is wanting for the purchaser has not said, either directly or indirectly, 'I have bought.' "

The concluding sentence of this quotation really means that the purchaser's assent to the sale had not been proved. Any attempt to apply the Muhammadan Law strictly in all cases might involve great if not insuperable difficulties. What is really required is some simple rule or rules, easily understood and easily applied. In *Jadu Lal Sahu's* case (10), Brett, J., suggested at page 599 that a solution of the problem was to be found "in determining in each case what was the intention of the parties." A working rule might perhaps be founded and that with the addition that the intention of the parties to the sale must be manifested n some unequivocal way to the outside world. One effectual and acceptable mode of manifesting that intention may be delivery of possession: another may be registration.

In the present case, however, we need go no further than the learned Judges actually went in *Jadu Lal Sahu's* case (10) distinguishing the case of *Begam* v. *Muhammad Yakub* (9) on the facts and holding that when possession is not given and the price is not paid till registration, the right of pre-emption arises upon registration and not before. The result is that the contention that there was undue delay on the plaintiff's part in asserting his claim to pre-emption must be rejected.

There remains the question of waiver. It is said in the first place that the vendor offered the property to the plaintiff before he entered into negotiations with the vendee Budhai and that the plaintiff deprived himself of his right of pre-emption by refusing the offer. The circumstances, however, in which the offer was made and the details of the offer are not disclosed and, in my opinion, there is no substance in this contention. It further appears that after the execution of the instrument of the 4th December 1907, the plaintiffs themselves entered into negotiations with the vendor to purchase the property for Rs. 400. An instrument of sale was duly prepared but was not registered because the plaintiffs did not pay the price. I cannot suppose that the failure of the plaintiffs to purchase the property for Rs. 400 amounted to a waiver of their right of pre-emption in respect of the sale to the vendee for Rs. 300. The cases of *Toral Komhar* v. *Musammat Achhi* (1) and *Kooldeep Singh* v. *Ram Deen Singh* (2) were referred to in this connection but the facts being insufficiently reported, it is impossible to say precisely what was decided in those cases. The facts of the case before us do not bring it within such rulings as those in *Sheo Tuhul Singh* v. *Musammat Ram Koer* (13) and *Braja Kishore Surma* v. *Kirti Chandra Surma* (14). On the facts found the present case rather resembles that of *Jahangeer Buksh* v. *Bhickareelall* (6). It does not appear that at the time of the original offer the plaintiffs had any knowledge of any agreement or even of any proposal to sell the property to a third person and it does not appear that they ever had an opportunity to purchase the property for Rs. 300 or that they ever sanctioned its sale to the vendee for that price [*Cf. Kanhai Lal* v. *Kalka Prasad* (15)].

In the result I agree that the appeal should be dismissed with costs.

Appeal dismissed.

(13) (1864) W. R. 311.
(14) 15 W. R. 247; 7 B. L. R. 19.
(15) 27 A. 670; A. W. N. (1905) 149; 2 A. L. J. 390.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 965 OF 1911.
January 28, 1914.
Present:—Mr. Justice Teunon.
PITAMBAR BAUR—PLAINTIFF—APPELLANT
versus
CHANDI CHARAN HALDAR BENIA—DEFENDANT—RESPONDENT.

Mortgage-decree—Direction in decree that no application shall be entertained against property other than the mortgaged property, whether legal—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.

A Court cannot direct in a mortgage-decree that no application against property other than the mortgaged property shall be entertained. The question whether it is open to the decree-holder to proceed against property other than the mortgaged property is one which should be left to be determined when an application, if any, under Order XXXIV, rule 6, is made.

Appeal from the decree of the Additional District Judge of 24-Pergannahs, dated

December 19th, 1910, reversing that of the Fourth Munsif of Diamond Harbour, dated July 9th, 1910.

Babu *Siva Prosanna Bhattacharya*, for the Appellant.

Babu *Probodh Chandra Dutt*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit brought upon a mortgage. The learned District Judge in the Court of first appeal has decreed the plaintiff's claim but has directed by his decree that no application under rule 6, Order XXXIV, of the Code of Civil Procedure, that is to say, an application to proceed against property other than the mortgaged property, shall be entertained. The contention of the appellant is that the question whether it is open to the decree-holder to proceed against property other than the mortgaged property is one which should be left to be determined when an application, if any, under that rule and Order is made. It is conceded on behalf of the respondent that the contention of the appellant must prevail. It is, therefore, ordered that the decree of the learned District Judge, in so far as it directs that no application under that rule and Order shall be entertained, be set aside. The question if such an application be at any time made must be determined by the Court before which that application is made, and is for the present left open. Having regard to the principal sum advanced and the sum now claimed, I make no order as to the costs of this appeal.

Decree set aside.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 148 OF 1913.

February 3, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

EPOOR RAMASAMY REDDY AND OTHERS —APPELLANTS

versus

KANDADAI RANGAMANNAR IYENGAR —RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Mortgage-decree—Preliminary decree executed—No objection by judgment-debtor—Not open to parties to plead subsequently that there was no executable decree—Res judicata.

Although a relief may not have been granted by a decree, yet if in execution proceedings a Court holds that the decree-holder is entitled to that relief under the decree, the order of the Court, if not set aside in due course, operates as *res judicata* and it is not open to the parties afterwards to go behind it on the ground that no such relief was awarded by the decree.

Therefore, where a preliminary mortgage decree, which is not capable of execution, is executed with the knowledge but without any objection on the part of the judgment-debtor, it cannot be afterwards pleaded that there was no decree under which the property could be sold.

Appeal against the order of the District Court of Nellore, dated the 13th March 1913, in Civil Miscellaneous Petition No. 337 of 1912, (in Execution Petition No. 113 of 1911 in Original Suit No. 37 of 1908).

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *V. Visvanatha Sastri* and *A. Krishnaswami Aiyar*), for the Appellants.

Mr. *S. T. Srinivasa Gopalachariar* (with him Mr. *O. V. Anantha Krishna Aiyar*), for the Respondent.

JUDGMENT.—We think the District Judge is right in holding that the 1st appellant has failed to prove the agreement set up by him. His case was that in December 1911, the decree-holder came to his village to see the properties and in January 1912 he offered the lands at Rs. 250 per acre of wet land and Rs. 80 per acre of dry land. He swore that the decree-holder told him that he proposed to sell some of these lands after his purchase to Subba Reddy and Rangu Reddy, and Exhibit A according to him is a letter with reference to this conversation. In our opinion Exhibit A not only does not support but is against his contention. It shows further that the decree-holder did not want to purchase the lands. If he wanted to get the lands himself he would, undoubtedly, have taken steps to enforce the decree soon after the amount became payable to him. We are not satisfied that the letter, Exhibit B, was written in accordance with instructions given by the respondent. The affidavit, Exhibit K, also is not in support of the petitioner's case. In these circumstances we are not prepared to believe the witnesses whom the Judge has disbelieved and we confirm his finding on this point.

The next question is whether the respondent is entitled to execute the decree at all. It is contended that it is only a preliminary

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decree and that according to the decision of the Privy Council [*Ashfaq Husain* v. *Gauri Sahai* (1)] which has been followed by Miller and Sadasiva Aiyer, JJ., in *Yemani Chinna Seshaya* v. *Varanasi Pepaya* (2), Benson and Sundara Aiyar, JJ., in *Raja Kumara Venkata Perumal Raju Bahadur* v. *Audikesvalu Reddi* (3) a preliminary decree is not capable of execution and it is only the decree absolute under rule 5, Order XXXIV, that can be executed. In this case it is clear that no decree absolute under rule 5 has been passed, but we think it is unnecessary to decide this question because this contention is not available to the appellants. On the decree-holder's application for the execution of the decree, notice was issued to the judgment-debtors (appellants) and an order was passed directing the sale of the property; no objection was taken to the sale on this ground. It has been repeatedly held that even though a relief may not have been granted by the decree, yet if in execution proceedings a Court holds that a party is entitled to such relief under the decree, it is not open to the parties afterwards to contend that no such relief has been awarded and the matter is *res judicata*. We are, therefore, of opinion that in this case it is not open to the appellants to plead that there is no decree under which the properties could be sold. We must, therefore, disallow this contention and we dismiss the appeal with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140.

(2) 15 Ind. Cas. 732.

(3) 17 Ind. Cas. 759; 23 M. L. J. 675; 12 M. L. T. 659.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 563 OF 1912.

March 11, 1914.

Present:—Justice Sir Herbert Carnduff, Kt., and Mr. Justice Richardson.

PITAMBAR SAHA AND OTHERS—OPPOSITE PARTIES—APPELLANTS

versus

KRISHNA MOHAN DAS—PETITIONER—RESPONDENT.

Waiver—Acceptance of overdue instalment, whether amounts to.

The question whether the acceptance of an overdue instalment amounts to waiver of the lateness in payment is one to be determined in the circumstances of each case.

In the course of proceedings in execution of a money decree for the sum of Rs. 782, a compromise was executed by the parties under which the decree-holder was to accept Rs. 650 in full satisfaction of the judgment-debt, provided that the judgment-debtor paid Rs. 100 at once, Rs. 250 in October 1908 and the balance of Rs 300 in October 1909. In case of default, the decree-holder was to be entitled to execute his decree for Rs. 782. The judgment-debtor paid Rs. 100 on the spot, but he did not tender the sum of Rs. 250, which was due in October 1908, at the stipulated time. The decree-holder demanded payment of the entire balance remaining due on the footing of the original decree, but he subsequently accepted the payment of Rs. 250. Subsequently, the decree-holder sought to execute his decree for Rs. 782 giving the judgment-debtors credit for what they had paid:

Held, (1) that the acceptance of the overdue instalment of Rs. 250 under the compromise was sufficient to constitute a waiver; and

(2) that by accepting it, the decree-holder condoned the default and could execute his decree only on the footing of its being a decree for Rs. 650 in accordance with the compromise.

Appeal from the order of the Sub-Judge of Mymensingh, dated August 5th, 1912, affirming that of the Munsif of Netrokona, dated April 22nd, 1912.

Babu *Birendra Kumar De*, for the Appellants.

Babu *Kali Kinkar Chakravarti*, for the Respondent.

JUDGMENT.

CARNDUFF, J.—This appeal arises out of proceedings in execution of a money-decree for the sum of Rs. 782. In the course of the proceedings, a *razinama* was executed by the parties, under which the decree-holder was to accept Rs. 650 in full satisfaction of the judgment-debt provided that the judgment-debtor paid Rs. 100 at once, Rs. 250 in October 1908, and the balance of Rs. 300 in October 1909. In case of default, the decree-holder was to be entitled to execute his decree, that is, the decree for Rs. 782.

The judgment-debtor duly paid Rs. 100 on the spot, but he did not tender the sum of Rs. 250, which was due in October 1908, till the following month. It was accepted, and the Courts below have held that, by accepting it, the decree-holder condoned the default and could execute his decree only on the footing of its being a decree for Rs. 650 in accordance with the *razinama*. The decree-holder has, it appears, sought

eventually to execute his decree for Rs. 782 giving the judgment-debtors credit for the payment of Rs. 250. The decision is that he can claim the sum of Rs. 300 only, that is, the difference between Rs. 650 and Rs. 350 paid and accepted.

Prima facie, the acceptance of an overdue instalment condones the delay in payment. But the circumstances may alter the case and the point turns on what the circumstances were. It is contended on the decree-holder's behalf that on the judgment-debtor's own showing the decree-holder accepted the payment in November, expressly without prejudice to his right to enforce the original decree. But though there is evidence that he, when approached in November 1908, at first demanded payment of the entire balance remaining due on the footing of the original decree, it appears that he subsequently accepted the payment of Rs. 250 partly in cash and partly in the form of a bond. I think that the lower Court's finding, that this was an acceptance of the overdue instalment of Rs. 250 under the *razinama* and was sufficient to constitute a waiver, should be supported. I would, therefore, dismiss this appeal with costs assessing the hearing fee at one gold *mohur*.

RICHARDSON, J.—I agree. There is evidence that whatever was paid in November was accepted as a payment under the compromise. No doubt, the judgment-debtor says in his evidence that the decree-holder on account of the delay in paying the second instalment (the instalment of Rs. 250) at first demanded the whole balance due according to the decree. But there is no admission that when subsequently payment was actually made of a sum of Rs. 250 (whether wholly in cash, or partly in cash and partly by bond) that payment was not accepted as a payment under the compromise. The judgment-debtor may have caused some difficulty by overstating his case. He said that he paid Rs. 250 in cash and also Rs. 150 by means of a bond. What is found is that he paid Rs. 100 in cash and Rs. 150 by bond. Nevertheless, I cannot say that there is no evidence on the record capable of supporting the finding of both the Courts below, that a payment equivalent to a payment of at least Rs. 250 was made and that that payment was accepted as a payment of the overdue instalment. As pointed out by Jenkins, C. J., in the case of *Rashi Ram* v. *Pandu* (1) the question whether the acceptance of an overdue instalment amounts to waiver of the lateness in payment is one to be determined in the circumstances of each case and I can find no error of law in the conclusion arrived at by the Courts below in the present case—substantially a conclusion of fact—that there was a waiver.

The result is I agree that the Court below was right in holding that the sum due from the judgment-debtor to the decree-holder after the payment of the instalment of Rs. 250 was the balance of the sum of Rs. 650 fixed by the agreement, namely Rs. 300. The judgment-creditor having abandoned his claim to treat any sum or sums actually paid as forfeited, this was the only question discussed before us. The appeal should, therefore, be dismissed.

Appeal dismissed.

(1) 27 B. 1; 4 Bom. L. R. 688.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 206 AND 207 OF 1912.

January 28, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

IN A. A. O. No. 206 OF 1912.

TOMMENIDI ADEYYA—DEFENDANT No. 1—APPELLANT

versus

CHILUKURI VENKATARAYUDU AND OTHERS—PLAINTIFFS NOS. 1 TO 4 AND DEFENDANTS NOS. 3 AND 2—RESPONDENTS.

IN A. A. O. No. 207 OF 1912.

CHILUKURI VENKATARAYUDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VEMPATI GOVINDA SASTRALU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Suit for partnership and accounts—Amount due to one defendant ascertained and Court-fee paid thereon—Withdrawal of suit by plaintiff—Defendant's right to claim trial.

Where a plaintiff in a suit for a dissolution of partnership and accounts withdraws the suit after the share of the profits due to one of the defendants has been ascertained, and the Court-fee due on it paid

by that defendant, he is entitled to pray that his claim must be tried.

Appeal against the order of the Subordinate Judge of Kistna, at Ellore, dated 28th June 1912, in Appeal Suit No. 315 of 1911, preferred against that of the Principal District Munsif of Narsapur, in Original Suit No. 181 of 1904.

Mr. *V. Ramesam* (with him Mr. *G. Venkataramiah*), for the Appellant.

The Hon'ble Mr. *B. N. Sarma*, for the Respondents.

JUDGMENT.—The suit was for dissolution of partnership and to take accounts. The second defendant also in his written statement prayed that accounts may be taken and the plaintiff and the first defendant may be made to pay him his share of the profits. When the amount was ascertained he paid the Court-fee on it. Subsequently the plaintiff withdrew his suit under Order XXIII, rule (1), Civil Procedure Code. He is entitled to do so on payment of the costs which it is open to the Court to direct him to pay. The question that now arises for decision is whether the second defendant is entitled to pray that his claim must be tried. We think that according to the decision reported as *McGowan* v. *Middleton* (1) he is so entitled and that the withdrawal of the suit by the plaintiff does not put an end to it so as to prevent the 2nd defendant from enforcing the claim put forward in his written statement. We do not see any reason for not following that decision. We think, therefore, the Subordinate Judge is right and dismiss these appeals with costs.

Appeals dismissed.

(1) 11 Q. B. D. 464; 52 L. J. Q. B. 355; 31 W. R. 835.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 476 OF 1910.

March 9, 1914.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

GOPAL LAL ROY—DECREE-HOLDER—OPPOSITE PARTY—APPELLANT

versus

SHAILENDRABASINI CHOWDHURANI—JUDGMENT-DEBTOR—PETITIONER—RESPONDENT.

Landlord and tenant—Rent-decree against dar-patnidar—*Mortgage-decree against* dar-patnidar *by landlord—Execution of mortgage decree—Sale of* darpatni mahal *subject to encumbrance of rent-decree—Execution of rent-decree against other property of* dar-patnidar, *if allowable—Merger, doctrine of—Intention—Benefit of person in whom the two estates have become vested—Transfer of Property Act (IV of* 1882), *s.* 101.

The superior landlord of a *dar-patni mahal* got a mortgage-decree against the *dar-patnidar* in respect of the *mahal*. In execution of this decree, he put up the *mahal* to sale and himself purchased it. Previously he had obtained a decree for rent due to him from the *dar-patnidar* on account of the *dar-patni*. In execution of the mortgage-decree, the sale of the *dar-patni mehal* was subject to incumbrances including the encumbrance of the rent decree. The landlord wanted to execute his rent-decree against some other property of the *dar-patnidar*:

Held, that the landord was entitled to do so.

In applying the doctrine of merger, the dominating principle by which a Court is guided is the intention, and in the absence of express or implied intention, the Court looks to the benefit of the person in whom the two estates have become vested.

Appeal from the order of the District Judge of Dinajpur, dated July 15th, 1910.

Dr. *Rash Behary Ghosh* and Babu *Ramani Mohan Chutterjee*, for the Appellant.

Babus *Sarat Chandra Ray Chowdhury* and *Biraj Mohan Mojumdar*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Dinajpore disallowing the appellant from proceeding in execution of his rent decree against the judgment-debtor's property other than the one on account of which the rent-decree had been obtained. The facts of the case are shortly these. The appellant who was the superior landlord of a *dar-patni mahal* belonging to the respondents got a mortgage-decree against them in respect of the same *mahal*. In execution of this decree he put up the *mahal* to sale and himself purchased it for Rs. 50,000. Previously he had obtained a decree for Rs. 99,380 and odd for rent due to him from the same judgment-debtors on account of the *dar-patni*. In execution of the mortgage-decree the sale of the *dar-patni mahal* was subject to encumbrances including the encumbrance of the rent-decree.

The appellant now wants to execute his rent-decree against some other property of the judgment-debtor's respondent.

Two objections are pressed against the appellant's claim to proceed against the respondent's other property.

The *first* is that, under section 101 of the Transfer of Property Act, the charge or encumbrance of the rent-decree has been extinguished, inasmuch as the appellant has become absolutely entitled to the *dar-patni mahal* by reason of his purchase in execution of the mortgage-decree.

The *second* is, that even if the charge or encumbrance has not been extinguished the purchase by the appellant was for so small a consideration, the sale being subject to encumbrances, that he must be taken to have included in the consideration their value.

Neither of these two objections appears to us to be tenable. In applying the doctrine of merger the dominating principle by which the Court is guided is the intention and in the absence of express or implied intention the Court looks to the benefit of the person in whom the two estates have become vested. In the present case merger of the charge or encumbrance would not be to the benefit of the appellant and we must hold that the doctrine of merger does not affect his case.

As regards the second contention we find from the sale notification at page 96 of the paper-book that the amount due to the decree-holder up to the date of the notification on account of the rent decree and what fell due as rent after it aggregated to Rs. 2,22,490. According to the deposition of the respondents' witness Upendra Mohan Biswas the value of the property was one lac of rupees only. Apart from the charge of Rs. 2,22,490 the property had another encumbrance of Rs. 11,000 due to the decree-holder on a mortgage *kistbundi* executed by the judgment-debtor's respondent. The appellant maintains the value of the property to be much below a lac of rupees and shows that the nett saving after deducting the superior landlord's rent does not leave more than Rs. 2,325 a year. It is possible that the appellant has made an under estimate of the nett income of the *dar-patni mahal* and we are not prepared to disagree with the learned Judge in this respect, but we are not satisfied that the respondent's witness has not made an over-estimate. In the circumstances we hold that the Rs. 50,000 for which the appellant purchased the property was not too small a value for it. The result is that this appeal is allowed. The order of the District Judge is set aside and the appellant will proceed to execute his rent decree against the other property of the respondents.

We assess the hearing fee at six gold *mohurs*.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 101 OF 1913.

March 6, 1914.

Present:—Mr. Justice Piggott.

GITA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

EAST INDIAN RAILWAY—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 2—Review—Jurisdiction—Application for review entertained by Judge who passed decree but disposed of by his successor—Grounds for review.

An application for review was made before a Small Cause Court Judge who had passed the decree complained of. Subsequently the Judge was transferred:

Held, that his successor had jurisdiction to dispose of the application according to law.

It is not the intention of the Legislature that the provisions of the Code of Civil Procedure dealing with applications for review should be made use of by a litigant who has mismanaged his case, in order to secure a re-hearing of the case on the same materials.

Application for revision against the decision of the Small Cause Court Judge of Agra, dated 23rd April 1913.

Mr. *A. Haider*, for the Applicant.

Mr. *Ladli Prashad Zutshi*, for the Respondent.

JUDGMENT.—The plaintiffs in this case are merchants carrying on business at Agra city. They ordered certain piece-goods from Calcutta, which were conveyed to them through the defendant company. The freight was to be paid on delivery and the Railway-receipt granted to the consignor showed a charge of Rs. 88-7 as payable. When the goods reached Agra the plaintiffs paid this sum under protest, claiming that on the terms offered by the defendant company in their various tariff pamphlets, they were entitled to carriage at a lower rate. They subsequently instituted the present suit in

the Court of Small Causes at Agra for the recovery of Rs. 31-15 as. as excess freight wrongfully realized from them by the defendant company. Their suit was decreed on February the 17th, 1913. Twelve days later, the defendant Company applied for a review of judgment under section 114, Civil Procedure Code, read with Order XLVII, rule 1, of the same Code. The application was admitted and notice ordered to issue by the same learned Judge who had passed the decree complained of. Unfortunately the matter came up for hearing before his successor after the said learned Judge had been transferred. It is much to be desired that applications for review of judgment should always come before the same officer who passed the order complained of. However the learned Judge who eventually decided this matter had jurisdiction under Order XLVII, rule 2, Civil Procedure Code. He was seized of the application, and it was his duty to dispose of it according to law.

As regards the decision arrived at by him I am content to say briefly that I am entirely satisfied that it was a right decision on the merits and did justice between the parties concerned. I have been taken through the various entries in the pamphlets of the defendant company on which the plaintiffs rely. In my opinion no honest man studying the entries on pages 452 and 453 of pamphlet No. 2, which has been laid before me, could in good faith have come to the conclusion that the defendant company had undertaken to carry piece-goods of this class from Howrah to Agra city at a rate lower than the special rate of Rs. 1-14-11 per maund expressly given on page 452. No doubt it is to be considered that the case was before the learned Judge of the Court below on an application for review, and that it was not the intention of the Legislature that the provisions of the Code of Civil Procedure dealing with applications for review should be made use of by a litigant, who had mismanaged his case, in order to secure a re hearing of the matter on the same materials. It is very difficult for me to understand how the learned Judge who decided this case in the first instance came to the conclusion that he did. His judgment does not refer to what seem to me most material facts in the evidence, such for instance as the special rates for piece-goods from Howrah to Agra city and to Ferozabad Railway Station given on page 452 of pamphlet No. 2. The question to my mind is whether the Judge himself who passed the original order would have been of opinion that he had been guilty of a patent oversight, and that his decision was vitiated by "some mistake or error apparent on the face of the records". Had I been sitting in the place of the learned Judge of the Court below before whom this application for review actually came, I might possibly have contented myself with making such remarks as would satisfy the defendant company that the decision decreeing the plaintiffs' suit was not likely to be used as a precedent. The position, however, is not quite the same now. I am sitting in revision from the order of the learned Judge of the Court below, after he has seen fit to exercise his jurisdiction under Order XLVII, rule 1, Civil Procedure Code. The exercise of such jurisdiction must, when all is said and done, be a matter for discretion with reference to the particular facts of each case. I am not prepared to interfere in this case on a finding that the order of the Court below is so clearly outside the jurisdiction conferred by section 114 or Order XLVII, rule 1, Civil Procedure Code, as to be absolutely illegal. If I interfere at all, it would be on the merits and on the merits the plaintiffs have, in my opinion, no case. I, therefore, dismiss this application with costs.

Application dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2349 OF 1913.

November 19, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge.

ALLAH DITTA—PLAINTIFF—APPELLANT

versus

Musammat FARZ BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Sub-letting—Forfeiture of lease—Meaning of "Dokandari khud"—*Transfer of Property Act (IV of* 1882), *ss.* 108 (*j*) *and* 111 (*g*).

NAYANI VENKA RANGA RAU v. RAMAKRISHNIAH.

In the absence of a covenant to the contrary a tenant is authorized to sub-let.

A breach of the condition of a lease does not effect its forfeiture unless the lease expressly so provides.

The words '*dokandari khud*' (for the purposes of his own shop business) standing alone in a lease do not mean that sub-letting is prohibited.

Abdul Qadir v. *Nur-ud-din*, 14 P.R. 1898, *Parameshri* v. *Vittappa Shanbaga*, 26 M. 157; *Netrapal Singh* v. *Kalyan Das*, 28 A. 400; A. W. N. (1906) 60; 3 A. L. J. 196, referred to.

Second appeal from the decree of the District Judge, Lahore, dated 3rd December 1912, reversing that of the Munsif, 2nd class, Lahore, dated 30th July 1912, decreeing claim.

Lala *Moti Lal*, for the Appellant.

Lala *Parduman Das*, for *Musammat* Farz Bibi, Respondent.

JUDGMENT.—The question for consideration is whether the appellant's lease has determined by forfeiture by reason of his having sub-let the premises leased to him. The Court of first instance held that it had not, but the lower Appellate Court held that it had, relying on the insertion of the words "*dokandari khud*" as the purpose for which the premises had been leased. The Pleader for the appellant relies on *Abdul Qadir* v. *Nur-ud-Din* (1); *Parameshri* v. *Vittappa Shanbaga* (2); *Netrapal Singh* v. *Kalyan Das* (3) and section 111 (*g*) of the Transfer of Property Act, for the proposition that a breach of a condition in a lease does not effect forfeiture unless the lease contains a provision that on breach of that condition the lessor may re-enter or the lease shall become void. Section 108 (*j*) of the Transfer of Property Act is also relied on for the proposition that the lessee might sub-let in the absence of conditions to the contrary; and it was contended that the words "*dokandari khud*" should not be interpreted as prohibited sub letting. I am not satisfied that these words were intended to prohibit sub-letting and, in any case, I have no hesitation in holding that the rule laid down in section 111 (*g*) of the Act applies and that the absence of an express condition, for re-entry by the lessor or for the lease becoming void on a breach of the condition not to sub-let, if such existed, is fatal to the defendants.

(1) 14 P. R. 1898.
(2) 26 M. 157.
(3) 28 A. 400; A. W. N. (1906) 60; 3 A. L. J. 196.

It appears that the rent entered in the lease is Rs. 2-5 per month, that the appellant sub-let for Rs. 3 per month and that the owners have found another tenant at Rs. 4 per month. I concur in the opinion recorded by the Court of first instance that this rise in the rent obtainable was at the bottom of the owners' action and their anxiety to terminate the lease. The appeal is decreed with costs of all Courts.

This case was admitted as a second appeal but was filed as a revision. It should have been and will now be brought on to the register of second appeals.

Appeal accepted.

PRIVY COUNCIL.

MADRAS HIGH COURT.

APPEAL FROM THE MADRAS HIGH COURT.

December 19, 1913.

Present:—Lord Shaw, Lord Moulton and Mr. Ameer Ali.

NAYANI VENKA RANGA RAU—PETITIONER

versus

RAMAKRISHNIAH AND OTHERS—RESPONDENTS.

Interlocutory matters—Leave to appeal.

Their lordships would be very slow to give leave to appeal to bring up a case at an interlocutory stage. It is better that the case should be allowed to proceed and be determined on its merits so that it may come up for final judgment at the proper time.

The order of the Madras High Court refusing leave is reported in 21 Ind. Cas. 842; (1914) M. W. N. 64; 14 M. L. T. 560; 26 M. L. J. 96.

Mr. *L. De Gruyther, K. C.*, for the Petitioners.

Mr. *Kenworthy Brown*, for the Respondents.

JUDGMENT.

LORD SHAW.—This is an interlocutory proceeding in the Court below. We quite see that there may be some prejudice unless you take this step to petition, but their Lordships would be very slow to give leave to appeal to bring up a case at an interlocutory stage. On the other hand, they are very anxious that neither party should be prejudiced by the fact that leave to appeal has been refused. They are of opinion that the case should be allowed to proceed

according to the judgment of the Court below and should be determined on its merits; that will leave a final judgment to come up at the proper time here. That is the view their Lordships take, subject to what Counsel might wish to say, their view being distinct that neither party is prejudiced by the fact that leave to appeal is refused at this stage. Furthermore their Lordships think that the costs of these proceedings ought to be costs in the cause to be determined in the Court below.

Mr. *De Gruyther.*—May I make one observation upon what your Lordship has been good enough to tell me The position really is this: the reason why the application for leave to appeal has been made is that if the appeal were successful it would entirely dispose of litigation which has been pending since the year 1903.

LORD MOULTON.—If they were unsuccessful?

Mr. *De Gruyther.*—We cannot suggest that the order which has been made disposes of the case in any event.

LORD SHAW.—We were really anxious to make it clear that while we take this course this morning, it should be distinctly understood by both parties that neither party should be prejudiced.

Mr. *De Gruyther.*—I am obliged to your Lordship, because, having regard to the Code of Civil Procedure and the construction placed upon it in India, there is an express provision which says if we do not appeal from this order, the result would be that we are bound by it.

Mr. *Kenworthy Brown.*—I do not suggest that applies here.

LORD MOULTON.—That is why we suggested the costs should be costs in the cause, because your petition was necessary.

LORD SHAW.—Anyhow we really determine nothing on the merits, we want to keep both of you free on the merits, so that you can have your full points arguable, and we want to make it so complete as this, that the costs even of these proceedings should be costs in the cause in the Court below.

Mr. *De Gruyther.*—After what has fallen from your Lordship I do not think any argument I could advance would lead to your Lordships making a different order.

LORD MOULTON.—I think you are very well protected.

LORD SHAW.—The petition is not dismissed.

Mr. *De Gruyther.*—I understand that, my Lord.

LORD MOULTON.—It really stands over till the hearing.

LORD SHAW.—Until the proceedings get to the merits.

Mr. *Kenworthy Brown.*—I am quite satisfied with what your Lordships have said, except as regards the costs.

LORD MOULTON.—It was quite necessary that the petitioner should come here.

Mr. *Kenworthy Brown.*—I do not think it was, under the section. However, I will not trouble your Lordships for this

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PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1224 OF 1911.

April 28, 1913.

Present:—Mr. Justice Scott-Smith.

Mir AFZAL ALI AND OTHERS—PLAINTIFFS—PETITIONERS

versus

Mir AMAN ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1008), *s.* 18, *Sch. I., Arts.* 166, 181—*Application to cancel sale by Insolvency Court on the ground of fraud—Inherent power of Court to entertain such application—When time begins to run.*

An application either of an insolvent or his creditor for cancelling, on the ground of fraud, a sale of immoveable property of the insolvent conducted by the Insolvency Court in realizing assets of the insolvent under sections 20 and 23 of Act III of 1907 is governed by Article 181 and not by Article 166 of the 1st Schedule to Act IX of 1908.

Section 18 of this Act is general and under its force the time for making such an application begins to run only when the fraud becomes first known to the applicant.

A Court has an inherent power to entertain such an application.

Petition for revision of the order of the Divisional Judge, Hissar Division, dated 3rd February 1911, confirming that of the Judge, Insolvency Court, Rohtak, dated 3rd November 1910, rejecting petition.

Mr. *M. N. Mukerji*, for the Petitioners.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—This was an application by Sekhawat Ali, insolvent and one of the

creditors, for cancellation of a sale of certain immoveable property on the ground of fraud.

The first Court held that no ground was proved and that the application was barred by time, a period of about one year having elapsed since date of confirmation of the sale.

The Divisional Judge on appeal held that this being an application to set aside a sale in execution of a decree was governed by Article 166 of the first Schedule of the Limitation Act, and that the limitation was 30 days from the date of the sale, whether the ground alleged was fraud or anything else. He noticed that the applicant's Pleader urged that Article 181 was the one applicable, but omitted to discuss the point.

Applicants have come up here on the revision side.

Now in the first place the Divsional Judge has not considered section 18 of the Limitation Act, which is general and must be read with Article 166 or with whatever other Article of the first Schedule is applicable. If applicants were by means of fraud kept from the knowledge of their right to make the application, the time only runs from the date when the fraud first became known to them.

In my opinion, however, Article 166 is not applicable, for this was not an application to set aside a sale in execution of a decree but one to set aside a sale conducted by the Court in realizing the assets of the insolvent under sections 23 and 20 of the Insolvency Act III of 1907. Such an application is governed by Article 181 of the first Schedule, as no other Article is applicable. This Article has been held to apply to certain applications in insolvency matters, see cases quoted in Mr. Sanjiva Row's Indian Limitation Act, pages 880 and 881 (No. 11).*

I, therefore, hold that the application was in time and the first Court had inherent power to entertain it. The revision is allowed and the order of the lower Appellate Court being set aside, the appeal is remanded thereto for re-decision on the merits. Costs to follow the event.

Revision allowed.

* Third Edition page 967.—*Ed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 995 OF 1912.

February 17, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

HENRY MOBERLY—PLAINTIFF—PETITIONER

versus

THE MUNICIPAL COUNCIL OF CUDDALORE—DEFENDANT—RESPONDENT.

Madras District Municipalities Act (IV of 1884), ss. 53, 60—District and Sessions Judge of Cuddalore—Stay for over 60 days in Kodaikanal—Payment of profession tax in Kodaikanal—Liability to pay in Cuddalore.

Section 53 of the District Municipalities Act distinguishes two classes of persons:

(*a*) salaried persons holding offices or appointments;

(*b*) persons exercising particular avocations.

The word "holding" does not necessarily involve any suggestion of discharging duties connected with the offices or appointments.

Chairman Ongole Municipality v. *Mounsey*, 17 M. 453, distinguished.

The cause of liability is participation in the benefit and convenience conferred by the Municipality upon those residing within the Municipal limits.

No distinction can be drawn between the administrative and judicial duties a District and Sessions Judge has got to perform.

Where the District and Sessions Judge of Cuddalore spent his vacation in Kodaikanal and paid profession tax there:

Held, that he was not liable to pay the tax again at Cuddalore and could claim the benefit of section 60 of the District Municipalities Act.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore, in Small Cause Suit No. 1381 of 1912.

FACTS.—The plaintiff was District and Sessions Judge of South Arcot. He closed his Court on 30th April and spent his annual recess up to 2nd July at Kodaikanal. The Kodaikanal Municipality assessed him with profession tax under section 53 of the District Municipalities Act, on the footing that the plaintiff held within the Municipality of Kodaikanal the office of a District and Sessions Judge for more than 60 days. He paid the tax. Afterwards the Municipality of Cuddalore assessed him with profession tax for the same half-year. He claimed exemption under the 2nd paragraph of section 60. He had to pay the tax under protest. The suit is to recover this amount.

HENRY MOBERLY *v.* MUNICIPAL COUNCIL OF CUDDALORE.

The Sub-Judge of Tanjore to whom the case was transfered dismissed the suit relying on *Chairman, Ongole Municipality* v. *Mounsey* (1), and *Hammick* v. *President, Madras Municipal Commission* (2).

The plaintiff preferred a revision petition to the High Court.

Messrs. *M. O. Parthasarathy Aiyangar* and *V. Ramesam*, for the Petitioner:—The cases cited are in our favour. They show that the plaintiff did not hold the office within the Municipality of Cuddalore during the period (20th April—2nd July). He did administrative work at Kodaikanal. As Sessions Judge, he is a Justice of the Peace at Kodaikanal or anywhere within the Presidency (section 25, Criminal Procedure Code). The Court ignored the distinction between a person holding an office and a person exercising a trade, profession or calling. For a person to hold an office, no exercise of any function is necessary. The explanation to section 53 shows a pensioner who does nothing is a person holding an office [See *Subramaniam* v. *President, Municipal Commission, City of Madras* (3).] Though judicial functions cannot be discharged outside Cuddalore, administration work can be.

Mr. *T. R Ramachandra Iyer*, for the Respondent:—A District Judge is of a certain place and cannot be conceived apart from the place.

[AYLING, J.—The form of appointment is—A person is appointed as District Judge and is then posted to a place.]

Even at Kodaikanal, he is District Judge of Cuddalore and must be regarded as doing duty at Cuddalore.

[Mr. *M. O. Parthasarathy Aiyangar*:—That would be inconsistent with *Chairman, Ongole Municipality* v. *Mounsey* (1) and *Hammick* v. *President, Madras Municipal Commission* (2).

He referred to section 4 of Madras Civil Courts Act and the Criminal Procedure Code fixing the Court where the Judge works.

[AYLING, J.—Supposing the District Judge of Ganjam, after working at Berhampore for one month, takes privilege leave for three months and stays at Ootacamund. Is he not likely to be taxed at Ooty?]

To be consistent, I must say he cannot.

(1) 17 M. 453.
(2) 22 M. 145.
(3) 22 Ind. Cas. 278; (1913) M. W. N. 935.

[AYLING, J.—Suppose a Judge, on orders of transfer, hands over charge at Ganjam and proceeds to Tinnevelly. During the interval is he holding the office of a Judge or not?]

I rely on the explanation of section 60 by Justice Muthuswamy Aiyer in *Chairman, Ongole Municipality* v. *Mounsey* (1).

Mr. *M. O. Parthasarathy Aiyangar* in reply:—The Civil Courts Act and the Criminal Procedure Code refer only to judicial duties. But the plaintiff passed orders at Kodaikanal as head of his Department and drew his salary. He did not lose his office and he held it while residing at Cuddalore. The question in *Chairman, Ongole Municipality* v. *Mounsey* (1), is different from the one here and the explanation of Muthuswamy Aiyer, J., refers to the facts of that case.

JUDGMENT.

SANKARAN NAIR, J.—The question turns upon the construction to be put on section 53 of the District Municipalities Act. Mr. Moberly cannot perform at Kodaikanal any of the duties of the District and Sessions Judge, South Arcot, which have to be performed in Court, that is, in public or in the presence of parties. But there is nothing to show that he cannot perform certain other duties of his office which concern parties only very remotely, if at all, outside the district. I agree, therefore, with the proposed order.

AYLING, J.—It is not contended before us that the payment of profession tax to the Kodaikanal Municipality will entitle Mr. Moberly to the benefit of section 60 of the District Municipalities Act unless the same is legally due. The question for decision is whether Mr. Moberly should be deemed to have held the appointment of District and Sessions Judge within the Kodaikanal Municipality during his stay in the limits thereof from April 30th to July 1st, 1911.

There is no dispute about the facts. Mr. Moberly was the District and Sessions Judge posted to the South Arcot District. He came to Kodaikanal to spend the annual recess, resided there for sixty days, drew his pay there and on various days during that period, estimated at 14 or 15 in number, did some administrative work and *quasi*-judicial work there. He did strictly no judicial work.

The point is not altogether free from doubt, but after consideration I think the requirements of section 53 of the District Municipalities Act must be held to be fulfilled. The words of the section are, "Holds any one or more of the offices or appointments," and do not in themselves necessarily involve any suggestion of discharging duties connected with the offices or appointments. It can hardly be suggested that during the period in question Mr. Moberly did not hold the office of District and Sessions Judge of South Arcot. The office was certainly not in abeyance; nobody else was holding it and Mr. Moberly was drawing the salary attached to it. The cases quoted deal with a somewhat different question arising out of the same section and are of no direct help. But they are clear authority for holding that he did *not* hold the office in Cuddalore Municipality during the period of his absence therefrom. Where then did he hold it except at Kodaikanal the place where he was residing?

Mr. Ramachandra Iyer, for the Respondent Municipality, argued that in the section the phrase "Hold the appointment" necessarily involved discharging the duties of the appointment, and for purposes of this particular case was obliged to go further and contend that as strictly judicial functions form the most important part of a Judge's duties the actual discharge of these duties is essential to the holding of the office.

I do not think this reasoning can be accepted. There is nothing in the wording of the section to support it, and the only authority quoted is a passage in the judgment of Muthuswamy Iyer, J., in *Chairman, Ongole Municipality* v. *Mounsey* (1) which runs thus:—"The material words 'hold office or appointment within the Municipality' mean carrying on business there as the holder of the particular office. The intention was to place public servants like the plaintiff in the same position in which the others are, who exercise their profession within the Municipal limits."

With all diffidence I may point out that section 53 of the District Municipalities Act clearly distinguishes two classess of persons: (*a*) salaried persons holding offices or appointments, (*b*) persons exercising particular avocations. There is a corresponding distinction in schedule A, though the word "exercising" being unnecessary, does not appear. Both classes under certain circumstances have to pay the tax but it does not seem obvious that their liability to pay is depends on the same factors. However this may be, the remark of the learned Judge as to the meaning of the words in the section was passed in considering a totally different case to the present one. The question before him for disposal was whether an officer who was absent from the Municipality should be deemed to hold office within it merely because his office building was situated within Municipal limits and one or more of his clerks remained working there. I do not think it need be taken as a deliberate pronouncement as to the law in connection with the point now occupying our attention. If it is to be so regarded appellant might fairly draw attention to a subsequent sentence. The cause of his liability is his participation in the benefit and convenience conferred by the Municipality upon those residing within the Municipal limits.

Mr. Moberly, undoubtedly, participated equally in the benefit and convenience of the Kodaikanal Municipality, whether he did or did not discharge any of his official duties at Kodaikanal. The acceptance of the doctrine that for the purpose of this section a man only holds office so long as he discharges the duties of the office might in practice lead to envious results. I am not sure that an officer might not claim that Sundays, public holidays and periods during which he was incapacitated from work owing to illness should be excluded from the period during which he held office. I further doubt whether the Courts would be justified in attempting to distinguish between the various duties, judicial and administrative, which have to be discharged by a District and Sessions Judge.

On the whole, I think that Mr. Moberly must be deemed to have held his office of District and Sessions Judge at Kodaikanal during his stay there on recess and that he was liable to pay profession tax under section 53 of the District Municipalities Act.

I would, therefore, give him a decree as sued for with costs in both Courts.

Appeal allowed.

BADIATANNESSA BIBI *v.* AMBICA CHARAN GHOSE.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 95 OF 1913.

March 27, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice D. Chatterjee.

BADIATANNESSA BIBI—DEFENDANT—APPELLANT

versus

AMBICA CHARAN GHOSE—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), *ss.* 14, 15, 16, 17--Pardahnashin *lady —Mortgage executed of her house in favour of husband's creditor—Undue influence of husband—Document if fairly taken—Onus on whom.*

A Court should always be careful to see that deeds taken from *pardahnashin* ladies have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about. The burden of establishing this rests on him who claims against the *pardahnashin* lady.

Girish Chunder Lahooree v. *Bhuggobutty Debya*, 13 M. I. A. 419; 14 W. R. (P. C.) 7; 20 Eng. Rep. 607; 2 Suth. P. C. J. 339; 2 Sar. P. C. J. 579, followed.

The undue influence which may affect a *pardahnashin* lady's understanding of a document may proceed from a third party.

Kanhaya Lal v. *The National Bank of India Limited*, 18 Ind. Cas. 949; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 C. (P. C.) 598; 40 I. A. 56, followed.

A *pardahnashin* lady executed a deed of mortgage of her property in favour of a creditor of her husband for the benefit of the latter. The lady herself derived no direct benefit from the transaction. At the time when this document was executed, the lady was living with her husband and she evidently acted under the influence of her husband in consenting to mortgaging her house for her husband's debt, because when a similar transaction was proposed before, the lady, who was at that time living with her husband's father and brothers, repudiated under their advice that transaction. The creditor, who was a Mukhtear, was present on the only occasion when the contents of the document were read and explained to her by no other than her husband who was an intended party:

Held, that as it was not shown that any independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, had clearly put before the lady what were the nature and consequences of the act; and that as the advice, if advice was given, was that of the husband or the creditors not removed entirely or at all from the suspected atmosphere, the mortgage was not fairly taken and that the lady was not bound by the transaction as she was not a free agent.

Bank of Montreal v. *Jane Jacques Stuart*, (1911) A. C. 120; 80 L. J. P. C. 75; 103 L. T. 641; 27 T. L. R. 117 and *In re Coomber* (*Coomber* v. *Coomber*), (1911) 1 Ch. 723 at p. 730; 80 L. J. Ch. 399; 104 L. T. 517, relied upon.

Appeal under section 15 of the Letters Patent from the following judgment of Mr. Justice Sharf-ud-din, dated June 27th, 1913, passed in Second Appeal No. 2695 of 1911.

FACTS appear from the following judgment of Sharf-ud-din, J :—

This is a second appeal on behalf of defendant No. 2 in a suit by the plaintiff against defendant No. 2 and her husband defendant No. 1. The plaintiff sued for recovery of Rs. 540 as principal and interest on a mortgage-bond alleged to have been executed by the defendants. The two defendants are husband and wife. The two principal issues framed by the first Court are these: (1) Did defendant No. 2 execute the mortgage-bond in suit? If not, is the mortgaged property liable under the mortgage? and (2) Did defendants or any of them receive any money out of the consideration of the mortgage bond? It seems that the property mortgaged exclusively belongs to defendant No. 2. Defendant No. 1, the husband, was involved in debts and he wanted to pay off his debts. The two defendants together executed the mortgage-bond in favour of the plaintiff. The consideration money appears to have been received by the husband, defendant No. 1, the present suit was instituted some years after the receipt of the consideration money by the husband. The first Court dismissed the suit against defendant No. 2 and released the mortgaged property from the mortgage lien. He gave a money-decree against the defendant No. 1, the husband. The plaintiff appealed to the lower Appellate Court. It decreed the appeal holding that the defendant No. 2 was bound by the mortgage-bond and the property mortgaged was under the lien of the mortgage-debt. Against that decree the present appeal has been preferred by defendant No. 2.

The points urged are these: *first*, that this mortgage is not binding upon defendant No. 2 as it was not executed with free consent of defendant No. 2; *secondly*, as the defendant No. 2 was a young, inexperienced and illiterate *pardahnashin* lady, the onus was upon the plaintiff to prove that she was a free agent when she executed the mortgage and that this onus had not been discharged by the plaintiff; *thirdly*, that the plaintiff has not discharged the onus of proving that defendant No. 2 acted independently and that she had disinterested advice in executing the document; *fourthly*, that the evidence given by the plaintiff is not legally sufficient to prove that the full effect of the

transaction was understood by the lady, and *fifthly* that the mortgage by the lady was without any consideration having been received by her and hence it is void against her.

I propose to take the above points one by one. The first point is about free consent and the finding as to that is as follows: "As to the appeal against defendant No. 2, the wife, I think that she is bound by the mortgage-deed and that she put her mark on it after the terms were read over and explained to her. Her husband signed it for her and she herself put her mark on it and admitted execution before the Registering Officer. There is the evidence of the plaintiff and two of the attesting witnesses to show that the mortgage-deed was read over and explained to her, and she evidently understood that she was taking this liability for her husband's debts on herself. This is a finding of fact and it appears to me from this finding that defendant No. 2 was a free agent in this transaction. And the view, that I take, is supported by the fact that some two or three months before the present transaction another mortgage-deed was executed in favour of the present plaintiff. This deed also purported to have been executed by both husband and wife. Defendant No. 1 was then living at Gaibandha and his wife was at his native village living with her father-in-law. Defendant No. 1 took a commissioner with him to his native village where his wife was, to have the deed registered by his wife. But defendant No. 1's father and brother objected to it and then the defendant No. 1 and his relatives almost came to blows over the matter. It was then that defendant No. 2 denied execution and hence the deed was not registered. Defendant No. 1 then removed his wife to Gaibandha where he himself used to live and the mortgage-bond in suit was then executed and registered. Defendant No. 2 having once denied execution of the previous mortgage-deed she would scarcely be willing to go to Gaibandha to her husband within a very short period of the previous incident, as she would have ample reason to suspect that the husband was taking her to Gaibandha for the purpose of getting her to execute a mortgage-bond. She goes to Gaibandha, executes the mortgage-bond in suit along with her husband, puts her mark on it and then goes in a *palki* to the Registering Officer where she admits execution after the document was read out and explained to her and she has said that "I have understood the purport of the bond; for the debts of my husband I am ready to execute a bond." In her written statement she admits execution of the document, but she says that she was under the impression that that document was a *kabuliat*. This statement of her was not believed by the lower Appellate Court. From the above circumstances it is clear that she was a free agent. Her husband's father and brothers were her protectors, and if she had refused to go to Gaibandh her husband's relatives would have supported her in that respect. It seems that she was anxious to relieve her husband of his debts.

Free consent has been defined in the Contract Act in section 14 which runs thus: "Consent is said to be free when it is not caused by—(1) coercion, as defined in section 15; or (2) undue influence as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of sections 20, 21 and 22." The defendant's case might have come under the second clause of the section, that is, undue influence. Undue influence has been defined in section 16 for the purpose of the Act which runs thus: "A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. (2) In particular and without prejudice to the generality of the foregoing principle a person is deemed to be in a position to dominate the will of another (*a*) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (*b*) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. (3) Where the person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will

of the other." From the above definition it is clear that undue influence is to be exercised by a party to a contract. Had the present contract been between the husband and wife it might have been stated that defendant No. 2 was unduly influenced by the husband. The present contract is between the husband and wife on one side and the plaintiff on the other. The plaintiff had no knowledge that the husband was exercising undue influence over his wife.

The second point relates to the young age and inexperience of this *pardahnashin* lady. It is contended that it should have been proved by the plaintiff that she was a free agent at the time. This point has been partially answered in the decision of the first point, that is to say, she could have freely refused to go to Gaibandha. She was at that time living under the protection of her father-in-law, that is, defendant No. 1's father and the finding is, as already quoted, that she went to Gaibandha, executed the deed, went to the Registration Office and admitted execution. Then for a number of years she sat quietly and never took any steps to repudiate the transaction on the ground that she was not at the time a free agent.

The third point relates to the objection that she had at the time no independent and disinterested advice. There is, no doubt, no express finding of either Courts whether she had or had not such advice. But from reading the judgments of both the lower Courts it appears to me that this point was not urged in either of the Courts below and there was no issue on this point. It has been taken for the first time in this Court. Her case was one of simple fraud. Her husband convinced her that it was a *kabuliat* that she was asked to execute, and not a mortgage-bond.

The fourth point is whether or not she understood fully the effect of the transaction. With regard to that the finding of the lower Appellate Court is this: "This defendant was in a *palki* near the Sub-Registrar's Office and the deed was read over and explained to her and she then put her mark on it from the *palki*. The mortgage-bond is not such a complicated document that a woman of ordinary intelligence would find any difficulty in understanding it." This amounts to a finding to the effect that defendant No. 2, although a woman of ordinary intelligence, must have understood the full effect of the document.

The fifth point is that the mortgage by the lady was without any consideration. When she agreed to execute the document knowing full well that it was a bond and said that she was prepared to take the risk for the payment of the debt of her husband, and when after execution and registration of the document she never took any trouble to make any demand for the consideration money from the plaintiff and for years she sat idle living with her husband, the inference is that the husband received the money for her. There can, therefore, be no doubt that she knew that the consideration money had passed to the husband for whose benefit the mortgage was created. It is found that the husband's debts were paid out of this consideration money.

An attempt has been made to impress upon me that it is necessary in the case of a *pardahnashin* lady that three things should be most distinctly proved by the plaintiff as the onus in such a case is on him: (1) that the document is read over to the *pardahnashin* lady; (2) that it is explained and (3) that she says that she has understood it. From the findings of the lower Appellate Court it is clear that these three elements have been proved. A number of authorities both of this country and of English Courts have been placed before me by both parties. These authorities would have been of very great help in the decision of the present case if there had been no finding as to the three essential elements enumerated above. I do not, therefore, think it necessary to discuss the principles laid down in these authorities. These principles are that it is a bounden duty of the plaintiff to prove that the *pardahnashin* lady has understood fully the effect of the transactions, that she was a free agent and has given a free consent to the execution of the document relating to the transaction. These principles of law are not new to us and no Court of Justice is likely to ignore these principles.

It has been argued that at the Registration Office she had said that she was willing to execute a bond for the payment of the debts of her husband and that she never said that she was willing to execute a mortgage-bond for that purpose. The word "bond" is

a general term which includes mortgage-bond, and in ordinary parlance, specially in the cases of women this word "bond" is indiscriminately used. This mortgage-bond was read over and explained to her. The property mortgaged must have been mentioned in the bond as also the boundaries of this property, and the provisions that on non-payment of money on the due date the mortgagee was entitled to sell the property. All these things must have been told to her when the document was explained to her. Now to say that she meant simple bond is absurd.

For the above reasons the appeal is dismissed with costs.

The defendant No. 2 appealed from the above judgment under section 15 of the Letters Patent.

Babus *Mohendra Nath Roy*, *Broiendra Nath Chatterjee* and *Shyam Lal Bose*, for the Appellant.

Babus *Ram Chandra Majumdar* and *Sajani Kanta Singh*, for Babu *D. N. Bagchi*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This is an appeal from a judgment of Mr. Justice Sharf-ud-din who has confirmed the decree of the lower Appellate Court by which the previous decree of the Munsif had been reversed.

The suit is one brought by a mortgagee against a man and his wife on a mortgage-bond.

With the rights against the man we have no concern for this appeal has merely to do with the right of the mortgagee, the plaintiff, against the wife.

The transaction was one from which the wife derived no direct benefit for herself, as she was giving a mortgage by way of security for her husband. In these circumstances it is contended on behalf of the wife that she being a Muhammadan *purdahnashin* lady is not bound by the mortgage.

It was said by the Privy Council in *Girish Chunder Lahooree* v. *Bhuggobutti Debia* (1), that the Committee has always been careful to see that deeds taken from *pardah* women have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about. The burden of establishing this rests on him who claims against the *pardahnashin* lady: so that what we have to see is whether on the findings of the lower Appellate Court such a case has been made out.

I have said that the lady herself derived no direct benefit from the transaction, and we have it in evidence that when a similar transaction of an earlier date was proposed the lady, at that time living with her husband's father and brothers, under their advice repudiated the execution by her of a document which has been represented to us as having been somewhat similar in effect.

At the time when this document was executed the lady was living with her husband, and it is found as a fact by the lower Appellate Court that she evidently acted under the influence of her husband in consenting to mortgaging her house for her husband's debt. The learned Judge goes on to say that "though this would have rendered the transaction invalid as between husband and wife, he did not think that it affected the validity of the mortgage so far as the plaintiff was concerned as he acted in good faith."

Now, the plaintiff is a *Mukhtear* and he was present on the only occasion when the contents of the document were read, and, it is said, explained to her. Who was the person who read the document and explained it? The husband—whose undue influence procured the execution of the document by his wife. Who was present when this reading and explanation took place? Among others, the mortgagee, so that we not only have the fact that all that is shown is a reading and explanation of the document by the husband, but the knowledge of the mortgagee that that was the means whereby it could be suggested that she was a free agent and duly informed of what she was about.

In my opinion it is impossible in these circumstances to accept the view that the undue influence of the husband had nothing to do with the matter. The mortgagee himself must have known the influences under which the lady came to sign the document. What the explanation is that was given to the lady we do not know; but I should not expect a very critical questioning or a very elaborate explanation between one who exer-

(1) 13 M. I. A. 419; 14 W. R. (P. C.) 7; 20 Eng. Rep. 607; 2 Suth. P. C. J. 339; 2 Sar. P. C. J. 579.

cised undue influence and another over whom he exercised it.

It may be, as has been suggested before us that section 16 of the Contract Act, as it now stands, requires that the undue influence should proceed from a party to the suit and that the language of the section is in this respect narrower than of the section for which it was substituted. I do not wish to express any definite and conclusive view on this point at present, but the undue influence which may affect a *pardahnashin* lady's understanding of a document may proceed from a third party. In the very instructive judgment of Lord Moulton in *Kanhaya Lal* v. *National Bank of India, Limited* (2) it is made clear that the word 'coercion' and, by parity of reasoning, the other words which have a special definition for the purposes of Chapter II of the Contract Act, are not by that definition deprived of the wider meaning that they may otherwise possess for other purposes.

This case is in its circumstances similar to that which came before their Lordships of the Privy Council in *Bank of Montreal* v. *Jane Jacques Stuart* (3). It was held there in circumstances substantially undistinguishable from the present that the lady was not bound by the transaction into which she purported to enter with the creditor of her husband for the benefit of her husband, and, their Lordships came to that conclusion, although the lady in her evidence repudiated the suggestion that there had been undue influence.

It appears to me that the findings in this case fall short of establishing that the mortgage was fairly taken or that the lady executing it was a free agent duly informed of what she was about. I have already stated the situation in which the document was explained to her; and, if I may adopt the language of another judgment of Lord Moulton,—Lord Justice Moulton as he was at that time,—in *In re Coomber* (*Coomber* v. *Coomber*) (4), I would say that it has not been shown that any independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, has clearly put before the lady what are the nature and consequences of the act, and the advice, if advice was given, was certainly not removed entirely or at all from the suspected atmosphere; nor had the lady an opportunity of learning, from the clear language of an independent mind, precisely what she was doing.

In this view of the case it appears that while we cannot uphold the judgment of Mr. Justice Sharf-ud-din and the decree of the Subordinate Judge, it will be unprofitable to send back the case, and we must, therefore, reverse the decree of the lower Appellate Court so far as it relates to defendant No. 2 and restore the decree of the Munsif so far as it relates to that defendant. As between the plaintiff and defendant No. 2 the plaintiff must bear her costs of this litigation in all the Courts.

D. CHATTERJEE, J.—I agree.

Appeal accepted.

(2) 18 Ind. Cas. 949; 17 C. W. N. 541; 40 I. A. 56; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 C. 598 (P. C.).

(3) (1911) App. Cas. 120; 80 L. J. P. C. 75; 103 L. T. 641; 27 T. L. R. 117.

(4) (1911) 1 Ch. 723 at p. 730; 80 L. J. Ch. 399; 104 L. T. 517.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 924 OF 1913.

February 17, 1914.

Present:—Mr. Justice Seshagiri Iyer.

RAGHAVA IYENGAR—DEFENDANT—APPELLANT

versus

ATHANAMBALAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Fraudulent execution of decree—Suit for damages, whether barred—Damages, measure of.

A suit for damages for fraudulent execution is not barred by section 47 of the Civil Procedure Code.

The measure of damages is the amount recovered in such fraudulent execution.

Appeal from the decree of the Sub-Court of Ramnad, in Appeal Suit No. 351 of 1912, dated 23rd December 1912.

Mr. *S. T. Streenivasa Gopalachariar*, for the Appellant:—The judgment of the lower Court contravenes the provisions of Order XLI, rule 31, Civil Procedure Code. The matter is *res judicata* by the prior execution proceeding. There is no fraud established

in the case, as there has been no adjustment of the decree between the plaintiff and the first defendant and as the assignment has not been recognised by the Court. The measure of damages has been wrongly assessed. Plaintiff cannot claim more than Rs. 170 wrongly paid over the Rs. 400 due legally under the decree.

JUDGMENT.— In this case the 1st defendant obtained a decree against plaintiff. He assigned the decree to 3rd defendant who recovered out of Court Rs. 170 from the plaintiff and gave him a receipt to the effect that the decree was satisfied. This payment was not certified. Taking advantage of this 1st defendant levied execution against plaintiff and recovered about Rs. 400 and odd. This suit is to recover that amount. Such a suit for damages for fraudulent execution is not barred by section 47. The measure of damages has been rightly held to be the amount which the 1st defendant recovered.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 291 OF 1912.

December 22, 1913.

Present:—Mr. Stuart, A. J. C.

Musammat SHEONATHA—DEFENDANT—APPELLANT

versus

SHEORAJ SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 28, Sch. I, Art. 44—Suit by minor after attaining majority for possession of land sold by his guardian during his minority.

Where the mother of certain Hindu minors, acting as their guardian, sold certain grove lands belonging to the minors during their minority and the minors brought a suit for possession of the grove lands more than three years after attaining majority but within 12 years of the sale:

Held, that under the provisions of section 28 and Article 44, Schedule I, of Act IX of 1908, the claim of the plaintiffs became extinguished three years after their attaining majority.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*, 23 M. 271; 27 I. A. 69; 4 C. W. N. 329; 10 M. L. J. 29, relied on.

Balbhaddar Singh v. *Jawahir Singh*, 11 O. C. 346, not followed.

Appeal against the decree of the District Judge, Bareli, dated 25th April 1912, upholding that of the Munsif of Dalmau, dated 1st March 1912.

Babu *Bisheshwar Nath*, for the Appellant.

Mr. *E. Manuel*, for Respondent No. 1.

JUDGMENT.—In this case the mother of Sheoraj Singh and Aman Singh, respondent, transferred by sale on 7th February 1902, certain grove lands, the property of the respondents during their minority. The respondents, brought this suit against the transferee for possession of the grove lands. The claim was decreed. The decision was upheld in the Court of first appeal. The written statement asserts that the mother of the respondents transferred the grove lands in question as the lawful guardian of the respondents. The respondents have made no contest on this point. The written statement further asserted that Sheoraj Singh was twenty-six years old, and that Aman Singh was twenty-five years old at the time of the institution of the suit. The question as to the ages of the respondents at the time of institution was covered by an issue framed in the Court of original decision. The respondents refused to produce evidence on the point. The appellant offered to produce evidence in support of his assertions, but the learned Munsif refused to hear it on the ground that, as the respondents had to prove that they were less than twenty-six and twenty-five years of age at the date of institution, and as they had failed to discharge the burden of proof, the appellant could not call rebutting evidence, as there was nothing to rebut. The learned Munsif and the learned District Judge have not decided what were the ages of the respondents on the date of institution. This point can be decided on the materials on the record, and I proceed to decide it under the provisions of section 103, Act V of 1908. I find that Sheoraj Singh was twenty-six years of age, and that Aman Singh was twenty-five years of age on the date of the institution of the suit. They had thus each attained majority more than three years before that date.

It has been urged in appeal that under the provisions of section 28 and Article 44, Schedule I, Act IX of 1908, the claim of the respondents became extinguished three years after each attained majority. Reliance is placed on the decision of their Lordships

of the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1). The facts in that case were that Velu and Kuppa were managers of a religious foundation. Velu was succeeded by an adopted son Nataraja, and Kuppa was succeeded by his own son Chockalinga. Chockalinga was a minor on the date of the death of Kuppa, and, while he was a minor, his mother who was his guardian sold the rights and interests appertaining to his share in the hereditary right of management. Their Lordships state at page 279 of their judgment: "Chockalinga attained majority in 1880 and had by Article 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so and by section 28 of the Limitation Act his right became extinguished." The facts in the present case are exactly similar. Here also a mother, who is described in the deed of sale as mother and guardian of the respondents and who has been admitted by the respondents to be their mother and guardian, transferred by sale, admittedly as their legal guardian, the rights and interests of the respondents in the grove lands. On the authority of this ruling it must be held that their rights became extinguished three years after each attained the age of majority and that their claim must fail. The decision of their Lordships has governed the subsequent decisions in *Madugula Latchiah* v. *Pally Mukkalinga* (2), *Satish Chandra Guha* v. *Chunder Kant Pyne* (3)—though no direct reference was made to the decision in that judgment,—*Sivavadevelu Pillay* v. *Ponnammal* (4), and in *Sham Chandra Dafadar* v. *Gadadhar Mandal* (5). In their decision in *Mata Din* v. *Sheikh Ahmad Ali* (6) their Lordships of the Privy Council again referred to the application of Article 44, though in that case they found it inapplicable because the transferors were not the guardians of the minor. The learned Counsel for the respondents has been unable to show that the ruling of their Lordships of the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1) conveys a meaning other than the meaning which I have assigned to it. He referred me amongst other cases to the decision in *Balbhaddar Singh* v. *Jawahir Singh* (7). But it does not appear that the decision in question of their Lordships of the Privy Council was before the Court which decided that appeal.

For the above reasons I allow the appeal and direct that the suit stand dismissed. The respondents will pay their own costs and those of the appellant in all Courts.

Appeal allowed.

(1) 23 M. 271; 27 I. A. 69; 4 C. W. N. 329; 10 M. L. J. 29.

(2) 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350.

(3) 3 C. W. N. 278.

(4) 15 Ind. Cas. 365; 11 M. L. T. 198; (1912) M. W. N. 383; 22 M. L. J. 404.

(5) 9 Ind. Cas. 377; 13 C. L. J. 277.

(6) 13 Ind. Cas 976; 16 C. W. N. 333; 11 M. L. T. 145; (1912) M W. N. 183; 9 A. L J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 34 A. 213; 23 M. L J. 6; 39 I. A. 49; 15 O. C. 49.

(7) 11 O. C. 346.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2003 OF 1911.

March 20, 1914.

Present:—Mr. Justice Teunon.

BHOLA NATH MANDAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHHOTA GUNARAM MIGHI—DEFENDANT—RESPONDENT.

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 68, 139, cls. (2) and (4)—Suit for ejectment by raiyat against under-raiyat—Whether jurisdiction of Civil Court barred.

The word "decree" in section 68 of the Chota Nagpur Tenancy Act is not to be read with the words "passed under this Act."

In a suit brought under the provisions of the general law for the ejectment of an under-*raiyat* by a *raiyat*, the jurisdiction of the Civil Courts is not barred either by clause (4) or by clause (8) of section 139.

Appeal from the decree of the District Judge of Manbhum, dated May 26th, 1911, confirming that of the Munsif at Raghunathpur, dated February 20th, 1911.

Babu *Mohini Mohan Chatterjee*, for the Appellants.

Babu *Jyoti Prasad Sarbadikari*, for the Respondent.

RAM LAL v. KHUNDAT-UN-NISSA.

JUDGMENT.—This case comes from the District of Manbhum in which the Chota Nagpur Tenancy Act, Bengal Act VI of 1908, is in force.

The plaintiff is a *raiyat* and in the suit he seeks to eject his under-*raiyat* because of non-payment of rent and after service of a notice to quit.

Both Courts below have held that by reason of the provisions of section 68 and section 139 (4) of the Act just referred to the jurisdiction of the Civil Courts is barred, and the plaintiff now appeals.

Now though an under-*raiyat* is a tenant [*Vide* section 4 (3) and section 3 (xxvii) of the Act] and may by custom or usage acquire a right of occupancy under section 76, yet he is not to be deemed a *raiyat* [*Vide* section 6 (2)], and it, therefore, follows that the provisions contained, for instance, in sections 22, 41, 42 and 178 do not appear to be applicable in his case. The only provisions regarding the ejectment of under-*raiyats* appear to be those contained in section 46 (4) and section 194 of the Act, and section 46 (4), which in effect reproduces in the case of under-*raiyats* the provisions of section 25 of Act X of 1859 (and of section 10-B introduced into the Chota Nagpur Landlord and Tenant Procedure Act of 1879 by the amending Act of 1903), refers to applications only.

Now suits and applications are not interchangeable terms [Vide *Khetra Nath Ghatack* v. *Peru Bauri* (1)] and in so far as suits are concerned there appear to be no special provisions in the Chota Nagpur Tenancy Act for the ejectment of under-*raiyats*. The only section applicable, therefore, appears to be section 68 which applies to tenants in general and provides as follows:—"No tenant shall be ejected from his tenancy except in execution of decree, or in execution of an order of the Deputy Commissioner passed under this Act."

In the absence of any special provisions in the Act regarding the institution of suits for the ejectment of under-*raiyats*, and having regard also to the language used in section 181 and section 183 of the Act it would seem that the word "decree" in section 68 is not to be read with the words "passed under this Act," and that, therefore, in a suit brought under the provisions of the general law for the ejectment of an under-*raiyat* the jurisdiction of the Civil Courts is not barred either by clause (4) or by clause (8) of section 139. It may be observed that under Act X of 1859 it was similarly held that the provisions of section 25 of the Act did not preclude a landlord from asserting his rights in the Civil Courts.

In another view of the case it may be said that if the tenancy of the under-*raiyat* was terminated by a good and sufficient notice to quit, his suit is one not for the ejectment of a tenant but for the ejectment of a trespasser. [*Vide Nathuni Ram* v. *Raja Paresh Nath Singh* (2)] and in that view also it is cognizable in the Civil Courts.

In the result this appeal is decreed and the case remanded to the District Judge in order that he may re admit the appeal and proceed to dispose of it on the merits.

Costs will be costs in the cause.

Appeal accepted; Case remanded.

(1) 9 Ind. Cas. 478; 15 C. W. N. 387; 13 C. L. J. 250.

(2) 3 Ind. Cas. 436; 14 C. W. N. 297.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 319 OF 1912.

March 7, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

RAM LAL—PLAINTIFF—APPELLANT

versus

Musammat KHUNDAT-UN-NISSA AND OTHERS—DEFENDANTS—RESPONDENTS

Court-fees—Deficiency made good within time allowed by Court but after limitatian, effect of.

Where a deficiency in Court-fee is made good within the time allowed by the Court but beyond the period of limitation prescribed for the suit, the suit is not barred by time.

Second appeal from the decision of the District Judge of Shahjahanpur, dated 22nd January 1912.

Mr. *S. C. Mukerjee*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—The learned Judge has dismissed this appeal holding that the deficiency in Court-fees, though made good

within the time allowed by the Court of first instance, does not save the case from limitation. He has held that the Court of first instance in allowing time to make good the deficiency did not exercise a judicial discretion. There is nothing to show that the Court of first instance did not exercise a judicial discretion. Various matters might have been brought to the notice of the learned Subordinate Judge which might be sufficient to explain why the full fee was not paid. Under the circumstances we do not think that the lower Appellate Court was justified in dismissing the suit solely upon the ground that the full Court-fee was not paid on the day the plaint was filed. With regard to the remarks the learned Judge has made about the plaint not having been the original plaint, there is no direct finding that this was the case; on the contrary, it would appear from the learned Judge's order which he has incorporated in his judgment that the plaint in this case was not tampered with in any way. Under the circumstances we must allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit the appeal under its original number and proceed to determine it according to law. Costs here and heretofore will be in the discretion of the Court below.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 228 OF 1912.

January 7, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

RAO SAHIB PYDAH VENKATACHALAPATHI GARU AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUTHU VENKATACHALAPATHI (DIED) AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Out and out sale—Unregistered letter written next day to convert sale into mortgage or to deprive it of its legal effect, whether admissible in evidence.

An unregistered letter is inadmissible in evidence to show either that the sale executed the previous day is in effect a mortgage or that it conveys no title. In either view the unregistered letter "affects immoveable property," within the meaning of section 17 of the Registration Act, and is not admissible in evidence without registration.

Appeal under section 15 of the Letters Patent against the decree of this Court, dated the 23rd September 1912, in Appeal No. 46 of 1909 (see 17 Ind. Cas. 987) preferred against that of the Court of the Subordinate Judge of Cocanada in Original Suit No. 22 of 1907.

Mr. *T. Rangachariar*, for the Appellants — The letter is sought to be proved in evidence in order to affect the contents of the sale-deed and for that purpose it is inadmissible, being unregistered.

In *Narayanan Chetty* v. *Muthiah Servai* (1) a lease was admitted in evidence even though unregistered to prove the agreement to lease, though no suit will lie to recover moneys due under it.

In *Rajah of Venkatagiri* v. *Narayana Reddi* (2) what was allowed to be proved was an oral agreement to let in which case section 49 of the Registration Act has no application.

[WHITE, C. J.—In this case, the document *i.e.*, the letter itself is not put in evidence; only secondary evidence of its contents was sought to be given].

In *Kanuparti Subbayaya* v. *Kurnani Madduletiah* (3) the character of the possession of the property was sought to be proved, and it is a document affecting immoveable property.

In *Achutaramaraju* v. *Subbaraju* (4) the decree in *Balkishen Das* v. *Legge* (5) has been explained; conduct of the parties ought not to be proved when the document is in clear and unambiguous language.

Merely because a party is entitled to show that the document is a nominal one, he is not also entitled to show that the document is something else.

It is not open to a party to go behind section 92 of the Indian Evidence Act to show that the document is not what it purports to be. *Challa Venkata Reddy* v. *Devabaktunni* (6).

(1) 8 Ind. Cas. 520; 35 M. 63; 9 M. L. T. 142; 21 M. L. J. 64.

(2) 17 M. 456; 4 M. L. J. 198.

(3) 17 M. L. J. 469.

(4) 25 M. 7; 1 M. L. J. 370.

(5) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 101.

(6) 14 Ind. Cas. 65; (1912) M. W. N. 164.

Mr. *P. Narayanamurthi*, for the Respondent—This point was not raised in the appeal grounds.

[WHITE, C. J.—The effect of admitting the letter in evidence is that the sale is not intended to be effective. The subsequent deed cannot be used in evidence to cancel the previous sale.]

Mr. *P. Narayanamurthi*.—If the sale was never intended to be operative, the defendant is a trespasser and only suit is simply to recover possession of the land from him. The other document is not intended to be operative as a mortgage.

In *Sangu Ayyar* v. *Cunarasami Mudaliar* (7) the document was held admissible.

In *Ramalinga Mudali* v. *Ayyadorai Nainar* (8) the title is to pass on the happening of an event, no event happened and no title passed under section 17, clause (*b*), of the Registration Act, the document is to be used for a collateral purpose, not affecting the property itself. No registration is necessary and it can be received in evidence.

I can show that the sale is not intended to be a sale but a mortgage, and I do not thereby intend to enforce the mortgage.

In all cases cited, the document was used to enforce its terms.

The words "be received in evidence" means that the party producing it uses it as evidence to enforce the document.

The gist of the document is that there is no intention to sell, and that is not evidence of a transaction affecting immoveable property.

In *Muthu Venkatachelapati* v. *Pyanda Venkatachelapati* (9) the defendant brought a suit for foreclosure; he wanted to prove the mortgage, and, therefore, put in the letter for that purpose.

Here he puts it in evidence to prove his possession and an unregistered letter is admissible in evidence to prove adverse possession.

Mr. *T. Rangachariar* with him Mr. *T. R. Ramachandra Aiyer*, for the Appellants.

Mr. P. *Narayanamurthi*, for the Respondents.

(7) 18 M. 61.
(8) 28 M. 124; 14 M. L. J. 493.
(9) 27 M. 348.

JUDGMENT.—If the claim of the plaintiff in the present suit is to be treated as based on the footing of a mortgage transaction we think it is clear that, as was held in *Muthu Venkatachalapati* v. *Pyanda Venkatachalapati* (9), that the unregistered letter cannot be received as evidence of such a transaction.

Assuming the plaintiff is entitled to sue for possession on the ground that no title passed to the defendants under the sale-deed (Exhibit A), in order to succeed he must show that by virtue of the unregistered letter the sale-deed does not affect the immoveable property, which is comprised both in the sale-deed and in the unregistered letter, in the way in which the sale-deed purports to affect the property, and would affect the property if the unregistered letter had never been written. This being so, it seems to us the unregistered letter is relied on as evidence of a transaction affecting immoveable property and, being unregistered, is inadmissible in evidence.

We think the principle of the decision in *Achutaramaraju* v. *Subbraju* (4) applies to this case.

The appeal must be allowed with costs in this Court and the suit dismissed. There will be no order as to costs in the Court of first instance.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1635 OF 1912.

July 5, 1913.

Present:—Mr. Justice Scott-Smith.

RANGILA MAL—PLAINTIFF—APPELLANT

versus

PHERU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Plaintiff not appealing against one of several defendants, whether Court can give decree against that defendant—Limitation Act (IX of 1908), Sch. I, Arts. 61, 120—Limitation, when right to sue accrues.

R supplied wood to *P* in 1909 and was paid the price thereof upon certain conditions by *K*. In 1908, *K* brought a suit against *R* and got back his moneys. Upon this, *R* sued both *P* and *K* in 1909, for recovery of the price of wood. The suit was dismissed against *P* but decreed against *K*. *K* appealed and *R* in cross-

RANGILA MAL *v.* PHERU.

objections asked that *P* should also be made liable for the decree.

The lower Appellate Court dismissed the suit holding that as regards *K* it was *res judicata*, that as regards *P*, *R* could not in cross-objection ask that *P* should be made jointly liable for the decree, and that in any case the suit against *P* was barred by time:

Held, that the lower Appellate Court had the power under Order XLI, rule 33, of the Civil Procedure Code, to decree the claim against *P* even though there was no appeal by *R*;

(2) that the suit was not barred by time, as there was a fresh cause of action in 1908, when *R* had been forced to pay back the money to *K* and that Article 120 of the Limitation Act, Schedule I, was applicable.

Second appeal from the decree of the Divisional Judge of the Ambala Division, dated 4th June 1911, reversing that of the District Judge, Simla, dated 31st August 1911, decreeing the claim.

Mr. *Beni Parshad Khosla*, for Rai Bahadur Lala *Sukh Dyal*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The facts of this somewhat complicated case are given clearly in the judgment of the learned Divisional Judge.

Rangila, plaintiff-appellant, sued Pheru and Kanwar Ranzor Singh for Rs. 716-12-9. A decree was passed against Kanwar Ranzor Singh, and the suit was dismissed as against Pheru, whose costs Kanwar Ranzor Singh was also ordered to pay.

Kanwar Ranzor Singh appealed to the Divisional Judge, and plaintiff in cross-objections asked that Pheru also should be made liable for the decree.

The lower Appellate Court held that the suit was *res judicata* as against Kanwar Ranzor Singh and accepting his appeal dismissed the suit. It held that plaintiff could not ask in cross-objections that Pheru should be made jointly liable for the decree, and that in any case the suit as against him was barred by time, and plaintiff has filed a second appeal in this Court which has been heard *ex parte* against Pheru.

Mr. Beni Parshad for appellant has not at all pressed the appeal as against Kanwar Ranzor Singh. It was finally decided in the suit between the latter and the plaintiff, that plaintiff was not entitled to payment from Kanwar Ranzor Singh. He had been paid upon certain conditions, but it was held that Kanwar Ranzor Singh was entitled to a refund. Plaintiff cannot now say that on the merits he is entitled to recover the sum from Kanwar Ranzor Singh. In the former case he had an opportunity of raising every possible defence to the suit, and he cannot now make as a ground of attack any ground which he could have urged by way of defence in that suit. I, therefore, maintain the order of the Divisional Judge as to Kanwar Ranzor Singh.

As to Pheru the lower Appellate Court had the power to decree the claim against him even though there was no appeal by the plaintiff. Order XLI, rule 33, Civil Procedure Code, is clear in this respect, and the power given to the Court thereby should certainly be exercised in the present case, if it be held that Pheru is liable and that the claim as against him is within time.

The lower Appellate Court says the claim is time-barred because the wood was purchased by Pheru or supplied to him in or before 1901 and he then became liable for the price, and as the present claim was not brought till 1909, it is not within limitation. The original cause of action no doubt arose upon the purchase of wood, but Kanwar Ranzor Singh paid the price of the wood and that cause of action came to an end.

When Rangila was forced to pay back this money to Kanwar Ranzor Singh and he paid it back on 12th March 1908, a fresh cause of action arose and the question is what Article of the 1st Schedule of the Limitation Act applies. The first Court thought Article 120 was applicable and with this I agree. Counsel for appellant suggested Article 61, but that Article is not in terms applicable, nor is any other in my opinion.

The Divisional Judge has made certain remarks as to Pheru's liability, but there is no clear decision on the point. I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, so far as Pheru's liability is concerned, remand the case to the lower Appellate Court for re-decision of the appeal as regards him.

The stamp in this Court will be refunded and the plaintiff's other costs will be costs in the case.

Kanwar Ranzor Singh will bear his own costs.

Appeal accepted; Case remanded.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 344 OF 1911.

March 24, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

MANINDRA CHANDRA NANDY—PETITIONER—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT.

Land Acquisition—Acquisition by Calcutta Municipality—Bustee *land—Market value—Future advantageous disposition not to be taken in account—Valuation of* bustee *land not to be made on supposition of its adaptability for use as building land—Present disposition only to be considered—Evidence—Evidence relating to under-tenants and rents paid by them, whether relevant—Value of other lands which are not* bustee *lands, in the neighbourhood, if relevant.*

The words "the market-value to be the market-value according to the disposition of the land at the date of the publication of the declaration" in clause (*c*) of section 557 of the Calcutta Municipal Act, 1899, mean that when a land is compulsorily acquired by the Calcutta Municipality, any use to which the land may be put in future should not be taken into consideration in determining its value, but the valuation shall be determined according to the market-value then existing of the land in the position that the matters then were.

The clause precludes any valuation based on the most advantageous disposition of land, *e. g.*, a valuation of *bustee* land on the supposition of its adaptability for use as building land to carry expensive structures.

Consequently, the clause precludes evidence being given of other purposes to which *bustee* lands can be put in future.

Therefore, evidence relating to under-tenants and the rents paid by them is not relevant for the purpose of ascertaining the market-value as defined by clause (*c*) of section 557.

Evidence as to sales of other lands in the neighbourhood which were not *bustee* lands is not admissible.

Harish Chunder Neogy v. *Secretary of State*, 11 C. W. N. 875, followed.

Appeal from the decree of the Special Land Acquisition Judge of 24-Perganas, dated May 8th, 1911.

Mr. *Caspersz*, Babus *Jogesh Chandra De*, *Jyotee Prosad Sarbadhikari*, *Hemendra Nath Sen* and *Sarat Kumar Mitra*, for the Appellant.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a judgment of the learned Special Land Acquisition Judge of 24-Perganas, dated the 8th May 1911. The land which has been acquired for a public purpose is a certain piece of *bustee* land situated in Halsir Bagan within the Original Jurisdiction of this Court, that is, within the limits of the Presidency town, and the statutory powers under which the land has been acquired are the Land Acquisition Act of 1894 as varied by section 557 of the Calcutta Municipal Act III (B.C.) of 1899. The point that has been argued before us in this appeal turns solely upon the question whether the learned Judge of the Court below placed a right construction on the provisions of that section of the Calcutta Municipal Act and was right in excluding evidence as to sales of other properties in the neighbourhood which were not sales of *bustee* lands. The learned Counsel for the appellant conceded that, unless he could satisfy us that the learned Special Land Acquisition Judge had erred in excluding that evidence, there was no evidence before us on which we ought or could award to the appellant more than Rs. 590 a *cottah* which has been allowed by the lower Court.

Now, section 557 of the Calcutta Municipal Act provides as follows:—"Any land or building which any Municipal Authority is authorised by this Act to acquire," that means one of the three Municipal Authorities, namely, the Corporation, the General Committee and the Chairman who are the three Municipal Authorities to carry into effect the Act, "may be acquired under the provisions of the Land Acquisition Act, 1894; and for that purpose the said Act shall be subject to the following amendments." We may here mention only one of the amendments which is necessary for our purpose and that is (*c*) which provides "the market-value of the land or building shall be deemed for the purposes of clause first of sub-section (1) of section 23 of the Land Acquisition Act to be the market-value according to the disposition of the land or building at the date of the publication of the declaration relating thereto under section 6 of the said Land Acquisition Act." The clause is not very happily worded but it is quite clear what it means, namely, that when a land is compulsorily acquired, any use to which the land

may be put in future should not be taken into consideration in determining its value, but the valuation shall be determined according to the market-value then existing of the land or building in the position that the matters then were. That seems to me quite clear on the terms of that sub section and that was the view which was adopted by this Court in the case of *Harish Chunder Neogy* v. *Secretary of State for India in Council* (1). At page 878, the learned Judges in giving the judgment made the following remarks:—"Section 557 of the Calcutta Municipal Act precludes any valuation based on the most advantageous disposition of land, *e. g.*, a valuation of *bustee* land on the supposition of its adaptability for use as building land to carry expensive structures which is the most advantageous use to which the land can be put in Calcutta." With these remarks, I entirely agree. It seems to me that sub-section (*c*) of section 557 of the Calcutta Municipal Act precludes evidence being given of other purposes to which *bustee* lands can be put in future. Then comes sub-section (*d*) of section 557. Sub-section (*d*) provides that "the market-value of the land or building shall, until the contrary is shown, be presumed, for the purposes of the said clause first of sub-section (1) of section 23," which means section 23 of the Land Acquisition Act of 1894. "to be twenty-five times the annual value of the property, as entered in the assessment book prescribed by this Act." That, of course, is a rebuttable presumption because the sub-section states that that presumption is to be made only until the contrary is shown and it is only until the contrary is shown that the Court is entitled to presume that twenty-five times the annual value of the property as entered in the assessment book is the value of the property within the meaning of sub-section (*c*). The only point in this case is, therefore, whether the learned Judge of the Court below rightly excluded the evidence, as appears, first of all, from page 141 of the printed paper-book, relating to the under-tenants and the rents paid by them for land and structures thereupon. In my opinion, the learned Judge rightly refused to admit evidence relating to the under-tenants and the rents paid by them; and that matter is not relevant for the purpose of ascertaining the market value as defined by sub-section (*c*) of section 557. The other evidence which the learned Judge rejected was the questions put to a valuer with regard to sales of other lands in the neighbourhood which were not *bustee* lands. In ordinary cases, under section 23 of the Land Acquisition Act, that evidence would have been admissible but the case of *Harish Chunder Neogy* v. *Secretary of State for India in Council* (1) to which I have already referred shows quite clearly that, in the opinion of the learned Judges in that case, such evidence is not admissible; and with that opinion I agree. It seems to me that the learned Judge was perfectly justified in refusing to allow these questions to be put to the witness Krishna Chander Bannerjee as appears from pages 143 and 144 of the paper-book before us. That being so, the learned Judge, in my opinion, proceeded on a correct basis to arrive at the value of this land as provided by section 557 of the Calcutta Municipal Act. That being so, the present appeal fails and must be dismissed with costs.

RICHARDSON, J.— I agree.

Appeal dismissed.

(1) 11 C. W. N. 875.

MADRAS HIGH COURT.

CIVIL SUIT No. 364 OF 1912.

December 18, 1913.

Present:—Mr. Justice Wallis.

P. PUSHPAVALLI THOYARAMMAL—PLAINTIFF

versus

P. RAGHAVAIAH CHETTY—DEFENDANT.

Hindu Law—Widow—Rate of maintenance—Principle on which to be awarded—Arrears—Principle on which right of action depends.

Where a Hindu widow asks for separate maintenance, the principle on which Courts should fix it is to look *first* at the mode of life of the family during her husband's life-time and to find out what amount will be sufficient to allow the widow to live as far as may be, consistently with the position of a widow, in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life-time, *then* to see what the husband's estate is and

how far that estate is sufficient to supply her with maintenance on this scale without doing injustice to the other members of the family, who also have their rights as heirs, or their rights to maintenance out of the estate.

Shrimati Karoonamoyee Dabee v. *Administrator-General of Bengal*, 9 C. W. N. 651, followed.

Where the husband's share of the estate is amply sufficient to supply the widow with maintenance to live in the way of life to which she has been accustomed, and where the family belong to a class of people, *e. g.*, traders, who take greater pleasure in the accumulation than in the spending of riches, and are shown to have lived in a modest manner at an expenditure averaging about Rs. 400 a month, exclusive of house-rent, a monthly allowance of Rs. 140 a month to the widow is sufficiently liberal.

The right of action in respect of arrears does not depend upon the wrongful withholding of maintenance, nor is any demand necessary to give such a right, as her own status as the widow of one of the members of a joint family holding property in common is sufficient to entitle her to receive maintenance from the date of her husband's death. Arrears can be refused only when the person liable to make the payment has justifiable ground for inferring that the claim was abandened but waiver or abandonment cannot be necessarily inferred in every case from the fact of separate residence alone.

Raja Yarlagadda Mallikarjuna Prasad Nayadu v. *Raja Yarlagadda Durga Prasad Nayadu*, 24 M. 147; 5 C. W. N. 74; 26 I. A. 151, cited.

Rangathayi Ammal v. *Nelli Munuswami Chetty*, 9 Ind. Cas. 110; 21 M. L. J. 706; (1911) 1 M. W. N. 322; 9 M. L. J. 461 followed.

Messrs *Venkatasubba Rao* and *Radhakrishnaiya*, for the Plaintiff.

Messrs. *C. P. Ramaswami Aiyar* and *P. Rungaswamy Iyengar*, for the Defendant.

JUDGMENT.—This is a suit brought by a widow against her father-in-law to recover possession of certain jewels which she says were given to her by her husband and her father-in-law and also for maintenance. She also claims certain clothes in schedule C to the plaint and the defendant has now consented that she should have the clothes which are numbered 1 and 2 in that schedule.

The rest of the articles mentioned in that schedule are also admitted and there must, therefore, be a judgment for those articles.

The questions relating to the jewels and to the maintenance are more difficult. The story of the plaintiff is that negotiations were entered into before her marriage with her deceased husband who had been married previously and who was about twenty-two years of age, that the plaintiff's people offered to give Rs. 2,000 for the purchase of jewels and that the defendant's people offered to let the plaintiff have the jewels which had been in the enjoyment of the first wife which they say were worth Rs. 16,000 and also to give her further jewels.

* * * * * * * *

But the question I have to deal with is whether the plaintiff's story is sufficiently proved, and I am of opinion that it has not been sufficiently proved.

* * * * * * * *

Then the question remains whether, apart from that evidence, the use of the jewels by the plaintiff is sufficient to show that it was intended to give them to her. Now it seems to me that the balance of evidence is that these jewels remained in the custody and control of the defendant and I cannot regard it as insignificant that these jewels were left behind when the plaintiff went to her mother's house, never to return as it turned out. The plaintiff's explanation of her reasons for not taking them with her seems to me very weak, and I think there is more probability in the defendant's story that she was allowed to take away the Venki only at her request as a special favour. Having regard to the fact that the defendant is a trader, not perhaps inclined to incur unnecessary expenditure, it does not seem to me likely that he would have parted with the property in these jewels to his daughter-in-law, though, no doubt, as he says, he allowed her the very full use of them. The conclusion to which I have come is that the plaintiff's case on this point is not proved.

The next question is as to the rate of maintenance which should be allotted to her. Various cases have been cited to me and in particular the judgment of Mr. Justice Wilson in *Shrimati Karoonamoyee Dabee* v. *The Administrator-General of Bengal* (1) in which the learned Judge says: "I apprehend that there is no reasonable doubt now as to the principle on which Court should try to deal with these matters though the application is nearly in every instance extremely difficult. The principle so far as it can be defined is substantially this. Where a widow has asked for separate

(1) 9 C. W. N. 651.

maintenance, you look first at the mode of life of the family during her husband's life-time and you try to find out what amount will be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life-time. Then you see what the husband's estate is, and you also see how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate." There is no question in the present case that the husband's share of the estate is amply sufficient to supply the widow with maintenance to live in the way of life to which she has been accustomed, and, therefore, the only question is what is the rate that should be awarded. The defendant's family are traders and they belong to a class of people, as has been pointed out in another case cited before me, who take greater pleasure in the accumulation than in the spending of riches and they are shown to have lived in a modest manner at an expenditure averaging about Rs. 400 a month or about Rs. 5,000 a year in a house in one of the main thoroughfares of Georgetown which is said to be worth as much as Rs. 40,000. The defendant and his son kept horses and carriages and the defendant is said to have recently bought a motor car. Various cases have been cited to me in which particular sums were awarded, but each case was decided with regard to the circumstances of the family. I do not think that the circumstances of a *zemindar's* family are in the least a guide to the circumstances of a trader's family of this Chetty caste in Georgetown. As Mr. Justice Wilson says, it is an exceedingly difficult task to fix the amount. I am disposed to fix it on what I consider to be a liberal scale and have decided to award Rs. 140 a month.

Then the question arises as to the right of the widow to arrears of maintenance. Certain cases have been cited in which it was stated that the right of action depends upon the withholding of maintenance, and a more recent case was cited—the case of *Rangathay Ammal* v. *Nelli Munuswamy Chetty* (2). In that case it is stated: "A wrongful withholding is not necessary to entitle a widow to arrears of maintenance, if by that expression is meant that the withholding should be morally improper. No demand is necessary to give a right to receive arrears. Her status as the widow of one of the members of a joint family holding property in common is sufficient to entitle her to receive maintenance from the date of her husband's death. She may, no doubt, by living with her parents or otherwise, impliedly waive her right to be maintained by her husband's relations during the time that she lives away from them, but waiver cannot be necessarily inferred in every case from the fact of separate residence alone. The true principle to be applied is laid down in *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu* (3) by the Privy Council that arrears will be refused only in cases where the person liable to make the payment had justifiable grounds for inferring 'that the claim was abandoned' and had in consequence not set aside any portion of his annual income to meet such a claim."

In this case, the plaintiff was maintained for nine months in her husband's family after his death, and left them when no differences had arisen. The differences according to the evidence first became acute when she refused to attend her husband's annual ceremony on the 1st June 1911. And applying the principle laid down in the case referred to, I think that we may take it that from that date the defendant had notice that she did not intend to waive any claim for maintenance and, therefore, that I should be justified in awarding her arrears of maintenance as from that date *i.e.*, the 1st June 1911. There will accordingly be a decree to that effect with proportionate costs. There will be also a judgment for the effects mentioned in schedules A and C to the plaint. The maintenance will be a charge on items Nos. 1 and 2 of schedule D to the plaint.

Suit decreed in part.

(2) 10 Ind. Cas. 110; 21 M. L. J. 706; (1911) 1 M. W. N. 322; 9 M. L. T. 461.

(3) 24 M. 147; 5 C. W. N. 74; 27 I. A. 151 (P. C.).

TARINI CHARAN MAJUMDAR *v.* UMAR MALITA

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 104 TO 109 OF 1913.

March 26, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice D. Chatterjee.

TARINI CHARAN MAJUMDAR—PLAINTIFF—APPELLANT

versus

UMAR MALITA—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 103B, 148B (1), 153—*Second Appeal—Decision of amount of rent annually payable—Rent suit below Rs.* 100—*Decree according to defendant's admission of rent—Presumption—Publication of Record of Rights—Admission of plaint in rent suit without statement of rental of tenancy according to Record of Rights—Duty of Court to require Collector to supply copy of statement.*

In a suit for rent valued at less than Rs. 100, the question at issue between the parties was the amount of rent annually payable by the tenant. The lower Appellate Court decided that the plaintiff had not been able to prove his allegation as to the rate of rent, and the result was that the Court awarded the amount of rent annually payable which was admitted by the defendant:

Held, that there was a decision of a question of the amount of rent annually payable by the defendant within the meaning of section 153 of the Bengal Tenancy Act, and that a second appeal lay.

Under section 103B of the Bengal Tenancy Act the Record of Rights shall be presumed to have been finally published, unless such publication is expressly denied.

Under the proviso to section 148B (1) of the Act, in all cases in which a Court admits a plaint in a rent suit, which does not contain a statement of the rental of the tenancy according to the Records of Rights, the Court shall require the Collector to supply a certified copy of the Record of Rights relating to the tenancy.

Appeal from the following judgment of Mr. Justice Sharf-ud-din, dated July 29th, 1913, in Second Appeal No. 2646 of 1911.

SHARF-UD-DIN, J.—These are six appeals governed by one judgment. On their being put up for hearing a preliminary objection was taken by the respondent under section 153 of the Bengal Tenancy Act. The value of the suits in each case is below Rs. 100. The decision arrived at by the lower Appellate Court was that the plaintiffs had not been able to prove their allegation as to the rate of rent. The lower Appellate Court, therefore, gave a decree to the plaintiffs in all these suits at the rate admitted by the defendants. It has been urged on behalf of the respondents that no appeal lies on the ground that there has been no decision on the question of the amount of the rent annually payable. In support of this contention I have been referred to the case of *Nekejaie* v. *Nanda Dulal Bamkeja* (1) and my attention has been drawn to a certain portion of the judgment in this reported case. It is a short judgment and does not given all the facts of the case. That judgment is this: "We must hold in these two cases that no appeal lies. There was certainly a question as to the amount of rent annually payable by the defendants, but the Subordinate Judge has not, in our opinion, determined what that rent was. His judgment on this point is this: 'The plaintiffs have no reliable evidence to entitle them to decrees at the rates of rent claimed. They will recover arrears at the rates admitted by the defendants.' That is not a determination of the annual rent payable and the Subordinate Judge, we think, proceeded on the defendants' admission to decree the amount which was payable for the particular years in respect of which the rent was claimed." The above is the whole judgment in the case. It has been urged that in this reported case, as in the present case, the plaintiffs were not able to prove the rate of rent alleged by them; and in both the cases, that is, in the present case and the reported case the lower Appellate Court gave a decree at the rate admitted by the defendants. In the reported case it was held that no appeal lies and in the present appeals also on the same ground no appeal lies. On behalf of the appellant it is, however, contended that this judgment is distinguishable and my attention has been drawn to the word 'decree' in section 153 of the Tenancy Act. It has been urged that the quotation in the reported judgment is not from the decree of that case, but from the judgment in that case. Hence section 153 of the Bengal Tenancy Act cannot apply. The learned Pleader for the appellant also argues that the passage in the reported case that the "Subordinate Judge * * * * proceeded on the defendants' admission to decree the amount which was payable for the particular years in respect of which rent was claimed" shows that the decree was not really at the rate of rent admitted by the defendants but the decree was for an amount, and hence it was held in the reported case that no appeal lay. I am not satisfied with

(1) 1 C. W. N. 711.

this contention. In the reported case the only question before this Court was, so far as the admission of the appeal was concerned, whether that particular decree of the lower Appellate Court was appealable or not under section 153 of the Bengal Tenancy Act, that is to say, whether in the judgment and decree appealed against there was or there was not any decision as to the rate of rent. If there was a decision as to the rate of rent an appeal lay. If there was no such decision no appeal lay. That being the point in the reported case before this Court the decree in that case must also have been referred to. The decree has always to follow the judgment and both should be consistent. The quotation in the reported judgment was no doubt, not from the decree, but from the judgment in the suit. But that a portion must have been consistent with the decree, otherwise an objection similar to the one now taken would have been taken in the reported case. I think that under the circumstances the appeals do not lie under section 153 of the Bengal Tenancy Act.

But I want to observe something more in support of my view. If a plaintiff claims rent from the defendant, say at the rate of Rs. 10 annually, and the defendant alleges that the rate is Rs. 5 and the plaintiff fails to prove the rate of rent alleged by him on which the Court accepts the rate admitted by the defendant and gives a decree in accordance with that rate, I doubt very much if this is an adjudication as to the rate of rent. An adjudication, so far as I understand, means a decision not only on allegations made by the parties but also on the evidence adduced. In the hypothetical case supposed by me if the Court decided on the evidence, it is possible that the Court might reject the allegations as to the rate of rent made by both parties and adopt a middle course on the evidence on behalf of both parties. That would, no doubt, be an adjudication. But only accepting the allegation of the defendant simply because the plaintiff has not been able to prove his allegation is hardly an adjudication. I, therefore, hold that no appeal lies; and all these appeals are dismissed with costs.

The plaintiff appealed from the above judgment under clause 15 of the Letters Patent.

Babu *Ram Chandra Majumdar*, for the Appellant.

Babu *Gobinda Chandra Dey Ray*, for the Respondent.

PRELIMINARY JUDGMENT.—This appeal arises out of a suit for arrears of rent, and the question at issue between the parties was the amount of rent annually payable by the tenant, for it was on the determination of that question that depended the decision of the suit one way or the other. Both sides advanced their individual views in the pleadings and supported these divergent views by sworn testimony. The sworn testimony of the plaintiff as to the amount of rent annually payable by the tenant was disbelieved, and the result was that the Court awarded the amount of rent annually payable to which the defendant had deposed. I have no means of diving into the mind of the learned Judge for the purpose of satisfying myself as to whether he accepted that as positively proved or whether he accepted it as merely an admission which he could take as proof. But at any rate it seems to me that it must be said that not only was there this question of the amount of rent annually payable by the tenant at issue between the parties, but inasmuch as there has been a decree, that there has been a decision of that question for the purposes of this suit. It seems to me to be beside the question—though it may perhaps illustrate the difficulties that arise—to consider whether at all, and if at all then to what extent, the plea of *res judicata* will operate in future litigation, or how far this decree could not be made a starting point for the purposes of section 51 of the Bengal Tenancy Act. It appears to me that there has been a decision of a question of the amount of rent annually payable by the defendant within the meaning of section 153 of the Bengal Tenancy Act, and, therefore, that an appeal lies.

JUDGMENT.—Now that the appeal has been placed before us on the merits I quite understand the zeal with which the preliminary objection to an appeal lying was pressed before us; for, I think, it is impossible to read the judgment of the District Judge without feeling that it is an inadequate treatment of the case.

The suit is one for recovery of rent, the

NIHALA v. BHUTI.

plaintiff relying on a *khatian* and on the presumption which that *khatian* involves.

The learned Munsif admitted the *khatian* and expressed the opinion, as he was entitled to do with the authority of a trial Judge, that there was no evidence in disparagement of that *khatian* except the oral testimony of the defendant to which he thought little importance could be attached. The result was that the Munsif gave a decree on the strength of the *khatian*, and, where the *khatian* did not help, on the admissions of the defendant: and he obviously went very carefully into the matter.

The lower Appellate Court has modified that decree, holding that the *khatian* was not admissible because it was not proved that it had been finally published. When the learned Judge made that remark he must have overlooked the provision of section 103-B of the Bengal Tenancy Act which enacts that "In any suit or other proceeding in which a Record of Rights prepared and published under this Chapter, or a duly certified copy thereof or extract therefrom, is produced, such Record of Rights shall be presumed to have been finally published, unless such publication is expressly denied." This must have been present to the mind of the Munsif, for he expressly refers to the fact that the defendant did not deny the fact that the record was finally published.

We, therefore, have a fundamental error in the judgment of the District Judge in so far as he treated the certified copy as inadmissible on a ground which he was not entitled to take. This is not the only objection formulated by the learned District Judge in his dissent from the Munsif, for he suggests that the Court ought to have proceeded under section 143 (*b* 1) which provides that "where the suit is for the rent of land situated within an area for which a Record of Rights has been prepared and finally published, the plaint shall further contain a list of the survey plots comprised in the tenancy and a statement of the rental of the tenancy according to the Record of Rights, unless the Court is satisfied, for reasons to be recorded in writing, that the plaintiff was prevented by any sufficient cause from furnishing such list or statement". The learned Judge, however, omitted to notice the proviso which is to the effect that "in all cases in which the Court admits a plaint which does not contain such statement, the Court shall...require the Collector to supply, without payment of fee, a verified or certified copy of, or extract from, the Record of Rights relating to the tenancy". Apparently that was not done in this case. But I suppose that the Munsif was satisfied with the certified copies which the plaintiffs produced, and, therefore, there is no force in that part of the District Judge's criticism on the Munsif's comment of the case. There is a general statement of other reasons for which he thought that the lower Court ought not to have depended upon the *khatian*, but I do not think that is a sufficient determination in the case for us to accept his decision as one that should stand.

The result then is that we must reverse the judgment of Mr. Justice Sharf-ud-din as also the decree of the District Judge and send back the cases to the lower Appellate Court for determination in the light of these remarks.

Costs will abide the result.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 294 OF 1908.

July 21, 1913.

Present:—Mr. Justice Shadi Lal.

NIHALA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat BHUTI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Hindu Law—Ghirths of the Kangra District.

As among *Ghirths* of the Kangra District no custom either in favour of or against the right of succession of brother's daughters and their sons has been proved, the Hindu Law shall prevail.

Second appeal from the decree of the Additional Divisional Judge, Hoshiarpur Division, dated 22nd November 1907, reversing that of the Munsif, 1st Class, Kangra, dated 9th November 1905, dismissing the claim.

Rai Bahadur Bakhshi *Sohan Lal*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

BARHAMDEO SINGH *v.* HANMANOGE NARAIN SINGH.

JUDGMENT.—The sole point for decision in this appeal is whether the plaintiffs, *Musammat* Bhuti and her sons, who are *Ghirths* of Kangra District, are entitled to succeed to the estate of Mangal, the brother of *Musammat* Bhuti's father. The process of reasoning by which the learned Divisional Judge has arrived at the result in favour of the plaintiffs is incorrect and the learned Pleader for the respondents has not attempted to defend it. He, however, supports the decree in favour of his clients by reference to the provisions of the Hindu Law under which the plaintiffs being *Bandhus* have the right of succession to Mangal's property. In fact, Mr. Sohan Lal does not dispute the plaintiff's right under the personal law of the parties, but he contends that the parties are bound by customs and the plaintiffs have failed to prove the existence of a custom in support of their claim. He further contends that the plaintiffs must succeed on the strength of that case and cannot take advantage of the fact that the defendants have no right to the property. It is admitted by the learned Pleaders on both sides that there is no evidence on the present record to prove any custom either in favour of, or against, the plaintiffs' right of succession. The question, therefore, arises whether, in the absence of a custom, the plaintiffs can fall back upon the personal law for a rule of decision on the point at issue between the parties. The majority of the Judges in *Diyi Ram* v. *Sohel Singh* (1) have held that this is permissible, and following that judgment, I hold that the plaintiffs are heirs to the property of Mangal and entitled to get the declaration sued for against the defendants who have no right at all to the land in dispute.

Accordingly I affirm the decree of the Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 110 P. R. 1906; 59 P. W. R. 1907; 31 P. L. R. 1907.

CALCUTTA HIGH COURT.

APPLICATION FOR AMENDMENT OF DECREE IN REGULAR CIVIL APPEAL No. 40 OF 1909.

December 11, 1913.

Present:—Justice Sir Herbert Carnduff, Kt., and Mr. Justice Richardson.

BARHAMDEO SINGH AND OTHERS—DEFENDANTS Nos. 9, 11 AND 12—PETITIONERS

versus

HARMANOGE NARAIN SINGH—PLAINTIFF AND RAM GOPAL ACHARIYA—DEFENDANT No. 1—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151, 152, O. XX, r. 6—Abandonment of decree—Power of Court—Decree not representing true intention of Court—No necessity for filing review.

Where a decree, as drawn up, does not correctly represent the judgment according to the intention of the Court, it is open to the Court *suo motu* to rectify it, either under section 151 or 152 of the Civil Procedure Code of 1908, even though the decree has been appealed against, and it is not necessary to review the judgment.

Brijratan v. *Jaynarain*, 7 Ind. Cas. 876; 37 C. 649, and *In re Swire, Mellor* v. *Swire*, (1885) 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785, followed.

A suit was instituted against 14 defendants including the petitioners, who filed written statements protesting against their inclusion in the category of defendants. The suit was contested by defendant No. 1 alone. The plaintiff obtained a partial decree. On appeal the contest was again solely between the plaintiff and defendant No. 1. "The appeal was allowed and the suit decreed with costs". The decree gave costs against all the defendants, and the present petitioners made this application to have the decree amended so as to relieve them of that liability:

Held, that the intention of the Court was to decree costs against defendant No. 1 alone, and that the decree should be amended under sections 151, 152 and Order XX, rule 6 of the Civil Procedure Code, 1908, without the necessity of an application for review.

Application dated 4th August 1913, for a review of the judgment and amendment of the decree passed in appeal from original decree No. 40 of 1909, dated 19th March 1913.

Babu *Ganesh Dutt Singh*, for the Petitioners.

Dr. *Dwarka Nath Mitter*, for the Opposite Party.

JUDGMENT.

CARNDUFF, J.—This is an application for the amendment of a decree, which has, it is said, erroneously and inadvertently made the applicants liable for the costs of certain litigation.

The plaintiff sued for the recovery of land occupied by one Ram Gopal Achari as *Mohanth* under a deed of endowment executed

by a Hindu lady. Ram Gopal Achari was made the first and principal defendant; but the deed associated with him a number of other persons in the management of the endowment, and these the plaintiff added as defendants Nos. 2 to 14. In the trial Court the suit was contested by Ram Gopal Achari alone. The plaintiff obtained a partial decree. He then appealed to this Court, and before us the contest was again solely between him and the first defendant. In our judgment Mr. Justice Harington, who has since left the Bench, and I ordered that "the appeal should be allowed and the suit decreed with costs". The decree, subsequently prepared in the Court's office and, let me say at once, signed by both of us, has given costs against all the defendants, and the present applicants, who were named as defendants Nos. 9, 11 and 12, now submit that as it cannot have been really intended to saddle them with costs, it should be amended so as to relieve them of that liability.

The applicants were nominated in the deed as "*panches*" authorised to supervise the management of the endowment. They filed written statements protesting against their inclusion in the category of defendants and disclaiming not only all interest in, and concern with, the endowment, but also all knowledge of their nomination in connection with it. They had never acted as "*panches*", nor had they ever been asked to do so. The judgment shows that Mr. Justice Harington and I were to a certain extent influenced by these disclaimers in coming to the conclusion that the endowment was of an illusory character: and, had these defendants entered appearance, they would certainly have been allowed their costs, unless, indeed, it would have been possible to disallow them on the ground that they had been unnecessarily incurred. In these circumstances, it cannot be contended—and Dr. Dwarka Nath Mitter does not contend—that it could have been our intention to make them responsible for the costs; but what the learned Vakil does contend is that the decree, in fact, agrees with the judgment, as required by Order XX, rule 6, of the present Code of Civil Procedure, that the former cannot, therefore, be amended, as suggested, and that the only remedy, which the applicants had but have lost through limitation, was for a review of the latter.

No doubt, the decree is not inconsistent with the order in the judgment as to costs, and in this way it may at first sight be said to agree therewith. But the order is elliptical, and, if the judgment as a whole be referred to, it becomes manifest that the order cannot have been meant to affect the applicants. The result is that the decree is not really in accord with the intention of the Court, and that Mr. Justice Harington and I can have passed it only through inadvertence. As pointed out in *Brijratan* v. *Jaynarain* (1) and *In re Swire, Mellor* v. *Swire* (2) there cited, a Court has an inherent power to amend or vary a perfected order when it finds that it does not correctly state what it actually decided, and apart from this inherent power to make such orders as may be necessary for the ends of justice, which is expressly recognised by section 151 of the Code, section 152 provides that errors arising in a decree from any accidental slip or omission may be corrected by the Court either *suo motu* or on application. I hold, therefore, that it is open to us to amend this decree.

There is a further contention that this Court is *functus officio*, an appeal to the Privy Council having been lodged; but section 152 expressly contemplates amendment "at any time," and *E.* v. *E.* (3) is a precedent for the amendment of a decree under appeal. This contention, therefore, must, I think, also fail.

But the success of the applicants at once raises the further question whether the decree for costs should not now be confined by us, acting *ex proprio motu*, as regards the added defendants other than the applicants, to the first defendant alone. The consideration of the whole matter was, therefore, adjourned in order to enable Dr. Dwarkanath Mitter to argue this point, and that he has now done. The learned Vakil admits that all the other defendants, except Nos. 2 and 13, are in practically the same position as the applicants. He also admits that the eighth defendant, who was implead-

(1) 7 Ind. Cas. 876; 37 C. 649 at p. 657.
(2) (1885) 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785
(3) (1903) L. R. P. 88; 72 L. J. P. 24; 88 L. T. 570.

ed because he was at the moment managing the Deoria Indigo Concern and the manager of that concern had been nominated by the deed, *ex-officio* so to speak, as one of the "*panches*," is in a much stronger position both by reason of the representative character he was required to assume, and in view of the fact that he has applied in time for a review of judgment. But Dr. Dwarkanath Mitter seeks, as I have indicated, to differentiate the cases of defendants Nos. 2 and 13 one of whom was nominated by the deed as a *pujari* of the endowment and the other as a *panch*. Both filed written statements protesting against their inclusion as defendants and declaring that they had had nothing to do with the endowment and were not interested in it; but, at the same time, they refused to admit that the deed was invalid, and indeed asserted that it was a valid deed of endowment. To this extent, therefore, they may be said to have resisted the plaintiff in the first instance; but they did nothing more than file written statements and no complaint of any interference, much less of any tortuous act, on their part has been made against them in the pleadings or in the evidence. There is, no doubt, this slight difference between them and the others, but Mr. Justice Harington and I certainly did not discriminate between the absent defendants. When we directed that the suit should be "decreed with costs" we can have contemplated only one of two things—costs against all the defendants or costs against the solitary defendant who was before us and present to our minds. No third intention can possibly be extracted from the elliptical words we used; but, as I have shown, we cannot have meant to saddle the applicants with the costs and *a fortiori* we cannot have meant to render the present Manager of the Deoria Indigo Concern liable. Therefore, we did not intend to saddle all the defendants with costs. And, therefore, we must have meant to saddle only the first defendant with the liability. As Mr. Justice Harington has gone I must here speak for myself; and I have no hesitation in saying that, as a matter of fact, it was the first defendant alone that I had in mind and that I had no idea of rendering any body except Ram Gopal Achari liable for the costs of the litigation. That being so, it seems to me to be our clear duty, now that the matter has come to our notice, to amend the decree by confining the order to the first defendant, Ram Gopal Achari, and I think that, if we were to shirk that duty, we should be causing needless anxiety, useless trouble and the accumulation of unnecessary costs.

In the result, I would allow this application and going further I would amend the decree in favour not only of the applicants but of all the defendants Nos. 2 to 14, making no order as to the costs of the present hearing.

RICHARDSON, J.—I was not a party to the judgment and decree out of which the question before us has arisen and am not in a position, therefore, to speak from personal knowledge as to what was intended or not intended. Upon the materials placed before me, however, it seems to me that the question really comes to this, whether the decree as drawn up correctly represents the judgment according to its true intent.

The language of the judgment in regard to costs is ambiguous, the person or persons against whom costs are given not being specified. The difficulty has been caused by the ambiguity and can only be solved by ascertaining what the judgment means. As to that, there can be little doubt. Regard being had to the pleadings and the course which the litigation took and the terms of the judgment as a whole, it seems impossible to suppose that the learned Judges intended to give costs against any of the defendants-respondents except the one who actually came forward to contest the case in the Courts. I am fortified in that view by what has been said by Carnduff, J., who, as one of the Judges who heard the appeal, can speak with authority on the point.

The result then is that an error has been committed in the Court's office in drawing up the decree and the error is one which, as it seems to me, it is open to this Court to rectify either under section 152 of the Civil Procedure Code or under its inherent powers. It is not necessary to review the judgment which, regard being had to the provisions of Order XLVII, rule 5, I am not entitled to do. All that we do as I understand the matter is to bring the decree into accordance with what the Judges really intended, the judgment being left intact. Under Order XX, rule 6, the decree is to agree with the judgment and it is to state "the amount of costs incurred in the suit

and by whom or out of what property and in what proportions such costs are to be paid". All we are doing is to apply these provisions to the decree before us.

I agree in the order proposed.

Application allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 108 OF 1913.

February 4, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

PUNGALUR CHENNAMMA—PETITIONER—APPELLANT

versus

THE MINOR RAJA OF KARVETINAGAR BY GUARDIAN W. A. VARADACHARIAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 73, 104—Application for rateable distribution—Order, whether appealable—Appeal.

No appeal lies from an order passed under section 73 of the Civil Procedure Code, 1908.

Sorabji Coovarji v. *Kala Raghunath*, 12 Ind. Cas. 911; 13 Bom. L. R. 1193; 36 B. 156, distinguished.

Civil Miscellaneous Appeal against the order of the District Court of North Arcot, in Civil Miscellaneous Petition No. 247 of 1912, in Execution Petition No. 108 of 1905, in Original Suit No. 21 of 1882.

Mr. *N. Chandrasekara Aiyar*, for the Appellant.

Mr. *L. A. Govindaraghava Aiyer*, for the Respondent.

JUDGMENT.—The appellant, a decree-holder, applied under section 73 of the Civil Procedure Code to share in the distribution of the sale-proceeds of certain property sold in the execution of a decree obtained by another decree-holder, the *Mahant* of Tirupati, against the same judgment-debtor. His application was rejected by the District Judge and he appeals from that decision. A preliminary objection is taken that no appeal lies. We think this objection is well-founded. No appeal lies under section 104, Civil Procedure Code. But it is contended that this is a dispute arising between parties to the decrees, as the judgment-debtor alone contested his right to a share in the proceeds and he alone is a party to this appeal. We think this makes no difference. Any order passed under section 73, Civil Procedure Code, is an order which affects all the decree-holders who have applied for distribution under that section and the judgment-debtor. And it is conceded that so far as the decree-holders are concerned no appeal will lie by one decree-holder against another. This has been often decided; while that is so, we can see no ground for holding that separate appeals may be filed by the decree-holders against the judgment-debtor. The result would be anomalous. Every decree-holder is interested in any order that may be passed in appeal. We are, therefore, of opinion that no appeal lies. The case cited in *Sorabji Coovarji* v. *Kala Raghunath* (1) has no application.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1036 OF 1912.

November 4, 1913.

Present:—Mr. Justice Johnstone and Mr. Justice Beadon.

Lala DHANPAT RAI—DEFENDANT—APPELLANT

versus

Musammat KAHN DEVI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, Paras. 20 and 21—Arbitration without intervention of Court—Award deciding matters not referred to arbitration, whether legal.

A private award determining matters not referred to arbitration cannot be filed and no decree can be based thereon, even if those matters be separable from the rest of the award.

Bhagat Ram v. *Paras Ram*, 84 P. R. 1907; 184 P. L. R. 1908; *Mustafa Khan* v. *Phulja Bibi*, 27 A. 526; A. W. N. (1905) 86; 2 A. L. J. 416; *Thiruvengadathiangar* v. *Vaidinatha Ayyar*, 29 M. 303, followed.

Narsing Narain Singh v. *Ajodhya Prasad Singh*, 13 Ind. Cas. 118; 16 C. W. N. 256; 15 C. L. J. 110, distinguished.

A plea based on the defendant's acquiescence in the award is one that might be raised in a regular suit between the parties, but cannot be considered in proceedings under paragraphs 20 and 21, Schedule II, of the Code of Civil Procedure.

First appeal from the decree of the District Judge, Lahore, dated 7th March 1912,

ordering the award to be filed in Court and granting a decree giving effect to the award in so far as it deals with the matters which were referred to arbitration.

The Hon'ble Mr. *Shadi Lal*, R. B., and Lala *Tirath Ram*, for the Appellants.

Mr. *Bevan Petman* and Lala *Sangam Lal*, for the Respondents.

JUDGMENT.—On the agreement of the parties to refer to arbitration, an award was delivered but the award decided certain matters which had not been referred to arbitration.

The plaintiffs-respondents then applied to have the award filed and the application was numbered and registered as a suit under paragraph 20, Schedule II, of the Code of Civil Procedure.

In addition to other objections which were overruled the defendant-appellant objected to the filing of the award on the ground that it decided matters not referred to arbitration, but the lower Court, holding that these matters were separable from the rest of the award, passed the decree giving effect to the award in so far as it deals with the matters which were referred to arbitration.

Though in appeal the defendant-appellant, under section 104 (*f*), Code of Civil Procedure, contests the order filing the award, the appeal also purports to be one from the decree itself, and on behalf of the respondents a preliminary objection was taken that the memorandum of appeal is insufficiently stamped. This objection, however, was abandoned when it was pointed out that the decree is merely declaratory and that the Court-fee of Rs. 10 is sufficient for an appeal in a declaratory suit.

Paragraph 21, Schedule II of the Code of Civil Procedure, does not authorise a Court to file an award in part or to give effect to an award in part and *Bhagat Ram* v. *Paras Ram* (1) is authority for holding that, in regard to arbitration without the intervention of the Court, the Court must refuse to file the award when it determines matters not referred to arbitration.

Counsel for the appellant has also cited *Mustofa Khan* v. *Phulia Bibi* (2) and *Thiruvengadathiangar* v. *Vaidinatha Ayyar* (3), in support of the view that the lower Court should have refused to file the award, and Counsel for the respondents is constrained to admit that, in regard to arbitration without the intervention of the Court, the Court has ordinarily no power to amend the award. Reliance, however, is placed on *Narsing Narain Singh* v. *Ajodhya Parshad Singh* (4) and it is contended that, in the circumstances of the present case the lower Court's order and decree are right.

In the case cited the defendant had not appealed and there was no question of setting aside the decree which had been passed and which, as far as it went, had been accepted by both parties. The plaintiff was seeking to have the remaining portion of the award included in the decree and it was held that, as the erroneous action of the arbitrator operated in favour of the defendant, it was not open to him to impeach that part of the award. The award was accordingly filed in its entirety, a decree was drawn up in accordance therewith and thus the award was not amended but was wholly enforced.

In the present case, however, the appeal is by the defendant who has in no way submitted to the decree of the lower Court but continues to press his objections that the award cannot be filed and cannot be made the basis of any decree. Moreover, the award has not been wholly enforced and as the portion of the award, which is outside the matter referred to arbitration, imposes certain duties and liabilities on the defendant, it is doubtful whether this part of the award can be said to be in the defendant's favour.

It has been urged that the defendant has acquiesced but, if this is so, the point is one which might be raised in a regular suit between the parties. It cannot be considered in proceedings under paragraphs 20 and 21, Schedule II, of the Code of Civil Procedure, in which the only points for consideration by the Court are:—

I. Whether or not the matter has been referred to arbitration.

II. Whether or not an award has been made, and

III. Whether or not any ground such as is mentioned or referred to in

(1) 84 P. R. 1907; 184 P. L. R. 1908.
(2) 27 A. 526; A. W. N. (1905) 86; 2 A. L. J. 416.
(3) 29 M. 303.
(4) 13 Ind. Cas. 118; 16 C. W. N. 256; 15 C. L. J. 110.

paragraph 14 or paragraph 15 is proved.

In the present case a ground mentioned in paragraph 14 (*a*) has been proved, namely, that the award determines matters not referred to arbitration, and, on the authority of *Bhagat Ram* v. *Paras Ram* (1) it must be held that the award cannot be filed.

We accordingly accept the appeal and, setting aside the order and decree of the lower Court, we direct that the application to file the award be dismissed. We think, however, that the case is one in which each party should pay its own costs throughout and we order accordingly.

Appeal accepted.

ALLAHABAD HIGH COURT.

CIVIL REFERENCE No. 519 OF 1913.

January 20, 1914

Present:—Mr. Justice Ryves and Mr. Justice Piggott.

INDAR MAL—PETITIONER

versus

BALDEO DAS AND ANOTHER—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Suit for recovery of money based on account —Jurisdiction.

A suit for the recovery of a sum of money, the precise amount of which cannot be ascertained unless the accounts of the parties have been examined, is cognizable by a Small Cause Court.

Civil Reference made by the District Judge of Agra.

Mr. *L. M. Banerji*, for the Opposite Party.

JUDGMENT.—This case has been referred to us by the learned District Judge of Agra with a recommendation that the order of the Court of Small Causes returning the plaint to the plaintiff for presentation to another Court is contrary to law. The Small Cause Court, although no written statement had been filed, on representation made on behalf of the defendant seems to have come to the conclusion that the suit was one for accounts and for this reason ordered the plaint to be returned. An examination of the plaint shows that it is not a suit for accounts but for the recovery of a sum of money, the precise amount of which cannot be ascertained unless the accounts of the parties have been examined. In our opinion the suit was one cognizable by a Small Cause Court. We, therefore, set aside the order of that Court and direct the Court to re-admit the plaint to its original number and to dispose of the case according to law.

Order set aside.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 13 OF 1913.

February 13, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

SRINIVASACHARIAR—PETITIONER—APPELLANT

versus

GOPALAN MINOR BY HIS GUARDIAN AND FATHER RAMASWAMY IYANGAR AND ANOTHER—RESPONDENTS.

Succession Certificate Act (VII of 1889)—Application for certificate—Question as to whether debt belongs to deceased, whether relevant.

In an application for a succession certificate under Act VII of 1889, the question, whether the debts in respect of which the certificate is applied for belong to the deceased or not, is irrelevant, and cannot be gone into.

Bai Kashi v. *Parbu Keval*, 28 B. 119; 5 Bom. L. R. 721, followed.

Radha Rani Dassi v. *Brindaban Chandra Basack*, 25 C. 320; 2 C. W. N. 59, dissented from.

Appeal against the order of the District Court of Chingleput, dated the 2nd November 1912, in Succession Certificate Petition No. 25 of 1912.

Mr. *J. S. Jayarama Iyer*, for Mr. *G. S. Ramachandra Iyer*, for the Appellant.

Dewan Bahadur *M. O. Parthasarathy Iyangar*, for the Respondents.

JUDGMENT.—The Judge has dismissed the petition on the ground that the debts in respect of which the certificate is prayed for did not form the property of the deceased but very probably they belong to one of the persons who oppose the grant of the Succession Certificate to the appellant. We are of opinion that the question whether the debts belonged to the deceased is not a matter to be decided on this application. We agree with the decision of *Bai Kashi* v. *Parbu Keval* (1) which has been followed in Appeal

(1) 28 B. 119; 5 Bom. L. R. 721.

against Order No. 42 of 1906 by Benson and Wallis, JJ. We are unable to agree with the opinion of the Chief Justice to the contrary in *Radha Rani Dassi* v. *Brindaban Chundra Basack* (2). The order of the lower Court is, therefore, reversed and the District Judge is directed to restore the application to his file and dispose of it according to law. Costs hitherto incurred will be provided for in the final order.

Order reversed.

(2) 25 C. 320; 2 C. W. N. 59.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 606 OF 1912.
November 3, 1913.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.
SINGAMUSETTI VENKATIAH AND OTHERS—DEFENDANTS—APPELLANTS
versus
BOPPELLA CHIRRANNA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24—Civil Procedure Code (Act XIV of 1882), s. 25—District Court—Powers of transfer—Subordinate Judge's Court—Inherent power—Jurisdiction.

If a District Judge, to whom an appeal has been remanded by a High Court, transfers the same to a Sub-Judge and the latter disposes of it without any objection being taken as to his jurisdiction, the irregularity would not affect his decision on merits.

Gurdeo Singh v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbihary Singh*, 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611, followed.

Under section 24 of the new Civil Procedure Code the District Court's powers of transfer are much wider than they were under the old law.

Sita Ram v. *Nauni Dulaiya*, 21 A. 230; A. W. N. (1899) 38; *Chowdhry Hameddoollah* v. *Muteeoonissa Bibi*, 15 W. R. 574, *Tarucknath Mookerjee* v. *Gouree Churn Mookerjee*, 3 W. R. 147, referred to.

Second appeal against the decree of the Subordinate Judge of Kurnool, in Appeal Suit No. 13 of 1904, preferred against that of the Court of the District Munsif of Gooty, in Original Suit No. 388 of 1903.

JUDGMENT.—The questions of fact have been decided by the lower Appellate Court against the appellants (defendants Nos. 2 to 6) and we are bound by the lower Court's said finding of fact.

As regards the contention that defendants as tenants are entitled to notice to quit, it was found by the Munsif that the defendants were tenants of plaintiffs' vendor's mortgagees, that their lease term expired two months before this suit was brought and that hence no notice to quit was necessary. The defendants did not, in their appeal memorandum to the lower Appellate Court, object to the finding of the Munsif, that they were not plaintiffs' or plaintiffs' vendor's (1st defendant's) lessees after they attorned to 1st defendant's mortgagee. On that finding, the plaintiff, who was not their landlord when their illegal possession commenced in May 1903, was not bound to give them notice to quit.

The contention most strongly pressed by the appellant's learned Counsel was that the Subordinate Judge who heard the appeal had no jurisdiction to hear it as the High Court remanded the appeal for hearing by the District Court and the District Court had no power to transfer such a remanded appeal for disposal to the Subordinate Judge. We might here state that the appellants raised no objection either before the District Court or before the Subordinate Judge's Court to the validity of the order of transfer. Under those circumstances we hold on the authority of the case of *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbihary Singh* (1), that the Subordinate Judge's inherent jurisdiction was (putting it at the worst) merely exercised irregularly and that the irregularity has not affected the merits (section 99, Civil Procedure Code). We might add that considering the more comprehensive language of section 24 of the new Civil Procedure Code (corresponding to section 25 of the old Code) the District Court's powers of transfer are much wider than under the old law. We refer to the addition of the words "at any stage", and of the words "appeal or other proceeding" in the new Code, as well as the new clause (1) (*b*) (*iii*) and the new clause (2).

Even under the old Code, we are not satisfied that the observations in *Sita Ram* v. *Nauni Dulaiya* (2), about section 25 not applying to cases remanded under section 562, and the similar observations in

(1) 1 Ind. Cas. 913; 36 C. 193 at pp. 201, 202; 5 C. L. J. 611.
(2) 21 A. 230; A. W. N. (1899) 38.

ATAB PRAMANICK v. MEHRULLA SARDAR.

Chowdhry Hamedoollah v. *Muteeoonissa Bibee* (3), are not in the nature of *obiter dicta* [see *Tarucknath Mookerjee* v. *Gouree Churn Mookerjee* (4), *contra*] even if they are not explained away by the observations in *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrika Singh* v. *Rashbihary Singh* (1).

In the result, the second appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 15 W. R 574.
(4) 3 W. R. 147.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3659 OF 1911.
March 19, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
ATAB PRAMANICK AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
MEHRULLA SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Two mortgages on same property—Decree on second mortgage—Sale in execution—Purchase by mortgagee—Judgment-debtor sold part of mortgaged property to other persons in presence of mortgagee—Decree money paid to mortgagee purchaser—Satisfaction entered by mortgagee—Sale set aside—Suit by mortgagee upon first mortgage—Right of mortgagee to sell portion of mortgaged property sold to other persons—Estoppel—Not stating first mortgage in sale proclamation—Misrepresentation.

The defendants Nos. 1 to 4 executed a mortgage-bond in favour of the plaintiffs. A subsequent mortgage was executed by those defendants in favour of the plaintiffs on the same property. The plaintiffs got a decree upon this second mortgage and put the property up for sale. The property which consisted of 21 *bighas* of land was sold and the plaintiffs purchased it and obtained possession. The defendants Nos. 1 to 4 made arrangement with defendants Nos. 5 to 10 to sell to the latter 15 *bighas*, out of the 21 *bighas* mortgaged, for Rs. 1,000 and out of this money, Rs. 958 odd were paid to the plaintiffs, who were present, in satisfaction of their decree. The plaintiffs certified satisfaction and allowed the sale to be set aside. The plaintiffs then sued on their first mortgage-bond and sought to make not only the lands remaining in the hands of defendants Nos. 1 to 4 liable but also the 15 *bighas* which had passed into the hands of defendants Nos. 5 to 10:

Held, (1) that it was open to the plaintiffs in the present suit to proceed only against the mortgaged property remaining in the hands of defendants Nos. 1 to 4;

(2) that the plaintiffs could not be barred by estoppel merely by reason of their not having stated in the sale proclamation that there was a prior incumbrance;

(3) that as the plaintiffs kept silent as to their prior lien when part of the property was sold to defendants Nos. 5 to 10, they were guilty of misrepresentation, and, therefore, they could not touch the part of the property sold to those defendants.

Appeal from the decree of the District Judge of Rajshaye, dated September 19th, 1911, modifying that of the Sub-Judge of that District, dated February 7th, 1910.

Babus *Mohini Mohan Chackravarty* and *Krishna Kamal Moitra*, for the Appellants.

Babu *Monmotha Nath Mookerjee*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment and decree of the learned District Judge of Rajshaye who in modification of the decree passed by the Officiating Subordinate Judge has dismissed the plaintiffs' suit in respect of the mortgage land, which was sold to the defendants Nos. 5 to 10, and upheld the Munsif's decree in their favour against defendant No. 1 after contest and against defendants Nos. 2 to 4 *ex parte* in respect of the land remaining unsold. The plaintiffs appeal.

The facts which are necessary to set out are as follows: The defendants Nos. 1 to 4 or rather defendant No. 1 on behalf of himself and the others executed a mortgage-bond in favour of the plaintiffs on the 28th *Magh* 1299. A subsequent mortgage was executed by defendants Nos. 1 to 4 dated the 22nd *Falgoon* 1300, upon the same property. The plaintiffs got a decree upon this second mortgage and put the property up for sale. On the day the sale was held at Court in execution of the decree the plaintiffs filed an application for having it published that the property was liable to a further incumbrance, but that application was dismissed on the ground that it was too late. The property was sold and the plaintiffs obtained possession. On the 8th August 1908, the sale was set aside under the following circumstances:—The defendant No. 1 made arrangement with defendants Nos. 5 to 10 at the Court house at Noagaon to sell 15 *bighas*, out of 21 *bighas* mortgaged, to the defendants Nos. 5 to 10 for Rs. 1,000 and out of this money Rs. 958-4 6 were paid on the same day at Noagaon to the plaintiffs who were present in satisfaction of their decree. On the same day the plaintiffs in the Court of Munsif at Noagaon certified satisfaction and allowed

the sale which was held in execution of the decree for sale in the suit of the second mortgage to be set aside. The plaintiffs now sue on their first mortgage-bond, and they seek to make not only the lands remaining in the hands of defendants Nos. 1 to 4 liable but also the 15 *bighas* which has passed into the hands of defendants Nos. 5 to 10. The learned Subordinate Judge held that it was competent to them to do so.

The learned Judge in the Court below has, as we have seen, held that they cannot attach the property in the hands of defendants Nos. 5 to 10. But he has held in agreement with the Subordinate Judge that the suit on the second mortgage was not incompetent, and for this he has relied upon the Full Bench ruling in *Sundar Singh* v. *Bholu* (1), and the defendants Nos. 5 to 10 who alone appear as respondents in this appeal have, as they have every right to do, taken objection that the learned Judge was in error in this finding. In the Allahabad case the Full Bench held that the holder of two independent mortgages for one and the same property may sue to obtain a decree for sale on each of them separately. But what the learned Judge appears not to have noticed is that the Court also held that having obtained such a decree in each of the suits it would be difficult to see what benefit the two decrees would be to the plaintiffs except that the plaintiffs may execute one of these decrees by sale of the property, and if there is a surplus arising from the sale they may probably attach that surplus in execution of the other decree. There is a later case which has been brought to our notice reported as *Keshavram Dulavram* v. *Ranchhod Fakira* (2) and there it has been held, that where a mortgagee holds two mortgages on the same property executed by the same person he cannot maintain a suit to recover the sum due on the latter mortgage only by sale of the property subject to the prior mortgage, that is to say, that the decree obtained by the plaintiffs in the first suit precludes him from any further lien upon the property brought to sale. The Judges say: "It will be observed that section 43 of the Civil Procedure Code is imperative. Suppose a decree was passed for the plaintiff herein and he afterwards sued on the first mortgage, 'as is the case here, it seems to us that that would be a 'splitting of his claims' within the meaning of Sir Lawrence Jenkins' judgment, in *Govind* v. *Parashram* (3), which section 43 was intended to prevent".

It is argued by the learned Vakil who appeared for the plaintiffs that as a fact the plaintiffs did get a decree in their suit upon the second mortgage and that they did in their plaint in that suit state implicitly that they reserved their lien upon the first mortgage, but that reservation was objected to by the defendants in terms and the Court elected to proceed with the suit and passed a decree without adjudicating upon what effect that decree would have upon future litigation in respect of the first mortgage. Upon consideration of the law as laid down in all these cases it seems to us that it is only open to the plaintiffs in the present suit to proceed against the mortgaged property remaining in the hands of defendants Nos. 1 to 4 and possibly, as was pointed out in the Allahabad case, against the surplus sale-proceeds obtained by defendants Nos. 1 to 4 from defendants Nos. 5 to 10. But, of course, this case is different from the Allahabad case inasmuch as the sale to defendants Nos. 5 to 10 was not a Court sale. But the legal position of the plaintiffs which we have thus determined seems to us to throw a good deal of light upon the further question as to whether the plaintiffs were guilty of misrepresentation in not disclosing to the defendants Nos. 5 to 10 the fact of the existence of the first mortgage at the time they purchased the property from defendants Nos. 1 to 4.

There is an error in the judgment of the learned District Judge as to a question of fact. He states that defendant No. 6, Mithan states in his evidence that the money was paid through him to the plaintiff, and this is not improbable and may be accepted as true. What this witness does say is that the money was paid through him to the defendant No. 1. But, in our opinion, this is immaterial, inasmuch as it is admitted by the plaintiff himself in his evidence that both he and his co-plaintiff were present at the time

(1) 20 A. 322; A. W. N. (1898) 58.
(2) 30 B. 156; 7 Bom. L. R. 811.
(3) 25 B. 161; 2 Bom. L. R. 864.

the transaction in connection with the setting aside of the sale was carried out in the Noagaon Court-house, and the learned Judge finds that the plaintiffs must have known and did know about the purchase by defendants Nos. 5 to 10 and did not then disclose to them the fact of the existence of the first mortgage.

It is argued, however, by the appellants' Vakil that the learned Judge has based his finding of misrepresentation upon a wrong circumstance. He based it upon the fact that the plaintiffs announced to the world in their sale proclamation that the properties were not subject to incumbrance and the defendants Nos. 5 to 10 relied upon it and the plaintiffs not having disclosed to them at the time of their purchase the existence of the earlier mortgage they are estopped from ignoring or impugning the sale made to the defendants Nos. 5 to 10 of the 15 *bighas*.

It does not appear to us that the plaintiffs can be barred by estoppel merely by reason of their not having stated that there was a prior incumbrance in the sale proclamation, for the plaintiffs did not then owe any duty to inform the defendants Nos. 5 to 10 who did not purchase at the sale of this prior incumbrance. The authorities upon the law of mortgage have been freely cited to us, and the learned Doctor Ghose's work upon Mortgage has been used as part of the argument of the learned Vakil for the plaintiffs. "The law", says the learned Doctor, "does not oblige the mortgagee to give notice of his charge to any person whom he knows to be in treaty for the sale or settlement of the property. A mortgagee need not go out of his way to give notice of his security upon hearing that the mortgagor is dealing with the estate". An English authority is cited for this proposition. But if a person who proposes to make an advance on a property informs a mortgagee of his intention in such a manner as to show that he intended to be guided by what he might hear from the mortgagee and the mortgagee remains silent, then in either of these cases the mortgagee will be held guilty of fraud; and in the same way Story in his Treatise on Equity Jurisprudence deals with the matter, as we think it undoubtedly must be dealt with, as a question of evidence rather than one of mere jurisprudence. After mentioning what the Roman Law was on the subject and how nearly the akin the English Law is, he says that as to what shall be deemed a consent the Roman Law is very guarded, for it is there stated that we are not to take for a consent of the creditor to an alienation of the pledge the knowledge which he may have of it, nor the silence which he may keep after he knows it as if he knows that his debtor is about selling a house which is mortgaged to him and he says nothing about it. But in order to deprive him of his right it is necessary that it should appear by some act that he knows what is doing to his prejudice and consents to it, or that there is some ground to charge him with dishonesty for not having disclosed his right when he was under an obligation to do it, by which the purchaser was misled.

The real question in this case is, therefore, a question of fact, namely, was the plaintiff, who was present at the negotiation for sale between defendants Nos. 1 to 4 and defendants Nos. 5 to 10 and was willing to receive the purchase-money in satisfaction of his decree and to have the sale set aside bound as a party to the transaction to disclose to the defendants Nos. 5 to 10 the fact that he had a prior mortgage upon the property? It is admitted that the property was sold for its full value to defendants Nos. 5 to 10. It is admitted that the plaintiffs were present at the transaction. It is stated by the defendant No. 6 that the defendant No. 1 and his Pleader showed him the sale proclamation and pointed out to him that there was no prior mortgage mentioned and stated as a fact that there was no such prior mortgage. The learned Judge's finding appears to amount to this that the plaintiffs being present in the Court-house knew of this transaction and kept silent as to their prior lien. We, therefore, think that they were in fact guilty of misrepresentation and that the error which the learned Judge has fallen into in discussing the evidence does not vitiate his finding, so that upon that ground alone his finding must be supported. But we would hold as we have already said that in law the plaintiffs are now precluded from suing to recover by a second sale of the property which has passed to the defendants Nos. 5 to 10.

That being so the appeal must be dismissed with costs.

Appeal dismissed.

INDAR PAL SINGH *v.* MEWAH LAL.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 204 OF 1912.
March 10, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

INDAR PAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MEWAH LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Order II, r. 2, O. XXXIV, r. 14—Mortgage—Decree for recovery of money due under mortgage, not satisfied—Subsequent suit for sale of property, whether maintainable—Limitation Act (IX of 1908), s. 19—Acknowledgment of debt by Manager of Hindu joint family, whether other members bound.

A mortgagee brought a suit on the basis of his mortgage for a simple money-decree only. The suit was decreed but the decree, not having been satisfied, he brought a second suit on the basis of the same mortgage for the sale of the mortgaged property:

Held, that the second suit was maintainable under Order XXXIV, rule 14, in spite of the provisions of Order II, rule 2, of the Civil Procedure Code.

An acknowledgment of a debt made within limitation by the manager of a joint Hindu family is binding on other members of the family.

First appeal from the decision of the Subordinate Judge of Allahabad, dated the 28th February 1912.

Mr. *Rahamatullah*, for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *B. K. Mukerjee*), for the Respondent.

JUDGMENT.—This appeal arises in a suit brought by the plaintiffs-respondents for sale upon a mortgage executed on the 6th of September 1895 by one Amir Singh, his four sons and his wife in favour of Mewah Lal and Lachmi Narain plaintiffs. Prior to the execution of that mortgage another mortgage had been executed in favour of the Akhara Panchaiti in 1893. A suit was brought by the prior mortgagees and a decree was obtained by them under a compromise to which the present plaintiffs were also parties. After this compromise was made the plaintiffs on the 29th of March 1900 brought a suit on the basis of their mortgage-deed for a simple money-decree, and they did not seek to enforce their right to bring the mortgaged property to sale. In that suit a decree was passed in favour of the plaintiffs, but as the amount of the decree was not paid the plaintiffs brought the suit out of which this appeal has arisen to enforce the mortgage. Various pleas were set up in defence but they were overruled by the Court below and a decree was made in the plaintiffs' favour for sale of the mortgaged property. The decree, however, provides that the plaintiffs would not be entitled to a decree absolute for sale unless they relinquished all their rights under the money-decree obtained by them.

The defendants, who are the mortgagors, and members of their family have preferred this appeal, and the first contention raised on their behalf is that in view of the provision of Order II, rule 2 of the Code of Civil Procedure, the plaintiffs are not entitled to maintain this suit. This contention has, in our opinion, been rightly repelled by the Court below. The answer to it is furnished by the provisions of Order XXXIV, rule 14, of the Code. That rule provides that if a decree is obtained under a mortgage, the property comprised in that mortgage will not be sold in execution of such a decree unless the mortgagee obtains a decree for sale of the property, but Order II, rule 2, shall be no bar to the maintenance of a suit for sale.

It cannot be contended that the first suit brought by the plaintiffs for a money-decree could not be maintained. It is true that Order II, rule 1, provides that all suits should be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. The penalty for not following the directions contained in that rule is provided by rule 2. Ordinarily if rule 1 was violated rule 2 would preclude the plaintiff from bringing a second suit, but in the case of a mortgage we have the distinct provision in Order XXXIV, rule 14, which permits of a suit being brought for sale upon the mortgage in spite of the provisions of Order II, rule 2. Therefore, it is manifest that the rule last mentioned is no bar to the present suit. It is urged that the bar is afforded by the fact that in their plaint in the previous suit the plaintiffs stated that they relinquished their right to enforce the mortgage. If this statement be regarded as an agreement releasing their rights as mortgagees, that agreement being without consideration cannot be enforced. The mere averment in the plaint that the plaintiffs gave up their right under the mortgage for the purpose of that suit cannot

be regarded as an extinguishment of the mortgagee rights.

It is next contended that section 11 of the Code of Civil Procedure is a bar to this suit. The matter now in dispute was never directly or otherwise in issue between the parties in the former suit and it was not a matter which could have formed the ground of attack for the relief claimed in that suit. Therefore, in our opinion, section 11 or any of the explanations to that section has no application to the present case.

The next contention was that the present claim was barred by limitation. As to this we may only point out that in the written statement filed in the previous suit the mortgage in question was admitted. So that there was an acknowledgment of liability under the mortgage before the expiry of the prescribed period of limitation and a fresh start for the commutation of limitation accrued to the plaintiffs from the date of the acknowledgment. In the written statement mentioned above the allegations in the plaint were admitted including an allegation as to the mortgage and the amount payable under the mortgage being due, and the only contention raised was that the stipulation as to interest was hard and unconscionable. We think that the Court below came to a right conclusion in holding that the claim was not time-barred. The acknowledgment having been made by the manager of the joint Hindu family was, in our opinion, binding on the other members. It is not suggested that there was any fraud or collusion in connection with the acknowledgment.

The next contention is that in the money-decree which was passed in the former suit the Court stated that "the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on." This provision in the decree we understood to mean that under the decree which was passed by the Court the decree holders would have no right to bring the mortgaged property to sale, that is to say, that the mortgagees would not be allowed to violate the provisions of section 99 of the Transfer of Property Act. The Court evidently thought it possible that the plaintiffs might try to put the property to sale contending that they had relinquished their right to enforce the mortgage, and, therefore, it considered it desirable that it should be clearly provided in the decree that they would not be allowed to do so. We do not think that the Court intended to order or ordered that there would never be a suit for sale of the mortgaged property.

A further contention was raised that the plaintiff should not be allowed interest at a higher rate than that allowed by the decree to which we have referred. As to this we may mention in the first place that no such contention was raised either in the Court below or in the memorandum of appeal to this Court. Further as the plaintiffs are entitled to sue upon their mortgage they have a right to claim interest at the stipulated rate up to the date fixed for payment. This part of the defendants' case is as untenable as the rest.

As to the costs of the previous suit in regard to which a contention was put forward on behalf of the appellants, we may observe that the plaintiffs will not be entitled to recover these costs having regard to the terms of the decree passed in this case by the Court below. The costs of the present suit were incurred by the plaintiffs because they did not discharge the money-decree which was passed against them, and the plaintiffs have, therefore, in our opinion, been rightly awarded the costs of the present litigation.

We accordingly dismiss the appeal with costs including in this Court fees on the higher scale. We extend the time for payment for six months from this date. Interest at the stipulated rate will run to the extended date. No further interest will be allowed after such date.

Appeal dismissed.

VALLIAPPA CHETTY *v.* SUBRAMANIAN CHETTY.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 95 AND 96 OF 1913.

March 13, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar

P. M. A. VALLIAPPA CHETTY—PETITIONER

versus

T. N. SUBRAMANIAN CHETTY—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), *s.* 22—Hundi—*Days of grace—Contract, not allowing days of grace, whether permissible.*

Per *Seshagiri Aiyar, J.*—It is open to parties to enter into a contract that the provisions of section 22, Negotiable Instruments Act, relating to days of grace shall not apply to them, and it is not open to the promisee to insist that the maker of the note should be compelled to take advantage of the days of grace.

Where the giving up of a benefit secured by law does not offend against public policy, the Courts will enforce a contract to that effect.

East India Company v. *Odit Churn Paul*, 7 M. P. C. 85; 13 Eng. Rep. 811; 14 Jur. 253, *MacAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; 135 R. R. 739, 49 L. J. C. P. 443; 42 L. T. 81; 28 W. R. 584; *Markham* v. *Stanford*, 14 C. B. (N. S.) 376; 8 L. T. (N. S.) 277, followed.

No question of public policy is involved in the inclusion or omission of provisions for days of grace.

Per *Sadasiva Aiyar, J.*—As section 22 of the Negotiable Instruments Act omits in a marked manner the provision in section 14 of the English Bills of Exchange Act allowing the parties to contract that the bill shall come to maturity on the date fixed in it without the addition of days of grace, it is not open to the parties to contract themselves out of the benefit of that section by agreeing that the days of grace shall be dispensed with.

East India Company v. *Odit Churn Paul*, 7 M. P. C. 85; 13 Eng. Rep. 811, 14 Jur. 253, distinguished.

Petitions under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the Temporary Subordinate Judge of Ramnad, in Small Cause Suits Nos. 1406 and 1407 of 1911.

Mr. *A. Krishnasami Aiyeh*, for the Petitioner.

Mr. *A. Venkatarayula Aiyar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—I have the great advantage of having read the judgment prepared in this case by my learned brother.

It is often a difficult question to decide whether a statutory provision has been made solely for the benefit and protection of the individual in his private capacity or whether some public right and public policy is also involved in it. I am inclined not to go behind the plain words of a statute. Section 22 of the Negotiable Instruments Act clearly says that "every promissory-note or bill of exchange, which is not expressed to be payable on demand, at sight or on presentment, is at maturity on the third day after the day on which it is expressed to be payable." In the Contract Act, in the Transfer of Property Act, in the Negotiable Instruments Act and several other Acts there are numerous provisions made solely for the benefit and protection of the individual in his private capacity, and yet the Legislature has thought it necessary, whenever it wanted to indicate that the parties can waive the benefit of such provisions, to begin such sections with the words "in the absence of a contract to the contrary" or similar words. As section 22 of the Negotiable Instruments Act omits in a marked manner the provision in section 14 of the English Bills of Exchange Act allowing the parties to contract that the bill shall come to maturity on the date fixed in it without the addition of days of grace, I think that the promissory-note governed by the Negotiable Instruments Act cannot dispense with the days of grace. As regards the case, *The East India Company* v. *Odit Churn Paul* (1), it is, of course, binding on me but it seems to me that it is rather against the defendant. Lord Campbell's words at page 112 are: "There might be an agreement that, in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations .....and an action might be brought for breach of such an agreement" (that is, as I take it, for damages for breach of such agreement). His Lordship, however, proceeds to say, "but if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined.....the defendant, notwithstanding any agreement to inquire, is entitled to the verdict." This rather shows that the statute law could not be evaded by an agreement of parties though such an agreement might form the basis of independent action. I need not say that I put forward this conclusion of mine with some diffidence in view of the arguments which have been put forward by my learned brother to uphold the contrary view.

(1) 7 M. P. C. 85; 13 Eng. Rep. 811; 14 Jur. 253.

I entirely agree, however, with my learned brother on the 2nd point discussed in his judgment. I do not believe that the 2nd plaintiff had the authority of the 1st plaintiff to present or to sign the plaint on behalf of the 1st plaintiff when the 2nd plaintiff so signed and presented it.

I am also satisfied that there was no ratification by the 1st plaintiff of the 2nd plaintiff's said act before the period of limitation was over and any ratification after the expiry of the period of limitation cannot be allowed to the prejudice of the defendant. I, therefore, agree that these civil revision petitions should be dismissed with costs.

SESHAGIRI AIYAR, J.—The suit is brought on a *hundi* executed on the 18th May 1908 which runs as follows:—

"180 days after date (without grace) I promise to pay etc."

The 180 days ended with the 14th of November 1908. The suit was instituted on the 15th of November 1911. The question for decision is whether under section 22 of the Negotiable Instruments Act the plaintiff can claim that limitation commenced to run against him only on the 17th of November when the three days of grace allowed by that section expired, although the contract of the parties excludes the days of grace Under the English Law, the Bills of Exchange Act of 1882, section 14, which corresponds to section 22 of the Indian Act, provides that the days of grace shall be included only when the bill itself does not otherwise provide. The Indian Act does not contain a similar provision. Moreover, there are provisions in the Act which protect rights of parties under contracts notwithstanding anything to the contrary in the sections of the Act. (See sections 32, 35, 37 and 38.) On this ground it is argued that the omission in section 22 of words saving the contract of parties implies that the Legislature deliberately precluded parties from entering into contracts against the provisions of section 22. The report of the Select Committee on the Negotiable Instruments Bill shows that an endevour was made to omit all reference to days of grace in the Act itself but that failed. I am not prepared to accede to the contention that the failure to save the rights of parties in section 22 was a deliberate departure from the rule of English Law. It is a case of accidental omission. There was no intention to enact a separate rule of law in this country on the question of days of grace. I may also point out that the provision that a note shall be payable only after the days of grace is *prima facie* for the benefit of the maker of the note, and if he chooses to give up his privilege, the promisee cannot insist upon his taking advantage of the rule. As pointed out in Halsbury's Laws of England, Vol. II, Note to section 806, in all the continental countries, provision for days of grace has been abolished. It can, therefore, be safely assumed that no question of public policy is involved in the inclusion or omission of provisions for days of grace.

In *The East India Company* v. *Odit Churn Paul* (1) Lord Campbell, in delivering the judgment of the Judicial Committee, points out that it was open to the parties to stipulate that the ordinary rules of limitation shall not bind them with reference to particular contracts, the reason of the rule being that the non-observance of the statute affects only private rights and private individuals and does not offend against public policy. In *MacAllister* v. *Bishop of Rochester* (2), Lindley, J, held that private rights can be waived or renounced by parties to the contract; but if one of the contracting parties happens to occupy a fiduciary position, it was not open to him to give up rights which inhere in the general body of the public and not in him in his private capacity. The learned Judge observes: "We think, therefore, the well-known principles of equity on which the defence set up is based are not applicable to a case of this description." This observation was made in answer to the argument of Counsel that public policy is not opposed to parties waiving private rights. In Maxwell's 'Interpretation of Statutes', 4th Edition, the general law is thus summarised at page 580*. "Another maxim which sanctions the non-observance of a statutory provision is that, '*cuilibet licet renuntiare juri pro se introducto.*' Every one has a right to waive, and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of

(2) 5 C. P. D. 194 at p. 206; 49 L. J. C. P. 443; 42 L. T 81; 28 W. R. 584.

* 5th Edition page 625.—*Ed.*

the individual in his private capacity and which may be dispensed with without infringing on any public right or public policy." The cases of *Markham* v. *Stanford* (3) and *Walton* v. *Mascall* (4) are illustrations of this rule. The American Law on this point is very clear. In 7 Encyclopædia of Law and Procedure, page 871, it is stated: "Although the law merchant allows days of grace, the parties may stipulate that they shall not be allowed and, if the instrument shows an intention, it will be given effect. In some states the statute in terms allows grace only where the instrument contains no provision or stipulation to the contrary. The mere fact that an instrument or a memorandum therein states that it is due or payable on a certain day does not exclude grace. Even where there is no stipulation excluding days of grace, the right to grace may be waived by the party bound, as where a tender of payment is made on the day of maturity without grace and is refused on other grounds." The above authorities show that where the giving up of a benefit secured by law does not offend against public policy, or is not renounced by a person who holds a representative character, the Courts will enforce the contract. In this case the parties have chosen to expressly stipulate that the days of grace shall not be counted in reckoning the due date; and the individual for whose benefit the provision of law was intended has agreed to abide by the terms of the contract. I have, therefore, come to the conclusion that it is open to the parties to enter into a contract that the provisions of section 22 relating to days of grace shall not apply to them; and it is not open to the promisee to insist that the defendant should be compelled to take advantage of the days of grace in order that the starting point of limitation for him may commence on their expiry. My decision is that the suit is barred by limitation.

The decree of the Subordinate Judge can be supported on another ground also. The suit was instituted by two plaintiffs but the plaint was signed only by the second. The 2nd plaintiff claims to be the agent of the first. The Court returned the plaint on the ground that the 1st plaintiff had not signed it; it was not represented until after the period of limitation was over. The affidavit filed to show that the 2nd plaintiff had authority to file plaints does not give particulars regarding the authorisation. I am unable to hold that the 2nd plaintiff had authority prior to the institution of the suit to file the plaint on behalf of the 1st plaintiff. The suit is, therefore, barred by limitation on that ground as well.

I dismiss the petitions with costs.

Petitions dismissed.

(3) 14 C. B. (N. S.) 376; 8 L. T. (M. S.) 277; 135 R. R. 739.

(4) 13 M. & W. 452 at p. 458; 14 L. J. Ex. 54; 2 Dowl. & L. 410; 67 R. R. 671.

PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

February 25, 1914.

Present:—Lord Shaw, Lord Moulton and Mr. Ameer Ali.

MA NHIN BWIN—APPELLANT

versus

U SHWE GONE—RESPONDENT.

Burmese Buddhist Law—Succession—Co-heirs—Living separately—Brothers and sisters exclude parents.

According to Burmese Buddhist Law brothers and sisters are also co-heirs and, when living separate from their parents, the survivors succeed the deceased.

Therefore, where three sisters had settled separately from their father, the last surviving sister was held entitled to the estate of her two deceased sisters in preference to their father.

Appeal against the judgment of Mr. Justice Hartnoll and Mr. Justice Parlett, dated 14th June 1910, reported as 9 Ind. Cas. 442; 4 Bur. L. T. 1; 5 L. B. R. 231.

JUDGMENT.

LORD SHAW.— This is an appeal from a judgment and decree of the Chief Court of Lower Burma. The judgment is dated the 14th June 1910,* and it reverses a decree of the same Court in its Original Civil Jurisdiction dated the 16th February 1909. The appeal is also from an order dated the 2nd September 1910 which rejected the appellant's application for a review of the decree first mentioned.

The question to be afterwards dealt with is one of wide spread importance, affecting the rights of succession in Burma. It is, however, necessary to state the circumstances, which are few and plain, in such a way as to show the limits of the decision which is about to be pronounced. These will appear as the narrative proceeds.

The respondent, U Shwe Gone, had three daughters by his first marriage. These were

* See 9 Ind. Cas. 442; 4 Bur. L. T. 1; 5 L. B. R. 231 *Ed.*

Mah Nhin Bwin, the eldest, Mah Nhin Boo, about two years younger, and Mah Nhin Ghine, about six years her junior. The eldest, Mah Nhin Bwin, is the appellant in this case. She was born about the year 1865.

These three sisters lived together apart from their father. They traded in cocoanuts in the Municipal Bazaar at Rangoon. This state of matters lasted for many years, and one of the outstanding facts in the case is the complete separation of these ladies from their father, who had married again. They were, in fact, independent traders. In later years their business appears to have been of considerable importance. One part of it, for instance, mentioned in the proceedings, is three cargoes of Nicobar nuts, of which one of the ladies was consignee, and the combined value of which amounted to a large sum. In the year 1899, the three sisters bought a house in Rangoon with money derived from the profits of their trading, and they thereafter always lived there together. What were the exact relations in the eye of the law as between these three ladies need not be determined in this case. Whether they were all, or any two of them, in full partnership or in joint adventure with each other does not require to be decided in view of the events of death which happened, and of the opinion on the legal point of succession which is afterwards to be announced.

In May 1905 Mah Nhin Ghine died. Her sister, Mah Nhin Boo, took out Letters of Administration and took possession of her property. Their father, the respondent, however, made a claim thereto, and threatened proceedings, but nothing further was done. In June 1906 Mah Nhin Boo died of plague. Of the three sisters, the appellant was thus the sole survivor.

Should it accordingly be determined, as the respondent contends, that he, being the father of these two deceasing ladies, is entitled by the law of Burma to succeed to their property as their heir in preference to their surviving sister, then the corpus of the estate, whether it originally belonged to the one sister or the other, or to both, will go to him. If, on the other hand, as the appellant, the surviving sister, contends, it be the case that she is entitled as such to succeed as heir to her sisters, then again the entire corpus of the estate of both will pass to her in preference to her father. The point to be determined in this case is which of those two contentions is correct according to Burmese Buddhist Law.

A subsidiary question was raised in the appeal. It was founded upon allegations of commercial partnership existing between the appellant and her sister, Mah Nhin Boo. Separate issues, which in appropriate circumstances might come to be of great importance under the law of Burma, were raised as to the rights of a surviving partner, on the one hand in a full partnership, and on the other in a limited partnership or co-adventure. These questions have not been lost sight of, but they are superseded by the conclusion to which their Lordships have come as to the right of succession in law by the father on the one hand, or by the sister on the other. The right of succession being determined in favour of the surviving sister carries with it and covers subsidiary rights of partnership as among the sisters *inter se*. No pronouncement accordingly is necessary in regard to the separate case under this head.

A still further question has been argued, and it is well illustrated by the course which the case took in the Courts below. The learned Judge in the Court of first instance held that by Burmese Buddhist Law the respondent, the father, was entitled to succeed to the estate of his two deceased daughters in preference to the appellant, their sister. But he also held that the father by his conduct, which in the opinion of the Court amounted to "desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred," had forfeited the right of succession which would otherwise have opened to him, and that for this reason the suit, which was to declare such a right of succession, must fail. On this latter point the Appellate Court came to a different conclusion, holding that the respondent's conduct had not been so grave and reprehensible as to justify forfeiture. Accordingly agreeing as it did with the Court of first instance, that the father fell to be preferred as the heir entitled to the succession to his daughter's estate, they

affirmed that right and gave decree in his favour. But the Appellate Court, in reaching their conclusion as to the import of the appellant's conduct, showed very clearly by their judgment that, so far as actual separation in life of the daughters from their father was concerned, this had been established beyond doubt; and in short it may be taken as a salient fact in the present case that the life lived for years by these ladies was lived as a life separate from and independent of their father.

The need for this fact being pointedly alluded to is that their Lordships are desirous that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. The rights of a parent in Burma in such circumstances appear, according to their traditions and text-books, and to Eastern patriarchal ideas, to be of a high order; and they indeed recall to the mind various drastic rules of the earlier Roman Law with regard to the scope of the *patria protestas*. Many illustrations arise in the books, but one may suffice. It is mentioned in even the Manukye, the authority of which is the subject of separate treatment hereafter, that an impoverished parent could sell his children into slavery. These observations are, of course, not made to give any colour to the view that rights to such an extent still remain in modern Burmese Law or Practice, but to indicate that the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life.

On the broad, distinct, and simple issue now to be determined, it might have been thought that the recorded traditions and legal institutes of the country would have been clear. Unfortunately, it is very far from being so. This may, no doubt, be accounted for to some extent by the fact alluded to by Burge ("Colonial and Foreign Law," I. 60), that litigation was appealed to "when the parties refuse such compromises as may be suggested by relations and village elders." This salutary practice of compromise has the disadvantage, however, that its results do not enter the records or procure the stamp of authority for a guide in future cases. So far as these results or the decisions of local native tribunals are concerned, they appear to have failed to find a place in the chronicles of the people.

There were, however, as there are still, documents that could be appealed to, all of them authoritative, but varying in the weight of their authority. These are the Dhammathats, usually reckoned as thirty-six in number. They form the expositions of *inter alia* customs and juridical rules, their dates of issue varying sometimes by many hundreds of years. It is, no doubt, true that with regard to them a certain evolution can be traced, and it seems by those who have written on the subject also to be admitted that they differ from the ordinary legal institutes in this sense, that a change of dynasty was sometimes accompanied by a fresh composition in the shape of a new, and, it might be, a comprehensive Dhammathat, which, while not removing or extinguishing its predecessors, appeared upon the scene clothed with the authority of the fresh Government and containing the latest revisal of accepted juridical doctrine.

It appears to be acknowledged that the laws, or rules, contained in the earlier Dhammathats were in their remotest origin derived from the laws of Manu, which reached Burma by way of Southern India. But with the establishment of Buddhism and the spread of Buddhist doctrine came, in the course of time, the not unnatural desire to strengthen the sanctions of juridical rule by associating its foundations, the Dhammathats themselves, with the religious sentiments of the people, and in the later Dhammathats the commands, precepts, and principles are represented as truly being emanations from the spirit of Buddha himself.

This state of matters must have made the administration of justice still dependent on a comparison of Dhammathat with Dhammathat and a balancing of the weight of their authority. It cannot be said that at the present moment such difficulties have disappeared. Traces of them, indeed, are plain enough in the present case, and one cannot peruse the judgments under review

without noting the care with which the learned Judges of Burma address themselves to this task.

There are two views which may be taken. Either the subject is dealt with sufficiently by a single clear or governing authority, or the Dhammathats as a whole must be collated, and judgment determined by the best balance which can be framed as the result of their dicta. The Judges of the Court below have adopted the latter course, and with regard to it their Lordships are not satisfied that even on such a collation the balance has been correctly struck. But the importance of the subject induces their Lordships to put on record how this matter stands according to all the Dhammathats, if the version contained in the Digest of the Burmese Buddhist Law concerning inheritance and marriage, prepared by Mr. U Gaung, be taken. Mr. Gaung was a member of the Legislative Council of the Lieutenant-Governor, and the Digest was prepared under the authority of the late Judicial Commissioner and is published with the sanction of the Government of Burma.

As showing the variety and conflict of the Dhammathats, reference may be made in particular to sections 310 and 311 of Volume 1 of the Digest of Burmese Buddhist Law on the subject of inheritance. Section 310 refers to "relatives of previous generations who are not entitled to inherit," and the rule of the Manukye is thus cited.

"The rule whereby elder relatives are debarred from inheritance is as follows:—The co-heirs live apart from one another; one of them dies without leaving a wife or a husband or a child; his or her estate shall be partitioned among his or her younger brothers and sisters, but not among the elder co-heirs."

The point of the citation is as to the significance of the word "co-heirs" in this passage, and that is illustrated by section 311, where Mr. Gaung quotes from the Dhammara:—

"The five kinds of co-heirs are the following, namely, one's elder and younger brothers, elder and younger sisters, and their children."

It would thus appear that it was not within the conception of the Manukye on this particular section 310 to reckon the parent as having a preferred right to the co-heirs. The co-heirs came first, namely, the brothers and sisters of the deceased; and the point of the section is that as among these it was the younger brothers and sisters that were preferred to the elder co-heirs. As stated, the introduction of the parent as to be preferred to brothers and sisters as a class and as a whole is completely negatived.

But their Lordships recognise that the real difficulties of the case—and that the difficulties are real is established not only by the consideration given to the matter by the learned Judges in the present case, but by the course of Burmese decisions to which they refer—arise from the construction of section 311. That section deals with "relatives of previous generations who are entitled to inherit."

The conflict had better be exhaustively set forth, and the forces on either side stand in this way:—

On the side of preferring the parents and ignoring the brothers and sisters, the Dhammathats stand as follows:

Manu.—"On the death of a person leaving not even a casually adopted son, his or her parents may inherit."

Various other Dhammathats are cited by Mr. Gaung to the same effect as this extract from Manu.

Vilasa.—"In the absence of descendants the parents are entitled to inherit."

This is repeated—almost literally—in *Dhammathat Kyaw*, in *Nandaw*, and in *Vannana*.

Razathat.—"If the deceased person leaves no wife, children, grandchildren, or other descendants, his parents, grand-parents or other relatives of previous generations are entitled to succeed to the estate."

To the same effect is the extract from *Varulinga*, namely, "In the absence of sons, including those publicly or casually adopted, the parents are entitled to inherit."

Finally comes *Kyannet.*— "In the absence of wife and children, the parents are entitled to inherit the estate of their son."

It is plain that these extracts do not proceed upon the principle of express exclusion of a right of succession by brothers and sisters. The brothers and sisters are omitted or ignored in the statement of the succession.

MA NHIN BWIN *v.* U SHWE GONE.

On the other side, the same section (section 311) cites later Dhammathats which give very ample warrant not for ignoring, but for recognising, and for placing in priority to parents, the rights of succession on the part of brothers and sisters. The historical light in which these later Dhammathats should be viewed will be remarked upon later. But meantime this observation may be made. The opinion appears to be entertained that the Burmese Empire was in the 18th century of the Christian era one of the greatest Empires of the Eastern world. But it is at least certain that in the middle of that century a strong attempt was made to put the jurisprudence of Burma into a settled and more easily referable form. In the reign of Alompra one of his Ministers, a Judge, completed a prose Dhammathat, known as the Dhamma, and the citation from the Dhammathats affirmatory of the right of succession on the part of brothers and sisters as in preference to parents becomes thereafter fairly clear.

These citations are as follows:—

The Dhamma.—"If a deceased person has neither co-heirs nor descendants, his or her parents shall inherit the estate."

It has been already made clear that co-heirs include brothers and sisters, and the exclusion of a right of succession by the parents if such brothers or sisters are alive is thus plain.

The Manukye.—"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

The Vannana has been already cited as ignoring the rights of brothers and sisters in one passage, but in another the stituation is expressed thus:—"Failing children, the parents or brothers and sisters of the deceased are entitled to inherit."

The Rajabala.—"In the absence of husband or wife, children, and brothers or sisters, the parents are entitled to inherit."

The Manu.—"If children living apart from their parents die leaving neither heirs nor co-heirs, their parents inherit the estate."

Cittra.—"In the absence of heirs, parents, grandparents, or other relatives are entitled to inherit."

Kyetyo.—"In the absence of other relatives, the parents are entitled to inherit."

It will be subsequently shown that by the use of the phrase, "in the absence of other relatives," is meant simply "in the absence of brothers and sisters." This would necessarily appear to be so. And it is from this body of authority quite manifest that the right of parents is not only not preferred, but is on the contrary very plainly postponed to the rights of succession on the part of brothers and sisters.

With regard to the Dhammathats as a whole it has to be admitted that the figurative language so frequently employed becomes little helpful in expiscating the idea of inheritance. "It is natural," says *Razathat*, "for sea-water to flow back into the ocean after entering rivers and streams;" and in another passage, "When lakes are full, the overflow is returned to rivers and streams, and tidal water always flows back to the ocean." In later centuries the mind of the commentators was still struggling with these figurative expressions; as, for instance, in the *Manu Vannana*: "In the absence of wife and children, the parents inherit. Why so? Because of the water which flows into the sea a portion returns up the river." The figure which earlier appears is the simple one of water which cannot find an outlet being borne back to its source; but as the Dhammathats develop it is found that the source of the returning water cannot be reached until the intervening inlets and creeks have all been filled up, and there appears to be the conception accordingly, not of at once reaching to the source, namely, the parent, without having exhausted the collaterals, namely, the brothers and sisters. These struggles with figurative language appear even in the decisions in recent times in the Courts in Burma, and, as is not obscurely indicated in some of these judgments, they rather perplex than help the mind.

In their Lordships' opinion the balance of the authority of the Dhammathats is upon the side of the sisters and brothers of the deceased being preferred to the parent. It has been already noted that there is nowhere throughout any of the Dhammathats a specific exclusion of brothers and sisters, and it may further be added that the language of the earliest Dhammathats, where collaterals are

as has been stated, either omitted or ignored, seems not to be analysed or explained or the omission accounted for in the later Dhammathats holding the same view, and the concurrence is a mere repetition. Their Lordships incline to the opinion—and a special reason therefor will be immediately given—that a clearer note is struck by the Dhammathats from the time of the 12th century of the Burmese, or from about the middle of the 18th century of the Christian era. Brothers and sisters as such, co-heirs as such and relatives as such are all dealt with and find a place in the discussion, and wherever they appear as a class they appear in the first rank, that is to say, in the rank preferred to parents.

But these views of their Lordships are fortunately confirmed by another and an historical consideration. There can be little doubt that in the middle of the 18th century of the Christian era the conquest and subjugation of the country by Alompra was accompanied by a serious attempt by him and his high functionaries of State to place the jurisprudence of the country in a position of fresh and settled authority. One of his Ministers, supposed to be a Judge, issued under the royal authority one Dhammathat in prose, known briefly as the *Dhamma*. Another, "in charge of the Moat of the City of Shwebal," and taken by Dr. Forchhammer to have been Alompra's Minister of War, compiled in prose the Manugye or Manu Kyay Dhammathat, and it is this document last mentioned which was issued by royal authority in 1756, and which obtained the commanding position which it seems to have occupied for a succeeding period of nearly 170 years.

What was the attitude of the British Government in respect of these particulars constituting the foundations of Burmese Law? A period of about a century in the case of Lower Burma and a period of about 130 years in the case of Upper Burma intervened between the Alompraic Code and the British occupation. During this intervening period the Burmese jurisprudence had existed on the footing just described.

It would have been, of course, open to the British Government to adopt the ancient practice of issuing a fresh and authoritative Code. But it was more in accord with the genius and practice of the extension of British rule and of the incorporation of various races and populations within the British Empire to accept the native laws in their main elements in so far as they contained a working system of jurisprudence which was in accord with the traditions and habits of the people. This latter course was adopted. An instance to hand may be cited: In 1892, after the overthrow of King Theebaw and the establishment of settled order in Upper Burma under the British rule, a circular was issued "for the assistance of the Courts in dealing with questions of Buddhist Law." The Circular issued a translation of the Letters Patent in use under the Burmese Government for the appointment of Judges. A list of Dhammathats was appended to it, but, as showing the complexity of the subject, the Judicial Commissioner adds that he "will be glad of information regarding any copies that may be extant of any of these Dhammathats other than the more commonly known ones." After a recital of many resounding titles of the Sovereign, including that of "Mighty Fountain of Justice," the Circular proceeds thus:—

"Now with respect to the office of Judge, it is on this wise: In the Kingdom of which We are the Sovereign Ruler our numerous subjects must not be permitted one to oppress another, and the Judges must admonish and chastise, repress, and judge. In case of dispute they must, in accordance with the Dhammathats, enquire into the causes of the people and decide between them. And for this purpose they are appointed to the Courts as Judges."

This is the general rule, involving as it does that judicial task the difficulty of which has been already mentioned.

To recur to the Manu Kyay—which for so long had been recognised as the leading guide in the administration of justice. Professor Forchhammer, in his Treatise on the Sources and Development of Burmese Law, thus describes it:

"This Law Book is written in plain Burmese with very little Pali intermixed. It is not really a Code or a Digest of Law, but rather an encyclopædic record of existing laws and customs and of the rulings preserved in former Dhammathats. Manu Kyay

does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages; religious elements are freely introduced; unjust Judges shall suffer punishment in Hell with head downwards; a man to whom deposits are made must be a strict performer of the religious duties; a person guilty of perjury will be visited by preternatural punishments."

And having dealt with the development of Burmese jurisprudence and made a division of it into three periods, Dr. Forchhammer concludes thus:

"The Manu Kyay incorporates the contents of the Law Books of the first and second periods and records laws and customs existing among the people of his time. It deals with the religious laws and usages of the Brahmins and the monastic rules of the Buddhist clergy. It allows the Buddhist element to predominate and draws largely from the Buddhist Scriptures."

It is not seriously disputed that the authority of this text-book, where it is clear, as among the Dhammathats, is of the highest rank. And accordingly, when British rule was extended over Burmese territory, the recommendation to the judicial officers substantially accepted this situation as it was found. In the words of Dr. Forchhammer:

"The Manu Kyay is to this day the most widely read and studied law book in Burma, and after the British had taken possession of this Province the natives pointed to this Dhammathat as containing the body of laws by which they had been governed."

Much has been done during the last thirty years to extend the knowledge of the various Dhammathats; and the labours and encouragement of the Judicial Commissioner, Sir John Jardine, have greatly assisted this extension. The Manu Kyay itself has been textually translated by Dr. Richardson, and is in familiar use as a work of reference; and their Lordships do not understand that the pre-eminent authority of this Dhammathat has been lowered by the labours of other authors or the translation of other Dhammathats.

On the point in issue in the present case, the Digest of Mr. Gaung represents the dicta of the Manu Kyay thus:—

"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

There does not seem to be any room for ambiguity here. Both classes are dealt with. The one class—wife, children, brothers, and sisters—are specifically and exclusively preferred to the other class, namely, parents.

In the 10th book, chapter 19, of Dr. Richardson's translation, the text reads thus:—

"Though this is the law (that property shall not ascend), why is it also said the father and mother of the deceased have a right to his property? Because if the parents be alive and the deceased has no other relations, they shall inherit his property."

In short, the Manu Kyay is clear that the property cannot ascend to parents unless there be no other relations, and "relations," it should be added, are, as appears clearly from chapters 17, 19, 22 and 25 of the same book, synonymous with brothers and sisters.

Their Lordships do not think it necessary accordingly to pursue the enquiry further. In this Dhammathat, which still remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other Dhammathats do not require to be appealed to to clear up any ambiguity. Were that appeal to be made, it would, in the opinion of their Lordships, as already stated, lead to the same result.

The doubt, however, thrown upon the subject by the judgments of the Courts below can be explained to some extent by a brief glance at the development of authority on the subject.

The sense of the Manu Kyay and the authority of its rule, as above expounded, seem to have been accepted in Burma until the year 1894. On the 12th November of that year there occurred the case of Mi San Hla Me, and the narrative is observable:—

"The two lower Courts have held that according to Buddhist Law property cannot ascend where there are collateral heirs, and they have awarded plaintiff's claim. The general rule that property shall not ascend is laid down in the Manu Dhammathat, Book

10, sections 1, 18, 19, but the rule is not without exceptions."

(It may be noted that the "Manu Dhammathat" here referred to is simply the Manu Kyay.)

The exception referred to in that case had reference to the separation of one from his adoptive brothers and sisters, and to an adopted son living with his adoptive mother. It is manifest that this so-called exception has nothing to do with the present broad and general case. And it is also clear that the law as above laid down was held to be the general law of Burma.

Thereafter, however, a certain mischance arose by way of what is reported as an *obiter dictum* in the case of Maung Chit Kywe in the year 1895. The substantial question in the case is described as "whether the brothers and sisters of the father of the deceased, Mah Pean, who was unmarried, have, under the rules of inheritance in the Dhammathats, a title to the estate of Mah Pean superior to any title of the defendant as step-father living with deceased." Here it is also quite clear that the broad and simple question now to be determined was not before the Court. The step-father was held to have no equitable claim, but in the course of the judgment there occurs this sentence:

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals, and in the absence of heirs in that degree, to the grandfather and grandmother and the next line of collaterals."

By "the first line of collaterals" is here meant the line of the father and mother, and it will be observed from this sentence that the true line of collaterals, namely, the sisters and brothers of the deceased themselves, appears to be excluded from the succession, although on each of the higher lines they are included; that is to say, uncles and aunts would be preferred to the grandfather, although brothers and sisters would not be preferred to the father. Whatever may be said of this reasoning, at all events it is probably sufficient to observe that it is not applicable to the question in the present case, and it was not necessary to that decision.

In 1897, however, the case of Mah Gun Bon was tried, determining that the estate of a deceased step-parent or grandparent goes by descent to the step-children or grandchildren in preference to collateral relatives by blood. Again it must be observed that the broad and simple question now to be determined was not before the Court. Many citations are made from the Dhammathats and, as generally happens, these texts appear to be somewhat inconsistent with each other, but whether they are so in reality or not is difficult to say. After much examination the learned Judge says:

"From these various authorities and from the other Dhammathats of which there are printed translations, it is clear that, when the ascending line and the descending line fail, the collateral line succeeds, and probably brothers and sisters would be preferred in certain instances to parents."

No indications are given of what this probability is, and it may be sufficient with regard to this authority to say that it does not cover the simple point now to be determined.

The case of Mah E Dock (18th May 1898) was referred to. It was a case with reference to adoptive parents. Various texts were cited, concluding with section 211 of the Attathanyepa Vannana which says:—

"Where there is no younger brother or sister, then the property may revert or ascend to the elder members of the family, such as elder brothers, elder sisters, parents, or grandparents."

And the learned Judge says:—

"Although the last-quoted text throws some doubt on the subject, there seems to be good authority to the rule that parents are entitled to inherit in the absence of direct descendants. There has been no argument on the point."

The "good authority" here referred to appears to have been the cases just cited, and in their Lordships' judgment the case of Mah E Dock does not advance the proposition in any respect.

Reference was also made to the case of Maung Shwe Bo (27th February 1899) the head-note of which is this:—

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to

ascend, first to the father and mother, and, failing them, to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals."

It is to be noted that "the respondents in this case were not represented by Counsel and were unable to afford the Court any assistance in dealing with the difficult point of law involved." In those circumstances the Judge, perhaps not unnaturally, accepted the Chit Kywe case as a guide, and with that their Lordships have already dealt.

It is manifest that the clear and broad issue now to be determined has never been the subject of judicial decision, and that no series of precedents can be relied upon in justification of the judgments of the Courts below. Out of respect to the Judges, and in view of the embarrassment produced by the cases cited and by the conflict among the Dhammathats, as well as of the importance of the general question being authoritatively settled, their Lordships have thought it right to make an independent investigation so as, if possible, to clear up the whole question. In the result they are of opinion that the right of the respondent, the father of the deceased, cannot be maintained as against the right of the appellant, her sister.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Court below be reversed, and that the suit stand dismissed, the plaintiff-respondent to pay to the appellant the costs of the proceedings here and in the Courts below.

Suit dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 105 OF 1913.

July 4, 1913.

Present:—Mr. Justice Macleod.

BAI GULBAI BEHRAMSHA D. HARVER—PLAINTIFF

versus

BEHRAMSHA D. HARVER—DEFENDANT.

Parsi Marriage and Divorce Act (XV of 1865), s. 31—Parsis—Maintenance, suit for—Jurisdiction—Original side of High Court—Matrimonial Court.

The Bombay High Court has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation which admittedly by itself it has no jurisdiction to grant.

It is within the exclusive jurisdiction of the Parsi Matrimonial Court to entertain suits concerning matrimonial disputes amongst the Parsis and when the Court grants a decree for judicial separation it can order the husband to provide his wife with permanent alimony.

Messrs. *Wadia* and *Moos*, for the Plaintiff.

Messrs. *Kanga* and *Davar*, for the Defendant.

JUDGMENT—The plaintiff, a Parsi married woman, has filed this suit for maintenance alleging that her husband has treated her with such cruelty as to render it improper that she should be compelled to live with him; and that, therefore, in law that amounts to desertion, or a failure on the part of the husband to fulfil the legal liability entailed upon him to maintain his wife. The question arises whether she is entitled to file a suit on the Original Side of the Court for maintenance. It appears that in England when the Ecclesiastical Courts had exclusive jurisdiction in matrimonial matters those Courts only granted maintenance or alimony when the order was coupled with a decree for what was equivalent to the present decree for judicial separation. There is no record of any Ecclesiastical Court having given a decree simply for maintenance on the ground that the husband had failed to maintain his wife. The powers of the Ecclesiastical Courts were handed over to the High Court in the Probate and Divorce Division by the Matrimonial Causes Acts, and no authority has been cited to me to show that the High Court, either under or apart from the divorce jurisdiction, has jurisdiction to pass orders for maintenance in a suit by a wife against her husband on the ground that the husband has declined to maintain his wife. In England the Justices have now summary powers to order the husband to maintain his wife if she can prove that the husband has deserted her, and in case the Justices refuse to order maintenance there can be a reference to the High Court, and it seems clear that the application would be made to the High Court in its probate and divorce jurisdiction.

In the case of Parsis there is a special Act which establishes a special Court for the purpose of deciding matrimonial disputes amongst the Parsis; and though there is apparently no provision by which a Parsi wife can apply to the Parsi Matrimonial Court for an order of maintenance by itself on the ground of desertion, she can on certain grounds claim that she is entitled to demand judicial separation; and on the Court granting a decree for judicial separation, the Court can order that the husband provide her with permanent alimony.

Now, the plaintiff in this case in her plaint alleged facts which come within section 31 of the Parsi Matrimonial Act, and it seems clear that if she can establish those facts she would be entitled in the Parsi Matrimonial Court to a decree for judicial separation. She comes to this Court to establish those very facts on the ground that she is not bound to ask for a judicial separation but is entitled to get from this Court on its Original Side an order for permanent alimony. It seems to me clear that this Court has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation, which admittedly by itself this Court has no jurisdiction to grant.

There is no question about a denial of justice because the plaintiff can file her petition in the Parsi Matrimonial Court and there establish the very facts which she relies upon in her present plaint. Apparently she has some objection to applying for a decree for judicial separation, but as I pointed out, as far as I can see, in the Matrimonial Courts, both in England and India, this is the only way by which a wife is entitled to get a decree for permanent alimony.

I may add that it appears that under the Parsi Matrimonial Act such questions of fact as are alleged in this case are questions which the Act specifically directs should be tried by the Parsi delegates in the Parsi Matrimonial Court, and not by the Judge.

Attorneys for the Plaintiff: Messrs. *Payne & Co.*

Attorneys for the Defendant: Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1687, 1688 AND 1991 OF 1911.

March 23, 1914.

Present:—Justice Sir Herbert Carnduff, Kt., and Mr. Justice Richardson.

HEM CHANDRA CHOUDHRI—DEFENDANT—APPELLANT

versus

Rani HEMANTA KUMARI DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 37—Partition, suit for—*Ijmali *lands—Previous partition—Lands jungle or submerged in three* mouzas *—Separate suits for partition, maintainability of.*

Separate suits for partition of *ijmali* lands lying in different villages are maintainable against the same defendants on principles of justice, equity and good conscience and the plaintiff is not required to include in his suits those lands which have not emerged or become culturable and are incapable of partition.

Appeals from the decrees of the Additional District Judge of Mymensingh, dated April 4th 1911, affirming that of the third Sub-Judge of that District, dated April 25th, 1910.

Mr. *Caspersz* and Babu *Ramani Mohan Chatterjee*, for the Appellant.

Babus *Kishori Lal Sarkar*, *Bipin Bihary Ghose* (Junior) and *Debendra Nath Bagchi*, for the Respondents.

JUDGMENT.

CARNDUFF, J.—These appeals are preferred against three preliminary decrees for the partition of certain lands in the District of Mymensingh as appertaining to Pergana Pukhuria, of which the parties are the joint proprietors.

Pargana Pukhuria was partitioned by the Collector in the year 1339, when four separate estates were formed and allotted as follows:—Towzi No. 132 to the plaintiff's predecessor-in-interest; Towzi No. 6100 to the predecessor of the second defendant; and Towzi Nos. 4806 and 5513 to the predecessor of the other defendants. A considerable quantity of land in this Pergana was, however, either jungle or submerged at the time, and this was, and apparently had to be, excluded from the partition. It consits of parcels in a large number of different Mouzas, in which the nature and extent of the interest of the respective parties vary. As a rule the parties are

the superior landlords, the plaintiff's share being ten annas, the first defendant's four annas and the second defendant's two annas. But in some Mouzas the shares are different, in Mouza Sailarkhanda the plaintiff and the first defendant own eight annas each, the second defendant not being a coparcener at all; in another Mouza a twelve-anna share is monopolised by an idol, and in a third the parties are *taluqdars*. In three of the Mouzas the lands are becoming culturable, and the allegation of the plaintiff is that they are being taken possession of in a haphazard way as opportunity arises, and quarrels and obstacles to improvement have been the consequence. The plaintiff, therefore, sought, by means of these three suits, to have all the joint lands in the three Mouzas partitioned between herself and her co-sharers. To this the second defendant has raised no objection, but the first defendant has on the ground that separate suits for the partition of portions of the *ijmali* lands are not maintainable, and that one suit ought to have been brought for the partition of all the *ijmali* lands in the Pergana which were omitted from the Collectorate partition of 1839. There were other points raised; but that is the main point, and it is the only one with which we are concerned in these appeals.

Mr. Caspersz, on behalf of the appellant, contends that the general rule is that a joint-owner cannot claim a partition of the joint property without bringing the whole of it into hotchpot so that all the equities between the parties may be considered and settled and the matter may be dealt with once for all. And he further urges that the institution of suits for partition piecemeal involves multiplicity of actions and offends against the provisions of Order II, rule 1, of the Civil Procedure Code. In support of the appeal reliance is placed on several reported cases.

In *Jogendra Nath Mukerji* v. *Jugobandhu Mukherji* (1) it was held (Petheram, C. J., doubting, but following authority) that a suit will not lie for partial partition. But the property here was the joint property of a Hindu family, and as the learned Vakil for the respondent admits, the application of the general rule in such a case can hardly be denied. But that even then there may be an exception is shown by the next ruling on which the learned Counsel for the appellant relies, that in *Punchanun Mullick* v. *Shib Chunder Mullick* (2) in which Trevelyan, J., while mentioning the general rule against partial partition, nevertheless entertained a suit for the partition of so much only of a Hindu joint estate as lay within the original jurisdiction of this Court.

In *Jogendra Nath Rai* v. *Baldeo Das* (3) Mookerjee and Caspersz, JJ., observed that "a co-owner cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and the entire property must be included in the partition". But the observation was incidental and parenthetical, the suit before the Court being one for the recovery of joint possession of some lands which had accidentally, as in this case, been excluded from the partition of the holding to which they appertained.

In *Mahomed Fazlur Rahman Chowdhri* v. *Mohammed Fayzur Rahman Chowdhri* (4) Chitty and N. Chatterjea, JJ., expressed the view that there is "no distinction in principle between partition of joint property under Hindu or Muhammadan Law", and held that it was inexpedient to allow a suit for the partition of a portion only of joint property. But here their Lordships were dealing with family property, and, no doubt, very much the same considerations arise whether the joint family is Muhammadan or Hindu.

In *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (5) Mookerjee and Vincent, JJ., held that "although there cannot be a partial partition by suit" partial partition by private arrangement is allowable. But once more the property dealt with was that of a joint Hindu family.

In *Mansaram Chakravarti* v. *Ganesh Chakravarti* (6) Mookerjee and Beachcroft, JJ., remarked that "when the plaintiff sues for partition of a part of the joint property, it is open to the defendant to take exception to the scope of the suit

(1) 14 C. 122.

(2) 14 C. 835.

(3) 35 C. 961 at p. 968; 12 C. W. N. 127; 6 C. L. J. 735.

(4) 10 Ind. Cas. 354; 15 C. W. N. 677 at p. 679.

(5) 3 Ind. Cas. 247; 10 C. L. J. 503.

(6) 16 Ind. Cas. 383; 17 C. W. N. 521 at p. 522.

and to insist upon the inclusion of all the properties jointly owned by the parties." But the precise point before the Court was whether a person holding property jointly with another is precluded by section 43 of the Code of Civil Procedure, 1882, corresponding with Order II, rule 2, of the present Code, from suing for a partition of it by reason of its having been the subject-matter of a previous partition suit between the parties.

These are the strongest cases on the side of the appellant. On the other side there are *Srimati Padmanani Dassi* v. *Srimati Jagadamba Dassi* (7), *Ram Mohan Lal* v. *Mul Chand* (8) and *Syed Habibur Rasul Abul Faiz* v. *Ashita Mohan Ghosh* (9). In the first of these Phear, J., laid it down that one of two co-heiresses to a joint Hindu family property is not obliged to include in her suit the whole of the property, but may confine it to the portion which she is desirous of having partitioned, although it is open to the defence to show that the portion ought not to be divided or could not properly be divided and that a fair and equitable division could not be made without bringing in all the joint property. In the second the Allahabad High Court expressed entire concurrence with the view of Phear, J., held that the purchaser of certain shares in two shops was rightly decreed partition of the share purchased by him in one of them, and observed that "there is nothing to preclude one of the joint owners of several items of property from seeking a partition of one of such items". In the third, this Court followed the Allahabad Court and ruled that one of the co-owners of an estate could sue for the partition of the *chowkidari chakran* land appertaining to one Mouza in the estate.

In the result I think that the learned Counsel for the appellant has not been able to establish the broad proposition for which he contends, and that the rule to be applied is much more elastic. Indeed, what we have to consider in cases of this kind, under section 37 of the Bengal, N.-W. P. and Assam Civil Courts Act, 1887, is justice, equity and good conscience, and these seem in this case to lie entirely on the side of the plaintiff. So far as appears, the Rani has brought her suits in respect of the only *ijmali* lands regarding which any difficulty has so far arisen, and a suit in respect of the others might be premature and infructuous, for there is nothing to show that other lands, not included in the partition of 1839, have emerged and become culturable or capable of partition, and the suggestion that there may be such other lands is a mere surmise. *A fortiori*, there is no substance in the contention that the Rani may be in possession of more than her fair share of culturable lands in other villages, so that, without bringing all into hotchpot, she cannot establish her right to a particular share in the lands which have become culturable in the three Mouzas—Char Magura, Mirzapore and Sailarkhanda. And, as regards the apprehension as to multiplicity of suits, there is really no foundation for the objection if we look at the facts in connection with, say, Appeals Nos. 1687 and 1991, relating to Char Magura and Sailarkhanda. In the former Mouza the Rani has ten annas, the second defendant two annas, and the appellant four annas. In the latter the Rani holds eight annas and the appellant holds the other eight. If one suit were brought in respect of both Mouzas, there might, no doubt, be one preliminary decree, but the final decree would depend on the results of two entirely distinct enquiries by the Commissioner appointed to effect the partition.

On the whole I am of opinion that the appellant is merely obstructive, that there are no merits in his appeals, and that they should be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

(7) 6 B. L. R. 134.
(8) 28 A. 39; A. W. N. (1905) 169; 2 A. L. J. 700.
(9) 12 C. W. N. 640.

KIRPA RAM *v.* JAI CHAND.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 61 OF 1911.

February 26, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

KIRPA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Major Raja JAI CHAND—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), *Sch. I, Arts.* 62, 131—*Suit to recover arrears of* jagir *income wrongfully received by defendant from third persons—Limitation —Article* 131, *applicability of.*

The claim was to recover from the defendants six years' arrears of *jagir* income, which, according to the plaintiff, he was entitled to receive as *jagirdar* from the *lambardars* of the *jagir* village, but which had been wrongly received and appropriated by the defendants:

Held, that the suit was governed by Article 62 of the Limitation Act, and the plaintiff could only recover the *jagir* moneys received by the defendants for the three years immediately preceding the date of the suit.

Article 131 of the Limitation Act would not be applicable to a case unless it was proved that more than 12 years before the institution of the suit the plaintiff expressly demanded from the defendants the enjoyment of his right and was refused.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated 7th November 1910, affirming that of the District Judge, Kangra, dated 15th April 1910, decreeing plaintiff's claim.

Rai Bahadur *Bakhski Sohan Lal* and Bakhshi *Tek Chand*, and Sheikh *Umar Bakhsh*, for the Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, and Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff-respondent, Major Raja Jai Chand of Lambagraon, Tahsil Palampur, District Kangra, to recover from the defendants a sum of Rs. 1,881-10-6 alleged to have been wrongly recovered by them out of certain Jagir income to which, it is said, the plaintiff was entitled as Jagirdar of Mouza Khera, which is one of several villages comprised in the plaintiff's Jagir. Raja Partab Chand, father of the present plaintiff, had granted to the ancestors of the present defendants a lease of his Jagir income in Mouza Khera under a document dated the 6th *Phagon*, Sambat 1907, which came into operation in *Har*, Sambat 1908 (corresponding to 1852). The document in question, which will be referred to hereafter as the *patta* of 1852, is set out in paragraph 5 of the *Wajib-ul-arz* or *Dastur-ul-Amal* of 1868, and it is to the effect that the value of the annual Jagir payable to the Raja would be estimated at Rs. 2,507; that the lessees would collect the Jagir in kind and after paying the Raja Rs. 2,257 in cash would keep the balance Rs. 250 more or less for themselves; and that the *Begar* service shall be rendered by them. The circumstances under which the *patta* was granted by the Raja to the defendants' ancestors are described in some detail at pages 253-6 (paragraph 201) of the Settlement Report of the Kangra District, 1865-72, by Mr. (afterwards Sir James) Lyall, and also at pages 138-42 of the Gazetteer of the Kangra District, 1883-84.

Raja Partab Chand died in 1864, and his son, the present plaintiff, who was then an infant came of age in 1883. Meanwhile, the Record of Rights of the Kangra District had been prepared by Mr. Lyall in 1869, and he recognised and sanctioned the continuance of the form of the plaintiff's Jagir income in accordance with the terms of the *patta* of 1852. In 1887 the revised Settlement of the Kangra District commenced, and soon after the present plaintiff moved the Settlement Authorities with a view to have the *patta* in question cancelled, on the ground that it was revocable at his will. His prayer was not, however, granted by the Settlement Officials, as will appear from the report of Rai Moti Ram, Revenue Assistant, dated the 3rd July 1891, and the order of Mr. O'Brien, Settlement Collector, dated the 13th July 1891. In the last mentioned order Mr. O'Brien referred to paragraph 201 of Lyall's Settlement Report of the Kangra District, 1865-72, and decided that the *patta*, which had been granted by Raja Partab Chand in 1852, was intended to be a *patta* in perpetuity, and that the arrangements then arrived at could not be cancelled at Raja Jai Chand's will and pleasure. As a result of the revised Settlement, the Jagir, *i.e.*, villages of the Raja, were assessed in cash, the old arrangements under which land revenue was collected in kind and paid to the Jagirdar being discontinued. In 1898, Raja Jai Chand again tried to have

the arrangements of 1852 set aside, but the Collector, by his order dated the 26th October 1893, maintained the order which had been passed by Mr. O'Brien in 1891; and thereafter the present defendants continued to realise the annual Jagir income of village Khera in cash, the amount of which exceeded Rs. 2,507 at which sum the Jagir was originally fixed in 1852, and they continued to pay to the plaintiff Rs. 2,257 each year.

The present suit was brought by Raja Jai Chand in 1909, and the claim was to recover from the defendants six years' arrears of Jagir income which, according to the plaintiff, he was entitled to receive as Jagirdar from the Lambardars of the village, but which had been wrongly received and appropriated by the defendants. The gist of the claim was that the *patta* of 1852, by virtue of which the defendants had been receiving part of the plaintiff's Jagir income from the Lambardars, was not of a permanent character; that its operation was limited to the term of the Settlement; and that it rested with the plaintiff to put an end to the arrangements of 1852, when he chose to do so. The defendants set up various pleas in answer to the plaintiff's claim, the principal pleas being that the lease was one in perpetuity and, therefore, irrevocable, that the plaintiff's suit was barred by limitation, and that the plaintiff was estopped from cancelling the lease. Both the Courts below have held, following the decision of this Court in Civil Appeal No. 169 of 1903, *Major Raja Jai Chand* v. *Devi Singh*, decided on the 31st March 1906, that the *patta* of 1852 was revocable at the will of the plaintiff after the termination of the first Regular Settlement; that the defendants had wrongly refused to pay the plaintiff the Jagir money in respect of which the suit had been brought; and that the suit as laid was within limitation, it being governed by Article 120, and not by Article 62, of the first Schedule to the Limitation Act. On these findings the Courts below have concurred in decreeing the suit.

The defendants have preferred a further appeal to this Court, and we have heard the case argued at considerable length on both sides. On the main question whether the *patta* of 1852 does or does not evidence a lease in perpetuity it is unnecessary for us to say very much, as the matter has been practically set at rest by the judgment of this Court in Civil Appeal No. 169 of 1903, to which reference has been made above. That appeal arose out of a suit brought against the present plaintiff by certain persons to whom Raja Partab Chand, father of the plaintiff, had granted a lease of his Jagir income in respect of two villages, Bahlana and Darug, under a document, dated the 7th *Phagun*, Sambat 1907, which was executed under circumstances precisely similar to those under which was executed the *patta* which is the subject of consideration in this case. The terms of the *patta* in that case were more favourable to the lessees than are the terms of the *patta* before us, for in that *patta* the word "*hamesha*" (always) was used with reference to the right of the lessees to collect the Jagir dues, which word does not occur in the present *patta*. It was nevertheless held by this Court in that case that the lease was not one in perpetuity but was one limited to the term of the Settlement in the course of which the *patta* was granted, and that at the end of that term the Raja had power to put an end to the lease and collect his Jagir income himself direct from the Lambardars. The whole question of the nature of the Jagir conferred on the Raja by Government and of the special arrangements for the collection of Jagir income in kind which were arrived at in Sambat 1907, between Raja Partab Chand and certain members of the Katoch families that were connected with the family of the Raja, was very fully discussed by this Court in the said judgment, which is dated the 31st March 1906, and after giving every weight to what has been urged before us on behalf of the appellants in this case, we can see no sufficient reasons for differing from the view which the learned Judges took in that case as to the nature of the lease then in dispute, the terms of which were substantially the same as those of the lease relied upon by the appellants before us. We accordingly hold that the *patta* of 1852 does not evidence a lease in perpetuity and that it was revocable at the instance of the plaintiff-respondent at the end of the Settlement.

The only other question which we have

to decide in this case is one of limitation. The contention advanced by the appellants' Pleader in this connection was two-fold. In the first place, it was argued that the right of the plaintiff to collect his Jagir income direct from the Lambardars was an annually recurring right, that the enjoyment of this right had been refused by the defendants, who had always realised the Jagir income from the Lambardars and retained part of it under the terms of the *patta* of 1852, more than twelve years before the institution of the suit, and that, therefore, any suit which the plaintiff could bring to establish his right to receive his entire Jagir income from the defendants would be barred by limitation under Article 131 of Schedule I, Act IX of 1908. It was then urged that if the plaintiff was precluded from suing to establish his periodically recurring right as against the defendants, he was equally precluded from bringing a suit to recover the arrears of Jagir income falling due within the period of twelve years before suit and which, according to the plaintiff, had been wrongfully received by the defendants. In the second place, it was contended that if Article 131 aforesaid did not apply in this case, Article 62 of the Limitation Act did, and that according to that Article the plaintiff could only recover the moneys which the defendants had wrongfully received out of his Jagir income only during the three years prior to the institution of the suit. As regards the first branch of this argument we think it unnecessary to notice and discuss the various rulings that were cited to us on both sides, as it was conceded that Article 131 of the Limitation Act would not be applicable to the case unless it was proved that the plaintiff expressly demanded from the defendants the enjoyment of his right to receive the whole of the Jagir income and that he was refused it more than twelve years before the present suit was brought; and we are clearly of opinion that there is on the record no clear proof of a definite demand made by the plaintiff from the defendants and of their refusal to concede to the plaintiff the enjoyment of his right. The proceedings of the Settlement Authorities in 1891, on which reliance was placed by the defendants' Pleader, do not evidence any such demand and refusal as is contemplated by Article 131, aforesaid, and we hold that the said Article is not applicable to the present case. As regards the question whether Article 62 applies to this case or not, we think that the answer must be in the affirmative. The Courts below have held that Article 120 is applicable and not Article 62, and in support of their view they have relied on *Dost Muhammad Khan* v. *Sohan Singh* (1), with special reference to the remarks at page 307 of the report. It will, however, be observed that the suit there dealt with was one brought by the plaintiffs to recover arrears of Jagir alleged to be due to them from certain persons who had wrongfully omitted to pay the Jagir money to the plaintiffs, there being nothing to show that they had received the money from third parties. It was held that to such a claim Article 62 could not apply. In the present case, however, the defendants admittedly have received the Jagir money, which the plaintiff claims to be entitled to, from third parties and have not accounted for the whole of it to the plaintiff. We can, therefore, see no good reason for holding that Article 62 does not apply to the facts before us; and our view is that under that Article the plaintiff can only sue to recover the Jagir moneys which he was entitled to receive in respect of the three years immediately preceding the date of this suit. It follows that the decree of the Divisional Judge should be modified by reducing the amount claimed by the plaintiff from Rs. 1,881-10-6 to Rs. 940-13-3.

We accordingly accept the appeal, and in modification of the decree of the Divisional Judge we grant the plaintiff a decree for Rs. 940-13-3 with proportionate costs against the defendants.

Appeal accepted.

(1) 83 P. R. 1906; 89 P. L. R. 1907.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 135 OF 1912.

November 4, 1913.

Present:—Mr. Lindsay, J. C.

DEPUTY COMMISSIONER, LUCKNOW, FOR THAWAR ESTATE—DEFENDANT—APPELLANT

versus

Pandit SUKHNANDAN—PLAINTIFF AND DIRGAJ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Limitation of suit for sale on mortgage not affected by subsequent transaction between mortgagee and third person who pays off mortgage-debt—Right of priority, limitation for enforcement of—Purchaser of property subject to mortgage—Right to plead limitation, when mortgagee neglects to recover money within limitation.

Where a puisne mortgagee, who had paid the amount due on a decree for sale obtained by a prior mortgagee, brought a suit for sale on the basis of his mortgage and claimed priority as against intermediate mortgagees in respect of the amount spent by him in redeeming the prior mortgage:

Held, that the suit, in so far as it sought to enforce the priority, must be governed by the same rule of limitation as would have applied to a suit by the prior mortgagee.

The period of limitation in respect of a suit for sale on a mortgage cannot be extended by a subsequent transaction between the mortgagee and a third person who pays off the mortgage-debt.

Mahomed Ibrahim Hossein Khan v. *Ambika Pershad Singh*, 14 Ind. Cas. 496; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 C. 527, followed.

If a person purchases property subject to a mortgage and the mortgagee allows his right to recover the money to be lost by lapse of time, the purchaser is not debarred from taking advantage of the negligence of the mortgagee and raising a plea of limitation.

Appeal against the decree of the Subordinate Judge, Lucknow, dated 28th June 1912.

Mr. *N. N. Ghoshal*, for the Appellant.

Babus *Ram Chandra* and *Bisheshwar Nath*, for Respondent No. 1.

Babu *Puttu Lal*, for Respondents Nos. 6 to 11.

Babu *Kedar Nath*, for Respondents Nos. 13 and 14.

JUDGMENT.—The facts of this case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows:—

Three brothers, Narain Singh, Lachman Singh and Sita Ram, owned shares in the village of Thawar and in three hamlets, Atrauli, Sarsenda and Lahjara.

On the 22nd October 1886, Narain Singh and Sita Ram mortgaged a 10 pie 9½ *krant* share in Thawar and a 2 anna 4 pie share in each of the three hamlets to Thakur Din and Bhagwan Din, Banias. The mortgage-money was Rs. 900 and period of the mortgage was seven years.

On the 12th July 1887 a deed of further charge for Rs. 350, period two years, was executed by the same mortgagors in favour of the same mortgagees.

On the 13th October 1888 all three brothers joined in executing a mortgage of a portion of their property in favour of Pandit Bhagwan Din—and again on the 26th July 1894, they executed a deed of further charge in favour of this same mortgagee.

We are not in the present case concerned with any dispute regarding these two mortgages—but it is necessary to state the fact that they were made.

To come now to the fifth mortgage transaction the date of which was the 9th August 1895. The three brothers on that date mortgaged the whole of their property in Thawar and the hamlets to Raghunath Singh, Ghazi, Hansa and Shankar. Of these Raghunath Singh is represented in this case by the Court of Wards (defendant No. 5), Ghazi by the defendants Nos. 6, 7, 8, Hansa by the defendant No. 9 and Shankar by the defendants Nos. 10, 11 and 12.

On the 3rd September 1900 the three brothers sold to Dirgaj Singh (defendant No. 1) the equity of redemption of the property already mortgaged to Pandit Bhagwan Din. The price was Rs. 10,000, out of which Rs. 3,000 was left with the purchaser to pay off the first two encumbrances in favour of the two Banias, Thakur Din and Bhagwan Din. Dirgaj Singh, however, failed to pay these mortgagees and on the 15th October 1901 their heirs in a suit against the mortgagors and the vendee Dirgaj obtained a decree for sale of the mortgaged property.

On the 5th July 1904 Dirgaj Singh as the owner of the equity of redemption made a mortgage to Pandit Bhagwan Din. The mortgage-money was Rs. 4,750 and of this sum Rs. 4,310 was left with Bhagwan Din to satisfy the decrees obtained on the

first two mortgages. Bhagwan Din paid this money and matters were in this state when the Court of Wards, as representing Raghu Nath Singh, and the other mortgagees who are now represented by the defendants Nos. 6 to 12 brought a suit for sale on their mortgage of the 9th August 1895. Pandit Bhagwan Din was a party to that suit, as being the holder of two prior mortgages, namely, the third and fourth mortgages referred to above and in the plaint there was a reference to the first and second mortgages on which decrees had already been obtained. Nothing, however, was said as to the fact of Pandit Bhagwan Din having satisfied those decrees nor did Pandit Bhagwan Din put forward for himself any claim on the strength of his having discharged the decrees. The plaintiffs asked for a sale of the property subject to any mortgages which might be found to be of prior date and sale was eventually ordered subject to the prior mortgages one to four above mentioned, that is to say, the two mortgages of 1886, 1887, in favour of Thakur Din and Bhagwan Din Banias, and the two mortgages of 1888 and 1894 in favour of Pandit Bhagwan Din.

The Court of Wards and the other mortgagees, who were plaintiffs in the suit, got the decree and purchased the mortgage property themselves.

Pandit Bhagwan Din is noted dead and plaintiff in the present suit is his brother Pandit Sukhnandan who has succeeded to his interest. This suit as brought is one for sale to enforce the terms of the mortgage executed in favour of Pandit Bhagwan Din on the 5th of July 1904. The claim is for Rs. 8,696-14 6, and as regards the defendants Nos. 5 to 12, *i. e*, the Court of Wards and the other mortgagees who purchased the property mortgaged to them in the deed of 1895, the case of the plaintiff is put in this way: He says that Pandit Bhagwan Din, by paying off the decrees obtained upon the first two mortgages of 1886 and 1887 respectively, acquired the entire rights of the mortgagees in whose favour these deeds were executed. It is pointed out that these defendants when they purchased in execution, bought subject to the first two mortgages, and in paragraph 12 of the plaint it is claimed that in view of these facts that plaintiff, having acquired the mortgagee rights under the deeds of 1886 and 1887, is entitled to bring to sale the property purchased by the defendants Nos. 5 to 12 and to have the debts due to him on account of these prior mortgages satisfied out of the sale-proceeds.

The defendants Nos 5 to 12 met this claim by a plea of limitation. Their case in substance was that the plaintiff was trying in this suit to enforce his right of sale under mortgages of 1886 and 1887 and that such a suit was barred by the 12 years rule of limitation (Article 132 of the Limitation Act). Before the Subordinate Judge the plaintiffs' Pleader contested this plea by arguing that the suit was on the mortgage of 1904, by the execution of which coupled with payment of the sum due under the decrees obtained on the mortgages of 1886 and 1887, he had become entitled to the prior rights of the holders of these mortgages.

The learned Subordinate Judge, while admitting that Article 132 of the Limitation Act (Schedule I) applied appears, to have been uncertain as to the date from which limitation should be reckoned. He thought that as the period of the mortgage in suit was three years from the date of its execution, *i. e*, the 5th July 1904, the mortgagee could not have brought a suit for his money within the period and that, therefore, the suit could be brought within twelve years from the 5th July 1907. Then, again he pointed out that priority was acquired by paying off earlier mortgages, and concluded that as the plaintiff was entitled to recover from the defendants Nos. 5 to 12, who had bought subject to these prior mortgages, limitation could not run against him from any date earlier than the date on which he actually paid the money. And lastly he took a third view of the situation saying that limitation might well be considered to run "against the defendants" from the date when they purchased the property. In any case he held that the suit was within limitation.

The question of limitation is raised here in appeal by the defendant No. 5 (appellant) and it appears to me that after a careful consideration of the authority to be presently mentioned it must be held that the suit was time-barred as against him.

It seems perfectly clear that Pandit

Bhagwan Din by discharging the earlier incumbrances could not acquire any higher rights than those of the mortgagees who held them. If it be assumed in his favour that the circumstances attending the transaction justify the presumption that he acted for his own benefit and that he intended keeping the incumbrances alive, the most that can be said for him is that he acquired the rights of the prior mortgagees by virtue of the principle of subrogation—and he must be taken to have acquired those rights subject to any rule of limitation which would apply to a suit for their enforcement. It might be said [and there is some authority for the proposition in a case of the Madras High Court reported as *Bavanna* v. *Balaguriti* (1)] that as the mortgagees had obtained a decree on the two mortgages, the right to which Pandit Bhagwan Din succeeded after satisfying the decretal debt was that of executing the decree. On the other hand, their Lordships of the Privy Council in the case of *Gopi Narain Khanna* v. *Bansidhar* (2) seem to have thought that after the money is paid in such a case the decree becomes spent and there is nothing left to be done in the execution department so that the remedy left to the person subrogated is to enforce his rights by suit.

If then we take it that Pandit Bhagwan Din stepped into the shoes of the prior mortgagees with a right to bring a suit to enforce the claim they had under their two deeds, it must also be taken that any such right of suit is governed by the same rule of limitation as would have applied to a suit by the mortgagees themselves—that is to say—a suit like the present for the recovery of the debt by sale of the mortgaged property. It would, in my opinion, be impossible to hold that the period of limitation of a suit for sale on a mortgage could be extended by a subsequent transaction between the mortgagee and a third person who paid off the mortgage-debt. In this connection I would refer to a case cited by the learned Counsel for the appellants, a recent decision of the Privy Council, *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3). The facts of that case are in many respects similar to those of the case with which I am now dealing, the only difference being that the first mortgagee who had been paid off had not sued for and obtained a decree on his mortgage.

The suit was one for sale on a simple mortgage, dated the 17th February 1888, the rights under which had been assigned to the plaintiffs. The mortgage money had been applied in paying off a *zar-i-peshgi* mortgage bearing date the 20th November 1874, and the plaintiffs on this ground asked for a decree directing certain of the defendants who had taken mortgages of portions of the property at various times between 1874 and 1888, to pay the money due under the deed of 1888 and that in default of such payment the property might be sold and the proceeds applied in satisfaction of the debt in suit. It is not necessary to recite all the facts of the case or to refer to the various pleas which were raised. It is enough to refer to a portion of their Lordships' judgment towards the close of the report (page 558) in which they deal with the question of limitation. As already said the mortgage on which the suit was brought was executed in 1888. The *zar-i-peshgi* deed was executed on the 20th November 1874, and the debt was re-payable in September 1887. Their Lordships say:—

"But as the Rs. 12,000 were, under the *zar-i-peshgi* deed of the 20th November 1874, re-payable in *Jeth* 1294 *Fasli* (September 1887), and this suit was not brought until the 22nd of September 1900, the claim of the plaintiffs to priority is barred by Article 132 of the second Schedule of the Indian Limitation Act, 1877."

There can be no mistake as to the rule of limitation which was applied here. It was held distinctly that the limitation which governed the case was that which was applicable to a suit on the original mortgage of 1874, which had been paid off with the money under the mortgage of 1888. And so in the present case, if the plaintiff has the right of suit, and

(1) 9 M. L. J. 177.

(2) 27 A. 325; 15 M. L. J. 191; 2 C. L. J. 173; 7 Bom. L. R. 427; 9 C. W. N. 577; 2 A. L. J. 336; 32 I. 123

(3) 14 Ind. Cas. 496; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 C. 527.

it is assumed that he has, the limitation for that suit must be the limitation which would have governed a suit for sale on the mortgages of 1886 and 1887, which are the sources of all the mortgagee rights to which he can claim to have been subrogated. The first mortgage was executed on the 22nd October 1886, the period was seven years and limitation for a suit for sale expired in October 1905. A suit on the second deed of 1887 would have been barred by this date, if not earlier. The plaint in the suit now before me was filed in November 1911, and in accordance with the law as laid down by their Lordships in the judgment just referred to it is beyond time. The learned Counsel for the respondent was constrained to admit that this decision was a difficult one for him to get over. He sought in a way to avoid the force of it by insisting that the appellant had certainly bought subject to these two mortgages and he argued that he should not now be allowed to deny the plaintiff's right to recover the money. But this is no answer to a plea of limitation. A man may very well long for property subject to a mortgage, but if the mortgagee allows his right to recover the money to be lost by lapse of time why should the purchaser be debarred from taking advantage of the negligence of the mortgagee? And why should he be prevented, any more than a mortgagor, from raising a plea that the suit is beyond time? Further from a reference to the record of the suit brought by the Court of Wards and other mortgagees on the mortgage of 1895, it does not appear that the appellant here (the Court of Wards) ever admitted that he was liable to pay the money due under the mortgages of 1886 and 1887 to Pandit Bhagwan Din.

Pandit Bhagwan Din was a party to that suit; he was impleaded as the holder of two mortgages of prior dates 1888 and 1894. It was certainly admitted in the plaint that the mortgages of 1886 and 1887 had been made and it was actually stated that a decree had been obtained on them. But it was not stated in the plaint, presumably because the fact was not known, that Bhagwan Din had satisfied the judgment-debt. There is no reference to the mortgage of 1904, which resulted in the satisfaction of the mortgage-decree. So far as can be ascertained Bhagwan Din did not contest the suit. He does not appear to have filed any written statement of defence and he certainly did not put forward any case of priority based upon the fact of his having paid off the decree obtained on the earlier mortgages. He might have insisted upon his priority and have asked the Court for a direction that the plaintiffs should redeem him before bringing the property to sale. Nothing of the sort, however, was done, and this being so I do not think it can be argued now that any admission or conduct of the present appellant in that suit can be held up as a bar to a plea of limitation.

The operation of the law of limitation may, it is true, be saved by conduct amounting to an acknowledgment within the meaning of that term as used in section 19 of the Limitation Act, but the respondent has not put forward any case of this kind and indeed it would have been useless in view of the fact that at the time the present appellant brought his suit (the decree was obtained in 1908), the period for a suit on the mortgages of 1886 and 1887 had long expired—though perhaps it was thought, as it used to be erroneously thought, that the limitation for a suit of this nature was sixty years. The result is that this appeal is allowed and that the decree of the Court below is modified by its being declared that the plaintiff's suit is dismissed with costs as against the fifth defendant, Court of Wards (appellant).

The respondent No. 1, plaintiff in the suit, will pay the appellant's costs in this Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1355 OF 1911.

March 17, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

SURJU MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ASRAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884), s. 40 (1) (*a*) (*ii*)

SURJU MAL *v.* ASRAM.

—Further appeal—Small cause suit of value less than Rs. 2,500—Divisional Court confirming decree of first Court—No further appeal—Section 70 (1) (b) repealed before date of hearing—Court incompetent to exercise powers under it.

Plaintiff sued to recover Rs. 1,450 principal and interest on a bond, and obtained a decree for the principal amount, Rs. 1,258, payable by half-yearly instalments of Rs. 50 each. On his memorandum of appeal to the Divisional Court, plaintiff affixed a Court-fee stamp of Rs. 25, calculating the amount as follows: (1) Rs. 15 on account of *ad valorem* Court-fee payable on Rs. 192 interest which was disallowed by the first Court, and (2) Rs. 10 in respect of the prayer for the cancelment of that part of the decree which related to instalments. The Divisional Judge, however, ordered plaintiff to pay *ad valorem* Court-fee on Rs. 975 instead of the fixed fee of Rs. 10. The plaintiff failing to pay the required Court-fee his appeal was rejected under Order VII, rule 11 (*b*), read with section 107 (2) of the Civil Procedure Code.

On further appeal to the Chief Court:

Held, that under section 40, sub-section 1 (*a*) (*ii*), of the Punjab Courts Act, as it stood before it was amended by Act I of 1912, no further appeal lay in the case; and

that section 70 (1) (*b*) of the Punjab Courts Act, as it stood at the date of the institution of the appeal, having been repealed, the Court's powers under that section had been taken away, and hence it could not treat the petition as one of revision under that section.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated 10th October 1911, affirming that of the District Judge, Karnal, dated 25th May 1911, decreeing plaintiffs' claim in part.

Lala *Lajpat Rai*, for the Appellants.

Chaudhri *Ram Bhaj Datta* and Mr. *Morrison*, for the Respondents.

JUDGMENT.—This suit was brought by the plaintiffs-appellants to recover Rs. 1,450 principal and interest on the strength of a bond said to have been executed by the defendants-respondents on the 29th November 1909. The District Judge granted a decree to the plaintiffs for the principal amount Rs. 1,258 payable by half yearly instalments of Rs. 50 each. The defendants accepted the decree but the plaintiff appealed therefrom to the Divisional Court on the grounds (1) that the District Judge was wrong in disallowing the interest due under the terms of the bond and (2) that the decretal amount, Rs. 1,258. should not have been made payable by instalments. A Court-fee stamp of Rs. 25 was affixed on the memorandum of appeal, the amount of the stamp duty being calculated as follows (1) Rs. 15 on account of *ad valorem* Court-fee payable on Rs. 192 interest which was disallowed by the District Judge and (2) Rs. 10 in respect of the prayer for the cancelment of that part of the decree which related to instalments. The Divisional Judge, by order dated the 5th October 1911, held that in respect of the second relief asked for by the appellants they must pay an *ad valorem* Court-fee on Rs. 975 instead of the fixed fee of Rs. 10. The 10th October 1911 was fixed for the hearing of the appeal on the merits, and the plaintiffs were directed to pay the extra stamp duty at or before that date, but the appellants failed to make good the deficiency in stamp before the case was called on for hearing on the date fixed, and the Divisional Judge, therefore, rejected the memorandum of appeal with costs under Order VII, rule 11 (*b*), read with section 107 (2), of the Civil Procedure Code.

The present appeal before us is from the decree of the Divisional Judge and on behalf of the respondents Pandit Ram Bhaj Datt has raised the preliminary objection that since the decree of the Divisional Judge confirms the decree of the District Judge and the value of the suit which is a small cause, is below Rs. 2,500, no further appeal lay to this Court under section 40, sub-section 1 (*a*) (*ii*) of the Punjab Courts Act, as it stood before it was amended by Act I of 1912. Mr. Lajpat Rai, Pleader for the appellants, admits the force of this objection and concedes that no further appeal lies in this case, but he asks us to treat the memorandum of appeal as a petition for revision under section 70 (*i*) (*b*) of the Act as it stood when the appeal was filed. Following the decision in *Nur Din* v. *Jhando* (1), we hold that Mr. Lajpat Rai's prayer is wholly inadmissible, inasmuch as section 70 (*i*) (*b*) of the Punjab Courts Act as it stood at the date of the institution of the appeal having been repealed, our powers under that section have been taken away. Further, there are no grounds for interfering with the decree of the Divisional Judge under section 70 of the present Act, and, therefore, we maintain that decree and dismiss this appeal with costs.

Appeal dismissed.

(2) 23 Ind. Cas. 85; 44 P. L. R. 1913.

Musammat MUNIFA BIBI *v.* FATEH ALI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 183 OF 1912.

December 23, 1913.

Present:—Mr. Kanhaiya Lal, A. J. C.

Musammat MUNIFA BIBI—PLAINTIFF—APPELLANT

versus

FATEH ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 3—Muhammadan Law—Gift, validity of—Seizin in case of property not admitting of physical possession—Gift, when complete—Gift of two distinct properties of only one of which possession is delivered—Possession obtained subsequent to gift, effect of.

A gift is not valid without seizin. But where the property given does not admit of physical possession and the donor gives such possession, actual or constructive, as he is capable of giving, provided he himself is not out of possession, the gift would be valid. A gift is not, however, complete until possession is taken of the thing given.

If a gift is made by a Muhammadan of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety, but takes effect as to the property which has been duly delivered.

Under the Muhammadan Law, which has been made applicable under section 3 of the Oudh Laws Act to questions relating to gifts between Muhammadans, a gift of a house conveys no title unless it is accompanied by delivery of possession or followed by the taking of possession with the permission, express or implied, of the donor.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated 19th February 1912, confirming that of the Munsif, Musafir Khana, dated 8th January 1912.

Mr. *Samiullah Beg*, for the Appellant.

Mr. *Ali Mohammad*, for the Respondents.

JUDGMENT.—The dispute in this case relates to a house belonging to Wazir Ali. On the 13th January 1910, he made a gift of the house in favour of the plaintiff-appellant, who is the wife of one of his sons. The house was occupied by the plaintiff-appellant and her husband and by Wazir Ali and two other sons of his. The plaintiff sued for the ejectment of those two sons from the portion of the house occupied by them. The defendants claimed to be in proprietary possession of the southern portion by virtue of a partition of the ancestral property made by their father, Wazir Ali, prior to the gift. They pleaded that the plaintiff did not get possession over the disputed portion and that the deed of gift was consequently invalid.

The Courts below held that the entire gift was invalid because a portion of the house was in the possession of those two sons otherwise than on behalf of the donor. The plea of partition was negatived by the Courts below and it was found that they had separated from their father long before the date of the gift; that since the separation they were not on good terms with him, and that they were occupying the southern portion of the house from that time, not as licensees but in their own assumed right against their father's wishes. The question for consideration under the circumstances is whether Wazir Ali could have made a valid gift of the house belonging to him in favour of the plaintiff-appellant under the Muhammadan Law without getting the southern portion of the same, which was occupied by the defendants-respondents against his wishes, vacated by them.

It is a well-established rule of the Muhammadan Law that a gift is not valid without seizin, for, as observed by the Hedaya, gifts are voluntary deeds, and if the right of property were established in them previous to the seizin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily engaged for it. (Hamilton's Hedaya, page 482). But where the property given does not admit of physical possession, and the donor gives such possession as he is capable of giving, provided he himself is not out of possession, actual or constructive, the gift would be valid, for, according to the same authority, "as the object of the gift is the establishment of a right of property, it follows that the tender of the giver is virtually an empowerment of the donee to take possession"—(*ibid*, page 483). A gift is not, however, complete until possession is taken of the thing given. For this purpose the possession must be *kamil* or perfect. "There are three obstructions," says Baillie, "to a perfect possession:—*First*, the subject of gift may be joined to something that is not given, as fruit on the tree or crops on the ground, when either is given without the other. *Second*, it may be *mushghool*, or occupied with something that is not given. *Third*, it may be *mushaa*, or confused with something else by being *mushtarak*, or held in

co-partnership with another. The first is obviated by the gift being *muhawwaz*, or separated: and the second by its being *mufarragh*, or emptied. In the third case the gift being unlawful, when the property is susceptible of partition without injury, possession, if taken, would be invalid —(Baillie's Muhammadan Law, Vol. I, page 520). None of these obstructions exist in this case. The gift comprises the entire house, which is found to have been the property of the donor at the date of the gift. The donor was occupying the northern portion of the house with the donee and her husband, and the remainder was in the occupation of two of his other sons who are the defendants. The donor states in the deed of gift that he has delivered possession over the entire house, and that he and his heirs have no right or interest left therein.

The continued residence of the donor with the donee is not a matter of much consequence, because, as held by West, J., in *Shaik Ibhram* v. *Shaik Suleman* (1): "An appropriate intention where two (the donor and the donee) are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner, whose intention to transfer has been unequivocally manifested." (Tyabji's Muhammadan Law, page 304, and Mulla's Muhammadan Law, page 81). Mr. Ameer Ali states in his book on Muhammadan Law, Vol. I, page 120 that this is in accordance with the principle stated in the *Majmaa-ul-Anhar*, and Jenkins, C. J., observed in *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan* (2) that this decision stood in the authorized reports for over twenty years and was, as far as he could find never questioned. In *Humera Bibi* v. *Najm-un-nissa Bibi* (3) where a gift was made of a house and other immoveable property by a registered instrument and was attended by circumstances of great publicity, the fact that the donor, who was the aunt of the donee, never quitted the house, but continued to reside in it with her nephew, was held to be of no effect in the face of the clearly manifested intention of the donor to transfer possession of the house to the donee. In that case Stanley, C. J., and Burkitt, J. observed that it was not necessary according to the Muhammadan Law that in all cases where a gift of immoveable property was made that the donor should actually and physically vacate the property,—the subject of the gift. Where a husband makes a gift of a house in favour of his wife or a father in favour of his minor children, the force of the above rule is expressly recognized by the Muhammadan jurists. But as stated by Wilson, the real question is whether the two admitted exceptions were meant to be exhaustive or merely illustrative of another general principle, limiting the rule that the donee of a thing, susceptible of physical possession acquires no right over it unless he actually takes possession of it with the permission, express or implied, of the donor —(Wilson's Muhammadan Law, 4th Edition, page 340). In *Mandy Abdul Rahiman* v. *Hussain Saheb* (4) it was observed by Abdul Rahim and Ayling, JJ., that most of the *Futwas* or opinions of jurists were delivered in answers to abstract questions intended to illustrate a certain principle of law, and it would be entirely misleading to treat such opinions as absolute rules of law, having the same authority as the texts of the Quran or an universally accepted ruling of the Prophet or a proportion established by *Ijma* or a consensus of the opinion of the jurists.

Whether there has been a complete delivery or seizin or not is merely in each case a question of fact, which is to be determined with due regard to the intention and conduct of the parties and the nature of the thing given. Wazir Ali states in his evidence that he had two houses in the village, adjoining each other, which were occupied by him and his sons, and that he made a gift of those houses to the plaintiff and gave her possession. He further states that he lives in a portion of the house with the permission of the plaintiff and on her behalf. It appears from the map filed with the plaint that the portion of the house, occupied by Wazir Ali and the plaintiff and her husband, has got a separate enclosure

(1) 9 B. 146.
(2) 29 B. 468; 7 Bom. L. R. 443.
(3) 28 A. 147; A. W. N. (1905) 222; 2 A. L. J. 778.
(4) 16 Ind. Cas. 616; 12 M. L. T. 305; 23 M. L. J. 734.

with a door opening towards the north, while the portion occupied by the defendants has a separate enclosure with a door opening towards the south. The deed of gift describes the house given as No. 6, standing in compound No. 8, and containing a courtyard No. 9, but the boundaries given include both the houses, to which Wazir Ali refers in his evidence. It does not appear whether the southern portion, occupied by the defendants, has got a separate number, but it is obvious from the map as well as the statement of Wazir Ali that the two portions form two separate houses, standing behind each other with only a common well and a door for communication between the two. The delivery of possession over one house does not necessarily imply a delivery of possession over the other, and as held in *Mahomed Farid* v. *Mahomed Abdul Gafur* (5), if a gift is made by a Mahomedan of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety, but takes effect as to the property which has been duly delivered. In *Mohammad Idris Khan* v. *Iftikhar Ahmad* (6) it was held that in a case of a gift by a Muhammadan, it is not necessary to give actual or *khas* possession of the property transferred by gift, but the gift can be supported, if there is delivery of either actual or constructive possession. But where the owner of the property is ousted by a trespasser he has no possession at all and, therefore, a gift made by him is invalid.

It is contended by the learned Counsel for the plaintiff-appellant that, while it is open to the donor or his heirs or representatives-in-interest to question the validity of the gift before he has completed it by delivering possession, it is not open to third parties to set up a plea which the donor himself does not advance. Section 3 of the Oudh Laws Act requires that in the absence of a custom to the contrary, the Muhammadan Law shall be applicable to questions relating to disputes regarding gifts between Muhammadans, and the Inayah quotes as aying of the Prophet, which has been accepted as authoritative by Muhammadan jurists, that a gift is not valid unless possessed, implying thereby that such a gift conveys no title unless it is accompanied by delivery of possession or followed by the taking of possession with the permission, express or implied, of the donor—(Wilson's Muhammadan Law, 4th Edition, page 339). Mr. Ameer Ali seems to be of opinion that for the completion of gift of property in the hands of person holding possession under an adverse title something more is needed than mere declaration, *viz.*, an authority to sue for recovery and that such a gift is not *ipso facto* inoperative. He cites in support of his opinion a passage from the *Radd-ul-Mukhtar*, Vol. IV, page 785 saying that "*Saijani* has stated that a gift by a father of property in the hands of a pledgee, or a usurper, or a vendee under an invalid sale, shall take effect when the pledge or lease expires or the sale is set aside or the thing usurped has been recovered"—(Ameer Ali's Muhammadan Law, Vol. I, page 67). He observes that the right of the donor to such property is a mere inchoate right, *viz.*, to sue for the recovery of possession, and that there is no sufficient ground for holding that where a property, to which a person is rightfully entitled, happens to be in the hands of another, claiming adversely to him, the rightful owner may not make a gift of the same to a third person—(*Ibid*, pages 69 and 70). He explains the passage from the *Durr-ul-Mukhtar* which lays down that when land is in the possession of a usurper or wrong doer or of a lessee or mortgagee, it cannot be given away because in these cases the donor has not possession of the thing which he purports to give, as referring only to gifts to infants, who cannot themselves take possession of the subject of a gift. (*Ibid*, pages 66 and 71). But the doctrine of the invalidity of gift of property in the possession of a usurper is only a corollary to the general rule that no gift is valid without seizin. There would hardly have been any object in making only that corollary applicable to gifts in favour of minors, while exempting such gifts from the general rule of seizin, had it been not intended to limit the exemption to cases where the property gifted was in the possession of the donor or his depository—(Ameer Ali's Muhammadan Law, 4th Edition,

(5) 13 Ind. Cas. 434; 15 C. L. J. 14.
(6) 8 Ind. Cas. 717; 13 O. C. 347.

Vol. I, page 484). A guardian of a minor donee is as competent to sue on his behalf as any other donee, and if a mere authority to sue was an effective substitute for seizin, the validity of gifts of undivided property would equally have been upheld by the jurists, because the remedy of seeking a partition was available. The saying of the Prophet that no gift was valid without seizin, referred to in the *Hedaya* and *Inayah*—(Hamilton, page 482 and Baillie, page 520)—was evidently adopted by the Muhammadan jurists as the guiding test of validity, and no gift was upheld, if the circumstances rendered seizin, actual or constructive, not possible except as a remote and uncertain contingency. Mulla, Tyabji and Wilson adopt the view that a gift is not valid if the property given is in the possession of a trespasser—(Mulla's Muhammadan Law, page 78, Tyabji's Muhammadan Law, pages 276 and 277, and Wilson's Anglo-Muhammadan Law, 4th Edition, page 342); and in *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon* (7), *Mohin-ud-din* v. *Manchershah* (8), *Rohim Bakhsh* v. *Muhammad Hasan* (9) and *Fakir Nynar Muhamed* v. *Kandasawmi Kulathu Vandan* (10), that view was upheld by the different High Courts. The facts and circumstances of the case reported in *Mahomed Buksh Khan* v. *Hosseini Bibi* (11), which follows Case No. 10 of Macnaghten's Principles and Precedents of Muhammadan Law, were entirely different, for in that case the gift was a *hiba-bil-ewaz* of joint property, and the donee, who was a co-sharer, had obtained actual possession over the property soon after the gift. In Case No. 6 of Macnaghten's Principles and Precedents of Muhammadan Law, it was held that where a person made a gift of the property which was the subject of litigation and died while the action was pending without having been able to recover possession and deliver it to the donee, the gift was void and the donee had no *locus standi* to continue the suit. The gift of the southern house is, therefore, invalid and unenforceable.

The appeal is dismissed with costs.

Appeal dismissed.

(7) 9 W. R. 257.
(8) 6 B. 650.
(9) 11 A. 1; A. W. N. (1888) 266; 13 Ind. Jur. 152.
(10) 14 Ind. Cas. 993; 35 M. 120.
(11) 15 C. 684; 15 I. A. 81.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEALS NOS. 48 AND 49 OF 1913.

December 15, 1913.

Present:—Mr. Lindsay, J. C.

Thakur BASANT SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

MATA BAKHSH SINGH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 72—Mortgagee in possession, right of, to recover expenses incurred in suit to recover arrears of rent—Act of management.

In the absence of any foundation for a suggestion of bad faith, the filing of suits to recover arrears of rent by a mortgagee in possession, is an act of management and any expenses incurred in connection therewith are recoverable by the mortgagee under section 72 of the Transfer of Property Act.

Pokree Saheb Beary v. *Pokree Beary*, 21 M. 32, not followed.

Appeal against the order of the Subordinate Judge, Rae Bareli, dated 30th April 1913.

Babu *Bisheshwar Nath*, for the Appellant.

Mr. *Ali Mohammad*, for the Respondents.

JUDGMENT.—These are cross-appeals against an order passed by the Subordinate Judge of Rae Bareli in execution of decree. They may both be disposed of in one judgment. It is not necessary to set out many facts. It is sufficient to mention that Mata Bakhsh Singh and others who are appellants in Appeal No. 49 brought a suit for redemption against Basant Singh who is the respondent in that appeal and got a decree in 1907. In execution of that decree some proceedings were taken subsequent to the date of the decree in connection with the ascertainment of mesne profits. The order which is now under appeal has been passed in proceedings between the parties, the object of which was to ascertain the amount of mesne profits of the mortgaged property which accrued for the period between the 22nd of May and the end of November, 1911, in all a period of about six months. The appellants here put in a large claim for mesne profits in respect of this period alleging that the amount exceeded Rs. 2,000. The mortgagee filed an account according to which the sum owing to the opposite party was only Rs. 178 odd. From the record it is apparent that these proceedings lasted for a considerable time and that a large number of witnesses were

examined. Eventually, however, the parties were directed to put in statements of their account and in pursuance of that order the mortgagee filed an account with regard to which the judgment states that only certain items were disputed by the other side. One of these items related to *mahwa* produce, an item of Rs. 22. This is not in dispute in this appeal. The second item about which there was a contest was a sum of Rs. 150 which the mortgagee wished to charge on account of cost of establishment. Under this head the Subordinate Judge allowed the mortgagee only Rs. 75. This point is also not in dispute now. The third item was a sum of Rs. 39-4 0, which the mortgagee showed as having been paid on account of interest and the fourth was one of Rs. 441-6-3 claimed by the mortgagee on account of law expenses incurred in instituting suits for arrears of rent against certain tenants of the mortgaged property. With regard to the item of law expenses it appears that shortly before the mortgagors delivered possession under an appellate order passed by this Court the mortgagee instituted a large number of suits for arrears of rent. These arrears appear to have been decreed and it is stated that the sum of Rs. 441-6-3 is made up of costs which were allowed on taxation in connection with these rent suits. So far as this claim was concerned the Subordinate Judge found on the strength of a ruling reported as *Pokree Saheb Beary* v. *Pokree Beary* (1) that the mortgagee was not entitled to claim these law expenses. A sum of Rs. 179 odd, however, had actually been realised by the mortgagee and it was held that he was entitled to retain this money. The mortgagee has appealed against this portion of the Subordinate Judge's order. That appeal is Appeal No. 48 of 1913, and it will be convenient to deal with this first. The contention on behalf of the mortgagee is that under the provisions of section 72 of the Transfer of Property Act the mortgagee, being in possession, was entitled to credit for the expenses incurred in instituting suits for arrears of rent inasmuch as the expending of this money was necessary for the due management of the property and the collections of the rents and profits thereof. It has been suggested that these suits were not instituted *bona fide* by the mortgagee. Sixty of them are said to have been put into Court just a day or two before the final order was passed in appeal in this Court by which the mortgagors were entitled to get possession on payment of a certain sum. I am not prepared to infer from this that the mortgagee was acting in bad faith in filing these suits at the time he did. It is no argument to say that suits of this kind are only justified if they are lodged at a time when otherwise the recovery of the rents would become time-barred. A landlord is not bound to wait till the last moment to file suits for arrears of rent, and it may be good policy for him to file these suits long before the period of limitation expires. The fact remains that these suits have all been decreed and there appears to be no doubt, therefore, that the claims were at any rate honest claims, and in the absence of any foundation for a suggestion of bad faith I hold that the filing of these suits was an act of management, any expenses in connection with which were recoverable by the mortgagee. It is true that the case cited by the Subordinate Judge [*Pokree Saheb Beary* v. *Pokree Beary* (1)] is an authority for the proposition that a mortgagee is not entitled to recover expenses of this kind when the suits are brought by him against tenants whom he has admitted as tenants after the date of the mortgage. But I am not prepared to follow this ruling which seems to me to be clearly against the terms of section 72. In *Shri Ganesh Dharmjhes* v. *Keshavrao Govind Kulgavkar* (2) it was held that such sums were recoverable unless there were some express agreement that the costs of such suit were to be deducted from the revenues of the property; and in Ghose's Book on Mortgage a reference is made to a case of *Saunders* v. *Rao Khooman Singh*, (3) in which it is said to have been laid down that the costs incurred in the recovery of rents through the Rent Court can be allowed to the mortgagee. I observe that in the commentary to section 72 in Gour's Transfer of Property Act, it is stated with reference to the Madras ruling just cited that it is not supported by the authorities to which it refers; and as I have said already it seems to be a ruling quite opposed to the language of section 72. I, therefore, decline to follow it. In my opinion the mortgagee was entitled

(1) 21 M. 32.

(2) 15 B. 625 at p. 639.

(3) (1853) S. D. A., N. W. P., 692.

to these expenses. The sum claimed was Rs. 441-6-3. Out of this Rs. 179-11-0 has already been allowed to the mortgagee on the ground that he had actually recovered the money. He is, therefore, I think, entitled to the balance of Rs. 261-11-3. So far the appeal of the mortgagee No. 48 of 1913 must be allowed.

To turn now to the Appeal No. 49 of 1913 which has been filed by Mata Bakhsh Singh and others. It is difficult to discover from the memorandum of appeal what these persons are appealing about. In the first ground it is stated that the lower Court omitted to decide the question of the right of the appellants to realise outstanding rents and to execute decrees already obtained for rents; and in the second ground it is stated that the lower Court should have declared that the appellants were entitled to the sums mentioned above. I cannot find that there was any specific dispute in the Court below as to the right of these appellants to avail themselves of the decrees which had already been obtained by the mortgagee, nor does it appear that they ever asked the Subordinate Judge to declare their right to execute these decrees. *Prima facie* the right to execute the decrees does now belong to the appellants, but they cannot here complain of the Subordinate Judge not having done something which he was not asked to do. The only objection put forward by these appellants in the Court below was with reference to certain specific items of the account filed by the mortgagee. It surely cannot be meant that the Subordinate Judge ought to have debited the mortgagee with the amounts for which these decrees had been obtained when the decrees have not as yet been put in execution and while the money under them is still outstanding. That could not possibly be done. I can find no force whatever in this appeal of Mata Bakhsh Singh and others. There is only one point which was mentioned in the course of the argument and which, though not raised in the memorandum of appeal, may be fitly considered here. The Subordinate Judge allowed the mortgagee to charge the appellants with a sum of Rs. 39-4-0, on account of interest due on a loan which had been paid off by the mortgagee within the year. The loan was for Rs. 640, and it appears on both sides of the account filed by the mortgagee and to that extent it makes no difference to the account, but there can be no reason why the mortgagors should be charged interest on a sum which was borrowed by the mortgagee for his own convenience. This item, it would appear, was in dispute in the Court below but the judgment is silent regarding it. I, therefore, think that in settling the account now a sum of Rs. 39-4-0 should be deducted from the amount which was allowed to the mortgagee on taking the account. The Subordinate Judge found that Rs. 515-9-0 were due to the mortgagors-appellants. Adding to this the sum of Rs. 39-4-0, we obtain Rs. 554-13-0 from which a deduction of Rs. 26-11-3 must be made on account of the finding that the mortgagee was entitled to law expenses. This leaves a balance of Rs. 293-1-9 in favour of the appellants in this case. I, therefore, find that the sum payable to Mata Bakhsh Singh and others the mortgagors by Basant Singh the mortgagee is Rs. 293-1-9, and to this extent the order of the Court below is modified. The Appeal No. 49 of 1913 is dismissed and Appeal No. 48 of 1913 is allowed to the extent already indicated. I make no order as to costs in either case.

Appeal No. 48 allowed.
Appeal No. 49 dismissed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 709 OF 1911.
March 12, 1914.
Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

NATHA SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
ISHAR SINGH—PLAINTIFF, MEHR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Cause of action—Partition proceedings—Party referred to civil suit—Cause of action arising by institution of partition proceedings—Effect of entry in Revenue papers—Several plaintiffs suing jointly—Withdrawal of suit with permission to bring fresh suit—Separate claims—Not barred.

The land in suit had been shown in the Revenue Records for many years past as joint. Defendant, a recorded co-sharer, applied to the Revenue Authorities for partition. The plaintiff, who claimed the land in suit as his sole property, was referred to a civil suit for declaration of title:

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Held, that the cause of action arose only when the defendant applied for partition, and the suit was not time-barred by reason of the land having been recorded for many years past as joint.

Where several plaintiffs had sued jointly, but with a view to avoid difficulties as to misjoinder had withdrawn the suit with permission to bring a fresh suit, and subsequently filed separate claims:

Held, that the former suit did not bar the subsequent claims.

Second appeal from the decree of the Divisional Judge of the Ludhiana Division, dated 22nd April 1911, reversing that of the Additional District Judge, Ludhiana, dated 19th November 1910, dismissing the claim.

Chaudhri *Ram Bhaj Datta*, and Mr. *Nand Lal*, for the Appellant.

JUDGMENT.—This judgment will cover the two connected Appeals Nos. 710 and 711 of 1911. Appended to this judgment will be found a plan which, with the help of the genealogical tree given on page 3 of the paper-book in the present appeal, should make matters plain.

Nos. 6, 5, 11 and 10 on the plan are the old fort which stands in the village of Dheru Mazra. The other numbers are plots of land lying around the fort on all four sides. The fort itself has been partitioned. No. 5 falling to Daya Singh's branch, No. 10 to Sher Singh's branch and No. 11 to Lehna Singh's branch, while No. 6, in which is the entrance to the fort, has been kept joint, along with the adjoining Nos. 1, 2 and 7. Nos. 3 and 4 have also fallen to Daya Singh's branch. No. 8 to Sher Singh's branch and Nos. 15 and 14 to Lehna Singh's branch. So much is admitted. The dispute is as to Nos. 9, 12 and 13, which, according to defendants (the three sons of Ganda Singh, son of Daya Singh) is still joint, while the plaintiffs in these three suits claim a declaration of ownership, Mehr Singh, representative of Sher Singh's branch, claiming No. 9, Dalip Singh, etc., claiming No. 12 and Ishar Singh claiming No. 13.

The first Court held that plaintiffs had failed to prove their claim, but the learned Divisional Judge on appeal came to a different conclusion and decreed the claims. So the defendants, grandsons of Daya Singh, are the appellants in this Court.

Mr. Ram Bhaj Datta, who argued the case for the appellants, seems to have had the papers handed over to him at short notice, for at first he stated that plot No. 3 was at one time shown in the Revenue Records as joint. But this was evidently a mistake. The real facts are that the fort was partitioned before the advent of British rule and that the fort is on the south side of the *abadi*, and that none of the plots shown in the plan have ever been entered in any of the records as belonging to any one but have all been included in the *abadi deh*, excepting the land now in suit, *i.e.*, the three plots (Nos. 9, 12 and 13) to the south. These three numbers have been shown in the records as joint property of all the parties until the recent Settlement of 1909-1912, when they, too, were included in the *abadi deh*.

None of the land in suit appears ever to have been cultivated except in 1900, when Mehr Singh's uncle, Kishen Singh, grew onions in a portion of the land.

After due consideration we consider that the Divisional Judge's decision is correct. The land in dispute is of no great area and of no great value, and we do not suppose that any of the parties troubled themselves much about the entries in the Revenue Records, while it was only natural for the Revenue Authorities in early times to put down a strip of land adjoining the fort as belonging to the owners of the fort, without troubling to ascertain whether it was joint or not and a mistake having once occurred could easily be continued. On every side of the fort there are adjacent plots of land. Those adjoining the north-west corner of the fort (Nos. 1, 2 and 7) are kept joint, as is the north-west quarter of the fort. Other numbers fall to the owners of that quarter of the fort which they adjoin. Thus Nos. 3 and 4 go with No. 5, Nos. 15 and 14 go with No. 11, and No. 8 goes with No. 10. Why should Nos. 9, 12 and 13 have been kept joint? There is a good reason for Nos. 1, 2 and 7 being left joint, *viz.*, that they adjoin No. 6, which is the portion of the fort left joint. But Nos. 9, 12 and 13 are quite distinct from the joint portion and adjoin Nos. 10 and 11. Moreover, Nos. 5, 10 and 11 are of equal area, and if we allot Nos. 3 and 4 to No. 5 it will obviously be an unequal distribution to allot No. 8 only to No. 10 and Nos. 15 and 14 only to No. 11, since No. 4 alone is as large as

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No. 8 or as Nos. 14 and 15 put together. But if, in addition, we allot Nos. 8 and 9 to No. 10 and Nos. 12, 13, 14 and 15 to No. 11 the distribution will be a fair one.

Mr. Ram Bhaj Datta urges, as a reason for keeping Nos. 9 and 12 and 13 as joint, that these numbers adjoin cultivated land to the south, but as he has not shown us that the land to the south is joint land of the parties, we fail to see any force in this argument.

Then Mr. Ram Bhaj Datta wishes us to see the evidence of Bakhtawar Singh, whom he describes as a witness for the plaintiffs, but on referring to the record we find no such witness. He was apparently a witness in the former suit, but we cannot refer to the record of the former suit brought by the plaintiffs jointly, as that is not evidence in the present suits. We agree with the learned Divisional Judge in holding that the land is not joint, and that plaintiffs have proved their title.

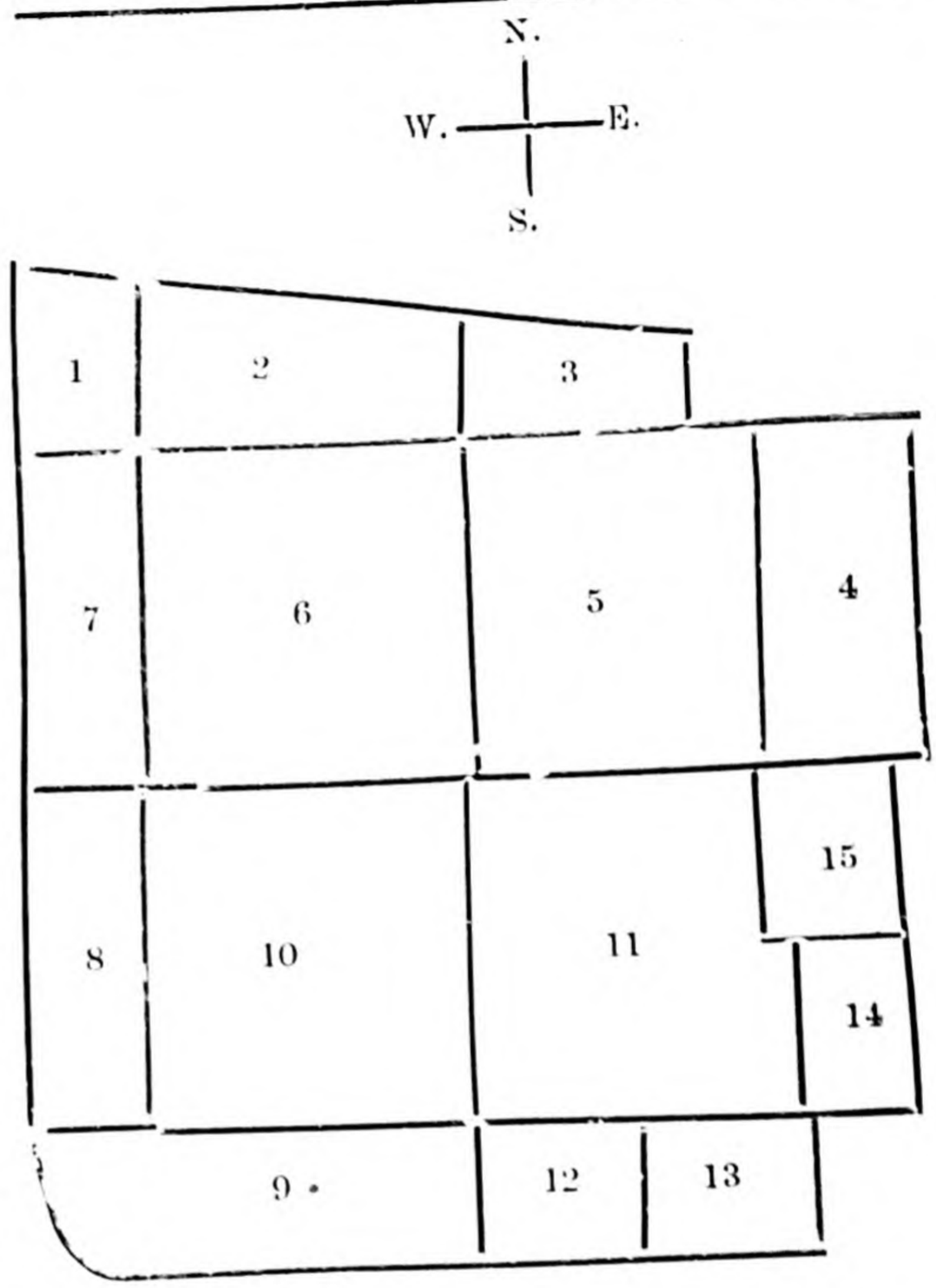
Next it is urged that these suits are time-barred, as the land in suit has been shown in the Revenue Records for many years past as joint. But the cause of action arose only recently when the defendants applied to the Revenue Authorities for partition.

Then it is urged that the present suits are barred by reason of the former suit, in which the present plaintiffs all sued jointly. But we find that that suit was withdrawn, with permission to bring a fresh suit if so advised. The plaintiffs evidently withdrew from the former suit to get over difficulties as to misjoinder. We can see no reason whatever why they should not, after having obtained permission to withdraw with liberty to sue again, file separate claims. Then it is urged that Order XXIII, rule 1 (4), is a bar, as all the plaintiffs did not join in the request for permission to withdraw from the former suit. Order XXIII, rule 1 (4), lays down that permission to withdraw cannot be given unless all the plaintiffs consent, but the application for leave to withdraw was presented by a Pleader, and two of the plaintiffs supported it in person and said they had obtained the consent of the absent plaintiffs and there is nothing to show that this statement was incorrect. We take it, therefore, that all the plaintiffs were parties to the request for permission to withdraw. No other points have been urged before us.

We uphold the decrees of the learned Divisional Judge, and dismiss these three appeals with costs.

Appeals dismissed.

APPENDIX TO CIVIL APPEAL NO. 700 OF 1911.



OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 5 OF 1913.

December 22, 1913.

Present:—Mr. Stuart, A. J. C.

SRI KRISHNA LAL—PLAINTIFF—APPELLANT

versus

Shaikh GHULAM SUBHANI—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 2, cl. 5, 124C and 124D—"Portion of the produce of land", meaning of—Landlord's remedy against tenant failing to cultivate holding held on rent payable in kind—Applicability of sections 124C, 124D.

The words "portion of the produce of land" in the definition of "*rent*", as given in section 2, clause

SRI KRISHNA LAL *v.* GHULAM SUBHANI.

5, Oudh Rent Act, mean a portion of what the land has actually produced and not a portion of what it might have produced. They cannot be held to be a portion of the produce which ought to have been grown upon the fields.

Where a tenant deliberately omits to cultivate a holding the rent of which is payable in kind, no arrears of rent can be held to exist and the landlord's remedy is to sue in the proper Court for damages for breach of the contract which such a tenant is implied to have made to cultivate the holding as well as his capacities and resources permit.

Sections 124C and 124D of the Oudh Rent Act apply only when the suit has been instituted in a wrong Court and not when the plaintiff has sued in the right Court upon a cause of action upon which he cannot succeed.

Appeal against the order of the District Judge of Gonda, dated 1st November, 1912, upholding that of the Assistant Collector, Bahraich, dated 22nd August 1912.

Saiyed *Zahur Ahmad*, for the Appellant.

Mr. *St. George Jackson*, for the Respondent.

JUDGMENT.—This suit was filed before an Assistant Collector of the first class in the Bahraich District by a *Thekedar*, holding a *theka* from the Court of Wards as Manager of the Nanpara Estate, against a tenant cultivating a holding on which the rent was payable in kind. The plaintiff's case was to the effect that the tenant had deliberately refused to cultivate 8·9 acres in 1316 *Fasli*, 8·54 acres in 1317 *Fasli* and the whole of his holding (which is of an area of 10·38 acres) in 1318 *Fasli*, and he claimed under section 108 (2), Local Act XXII of 1886, arrears of rent to be computed according to the value of the produce in the fields adjoining to the aforesaid holding at a rate equal to one-half of the value. The learned Assistant Collector framed the following four issues:—

1. Is the suit cognizable by a Revenue Court?

2. Did the disputed land produce any crops?

3. If *Parti*, can any rent be allowed for it?

4. What can be allowed, if at all, from defendant to plaintiff?

He decided the first issue in the plaintiff's favour and the second and third issues in the defendant's favour and dismissed the suit. An appeal was preferred to the Court of the District Judge who dismissed the appeal and upheld the dismissal of the suit. The plaintiff comes to this Court in second appeal. The written statement shows that the defendant, while admitting that he was the tenant of the holding in question and that rent was payable in kind, did not admit that the plaintiff was entitled to half the produce of the fields. His contention was that the plaintiff was only entitled to one third of the produce. Further, he contested, that his omission to cultivate any portion of the holding in any particular year was due to the action of the plaintiff who had deliberately placed obstacles in his way which had restrained him from cultivating. The Assistant Collector found that the defendant showed no negligence in not cultivating the fields in question, and further that the plaintiff had failed to prove what were the conditions of the contract of tenancy with regard to the division of the produce. The lower Appellate Court did not decide either of the latter points. Their decision is not necessary for the purpose of decision of this appeal.

The plaint can only be taken as asking for relief on the basis of an allegation that arrears of rent are due. I am unable to find that in a case where a tenant deliberately omits to cultivate a holding the rent of which is payable in kind any arrears of "rent" can be held to exist. The "rent" in such a case is a portion of the produce actually grown upon the fields. It cannot, by any stretch of language, be held to be a portion of the produce which ought to have been grown upon the fields, and, where no produce has been grown, no "rent" can accrue. It does not follow as a consequence of this finding that the landholder is left without a remedy in a case where such a tenant deliberately and perversely refuses to cultivate his holding. When a landholder permits cultivation by a tenant on an undertaking that he shall be remunerated for the use and occupation of the land by a share in the produce as agreed between the parties, there is necessarily an implied contract that the tenant shall cultivate the holding as well as his capacities and resources permit him, and in the event of his failure to cultivate the holding as well as his capacities and resources permit him the landholder has the remedy of suing him for damages for breach of this implied contract. But in such a case the suit would be for damages and not for rent. There can be no doubt that in this case the suit was for

rent and the Revenue Court has no jurisdiction to decide such a suit for damages for breach of contract. The provisions of section 127 of Local Act XXII of 1886 permit a Revenue Court to decree arrears of rent against a trespasser in cases in which the rate of rent has been fixed, and to assess the rate and decree arrears based on such rate in cases where the rent has not been fixed. But the provisions of this section do not authorise a Revenue Court to assess and decree damages. They rather permit the Revenue Court to place the trespasser in the position of a tenant, and then decree rent against him. A suit for damages for breach of contract cannot lie in a Revenue Court unless the provisions of the Act specifically permit such a suit to lie. There is nothing in the provisions of Local Act XXII of 1886 that gives a Revenue Court jurisdiction to decide a suit of the present nature. I have been referred to the decision in *Lalji Panday* v. *Berhamdeo* (1). The principles laid down in that decision are not, however, applicable to the present suit, for the definition of rent given in section 3 (5) of Local Act XXII of 1886 is: "The money or the portion of the produce of land, payable on account of the use or occupation of land." In this contract of tenancy there was no money payable on account of the use or occupation of land. The words "portion of the produce of land" can only be held to mean a portion of what the land has actually produced and not a portion of what it might have produced. For the above reasons I find that the appeal must be dismissed.

I have been asked by the learned Counsel for the appellant to take action under the provisions of sections 124 (C) and 124 (D), Local Act XXII of 1886. I am of opinion that I cannot take action under either of these sections. This is not a case in which a suit has been instituted in a wrong Court. The suit was a suit for arrears of rent. It was, therefore, instituted rightly on that plea in a Revenue Court. Why the plaintiff has failed is because he has stated a cause of action upon which he cannot possibly succeed. He sued for arrears of rent when no arrears of rent were due to him. If he had sued by error for damages in a Revenue Court the Court of original hearing or the Court of first appeal would have been in a position to take action under the provisions of sections 124 (A), 124 (B), 124 (C) or 124 (D). But as his suit stood, it had to be dismissed. In view of the fact that the suit was liable to dismissal as the plaint showed that no arrears of rent were due, and that all proceedings subsequent to the filing of the plaint were supererogatory, I do not propose to arrive at a finding upon other points raised in the pleadings. It will still be open to the appellant to file a plaint in the Civil Court upon a different cause of action to that which he originally alleged with regard to a portion of the subject-matter. In the circumstances it is inadvisable to discuss the value of the evidence adduced. I, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

(1) 13 Ind. Cas. 9; 16 C. W. N. 89.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEALS NOS. 452 AND 453 OF 1911.

March 3, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

Kanwar CHARANJIT SINGH—DEFENDANT—APPELLANT

versus

BISHEN SINGH—PLAINTIFF AND HIRA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Burden of proof—Limitation—Burden of proving age to bring suit within time—Plaintiff to prove his age under 21 at date of institution of suit—Proof to be affirmative and clear—Court reluctant to throw out case as barred by time if suit just or equitable.

For the purposes of limitation it is for the plaintiff to establish affirmatively and clearly that he was under the age of 21 at the date of institution of his suit, and where he fails to do this and has been able merely to show that he was possibly under that age at that time, it must be held that he has failed to discharge the burden of proving that his suit is within time.

The Chief Court will be naturally reluctant to throw out a claim as barred by limitation when it is satisfied that the claim is a just or equitable one.

Second appeal from the decree of the Divisional Judge of Jullundur, dated 20th January 1911, varying that of the Subordinate Judge, 1st Class, of Jullundur, dated 19th July 1910, decreeing plaintiff's claim.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Mr. *Badr Din Qureshi*, for the Respondent No. 1.

JUDGMENT.—The facts involved in

these two appeals are intermediately connected and this judgment will dispose of both appeals. The plaintiff, Bishen Singh, instituted the present two suits on the 14th of October and on the 10th of November 1909, respectively, and in them the relief, which he claims, is the usual declaration in respect of two sales, of which one was executed by his grand-uncle, Kahana, in February 1893; and the other was executed in April 1893 by his father, Jawala Singh, and his two uncles, Jowahir, deceased, and Hira, jointly. The vendee, in both cases, was Kanwar Sochet Singh Ahluwalia, who died subsequently and is now represented by his son Kanwar Charanjit Singh. The items, comprising the alleged consideration for the two sales, are set forth in detail in the judgment of the Divisional Judge and it is now not denied that the two first items referred to in each deed, *i e*, promissory-notes for Rs. 401 in favour of Dewa Singh and for Rs. 1,000 in favour of Usman Khan, are fictitious and were entered in the deeds through the misguided zeal of the vendee's agent who hoped thereby to stave off pre-emptors.

The Courts below are agreed that, save in respect of the said promissory-notes, full consideration and necessity have been proved. They also held that the plaintiff's suit was within time and consequently have granted him a decree to the effect that the sales shall be deemed to be mortgages so far as his rights are concerned; and that he will be entitled, after the death of his father and uncle, Hira Singh, to obtain possession on payment of the amounts found to be genuine by the Courts below.

The defendant-vendee appeals to this Court and the first ground urged on his behalf is that the suits are barred by limitation. *Prima facie*, this contention is correct as the sales took place in 1893 and the suits were not brought until 1909. It is urged, however, by the respondent that he was a minor at the time of the sales and that both suits were instituted by him within three years of his attaining the age of 21. Clearly the *onus* of proving that such was the case lies heavily upon him, and the very utmost that he has been able to show is that there is some doubt whether he was above or below the age of 21 at the time when he instituted the first of these two suits, *i.e.*, in October 1909. M. Dewan Ali, Assistant Surgeon, examined the plaintiff in that month and in his opinion the plaintiff was then above the age of 18 but under the age of 20. Lieutenant-Colonel Smith, Civil Surgeon, when examined as a witness in January 1910, stated that in his opinion plaintiff was probably about 20 years of age; but both the above gentlemen, when cross-examined, admitted that plaintiff might be 22 at the time when they saw him in Court. The Subordinate Judge himself considered plaintiff to be about 20 years old. The Divisional Judge, on the other hand, remarks in January 1911: "I have myself seen the plaintiff, and, judging by his appearance my opinion is that he may very well be 22 or even 23 and perhaps more." The learned Judge would, therefore, have himself held that plaintiff was probably over the age of 21 at the date of the suit, but he felt that he must (as he terms it) "follow the recognized practice," as set forth in two judgments to which he refers, and accept the opinions of the doctors as conclusive.

It was for the plaintiff to establish affirmatively and clearly that he was under the age of 21 at the date of institution of the suits, and, as he has not been able to do this but has been able merely to show that he was possibly under that age at that time, we must hold that he has failed to discharge the burden of proving that his suit is within time. This Court is naturally reluctant to throw out a claim as barred by limitation when it is satisfied that that claim is a just or equitable one. In the present case, however, there would appear to be very little to urge in support of the equity of the case so far as plaintiff is concerned. The sales, which he impeaches, were effected by all the adult members of his family who sold up their ancestral holding in the village and migrated elsewhere. His father and one of his uncles are still alive and plaintiff himself, we understand, has left India and gone to Australia since the date of the Divisional Judge's decree. There can hardly be any doubt that the suit has been instituted more or less as a speculation by some third party. Holding then that the suits are barred by limitation we accept this and the connected appeal and dismiss both suits. In view of the fact

that two large items of the consideration money were admittedly inserted in the deeds without justification, we consider ourselves justified in directing that the parties should bear their own costs throughout and we order accordingly.

IN No. 453 OF 1911.

For reasons recorded in our judgment in Civil Appeal No. 452 of 1911 decided to-day, we accept this appeal and dismiss plaintiff's suit.

Parties to bear their own costs throughout.

Appeals accepted

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 129 OF 1913.

February 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

AMIRTHAM PILLAI—DEFENDANT—PETITIONER

versus

NANJAH GOUNDEN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Promissory-note, signed by one out of several persons intended to be jointly liable—Liability of person signing—Material alteration, effect of.

Where one person signs a promissory-note on the condition that another person who was to be jointly liable with him should join in the execution and the latter does not, the former is not liable.

Sivasami Chetti v. *Sevagan Chetti*, 25 M. 389; 12 M. L. J. 17, followed.

A material alteration invalidates a whole note. This principle applies to a case where although there has been no alteration after the note came into existence, the note was *created* in the first instance itself with a forged signature of a material character.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge of the Niligris, the Small Cause Suit No. 674 of 1912.

Mr. *T. R. Venkatarama Sastri*, for the Petitioner.

JUDGMENT.—If, as is implied in the plaint, the two defendants were intended to be jointly liable for the plaint debt and were together to execute the promissory-note, Exhibit A, for that debt so as to make themselves jointly liable, and if the 1st defendant did not join in the execution (as found by the Subordinate Judge) and only the 2nd defendant signed it, even the 2nd defendant could not be made liable as he agreed to be liable only if the 1st defendant was also jointly made liable (see *Sivasami Chetti* v. *Sevagan Chetti* (1).

(1) 25 M. 389; 12 M. L. J. 17.

Further a material portion of the promissory-note being a forgery, it seems to come within the principle of the decisions which hold that a material alteration invalidates the whole note. I find that that principle has been so applied to a case where there seems to have been no alteration after the note came into existence, but the note was created in the first instance itself with a forged signature of a material character. (See Civil Revision Petition No. 601 of 1912, per Miller, J.).

I, therefore, accept this petition and modify the lower Court's judgment by dismissing the suit against the 2nd defendant also. The 2nd defendant will bear his own costs in both Courts.

Petition allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 60 OF 1913.

November 22, 1913.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji.

MOHAMMAD ALI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JASRAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Vakalatnama—*Pleader's name not mentioned by oversight—Presentation of appeal, whether proper—Objection at any stage of the case.*

Where by oversight the name of a Pleader presenting an appeal was not mentioned in the body of the *vakalatnama*:

Held, that the Pleader was not duly appointed and the appeal was not properly presented.

The fact that the objection was not taken till a very late stage in the case, would not validate the presentation of the appeal.

Letters Patent Appeal against the decision of Mr. Justice Rafiqua, printed in 19 Ind. Cas 674; 11 A. L. J. 458, wherein the full facts of the case are stated.

Mr. *Shamnath Mushran* (with him Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellant.

Mr. *Hamilton* (with him Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—We are unable to hold that the view taken by the learned Judge of this Court was wrong.

We accordingly dismiss the appeal but without costs.

Appeal dismissed.

BROWNE, C. H. *v.* EMPEROR.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 123 OF 1913.

March 13, 1913.

Present:—Mr. Justice Parlett.

C. H. BROWNE—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 297—Misdirection—Charge to Jury.

Where the accused was tried for criminal breach of trust by a District Magistrate with the aid of a Jury and in summing up the District Magistrate did not expressly tell the Jury that the test they were to apply was whether the circumstances relied upon by the accused showed an intention of causing 'wrongful gain' or 'wrongful loss', nor were they told what those terms meant:

Held, that there had not been sufficient compliance with section 297 of the Criminal Procedure Code and that the verdict could not stand.

Appeal against the conviction and sentence of nine months' rigorous imprisonment passed in Criminal Trial No. 12 of 1913, by the District Magistrate, Rangoon, under section 409, Indian Penal Code, on the appellant who was tried as a European British Subject by the District Magistrate sitting with a Jury of five.

Messrs. *Patker* and *Glanville*, for the Appellant.

The *Government Advocate*, for the Crown.

JUDGMENT.—Appellant was tried as a European British Subject by the District Magistrate, Rangoon, and a Jury and convicted under section 409 of the Indian Penal Code and sentenced to nine months' rigorous imprisonment. That sentence exceeds the Magistrate's powers under section 446 of the Code of Criminal Procedure and cannot be confirmed. Appellant, however, appeals on various grounds and those which were urged at the hearing might be summarised as follows:—

I. It was urged that the charge itself was defective in that it stated that accused "criminally misappropriated" the money entrusted to him and that it did not state that it was done "dishonestly." No doubt, the correct form of the charge in view of section 221 (2), Criminal Procedure Code, would have been that accused being entrusted with money in the way of his business committed criminal breach of trust in respect of that money. But, it is obvious not only that any objection to the wording could and should have been raised at the commencement of the trial, but also that the charge as framed did give the accused notice of the matter with which he was charged. Counsel naturally never ventured to suggest the contrary; indeed in his reply he withdrew the argument. It was clearly untenable.

2. It was argued that there was misdirection to the Jury in that the Magistrate told them that the facts were not in dispute, whereas certain of them were; that the Magistrate had decided certain questions of fact instead of leaving them to the Jury and that he expressed his opinion upon others without telling the Jury that they were not bound by such opinion. The charge must be read as a whole and in relation to the circumstances of the case. Appellant as an auctioneer received articles to sell on behalf of the complainant and did sell some and receive payments to the extent of Rs. 2,293-9-9 for them in March 1912. This amount less certain sums due to him for commission, etc, was due to be paid to complainant within three months. At the end of that time demand was made and appellant expressed himself unable to pay. Subsequent demands were also made unsuccessfully and complainant would have been willing to grant further time for payment, if appellant could furnish a guarantor. These facts are admitted. It is urged that the contract between the parties did not create a trust, that the facts, as to what that contract was, were in dispute and should have been left to the Jury to decide, whereas the Magistrate held that the existence of a trust was established. It appears that it is customary here for auctioneers to have to pay up the value of goods sold for their clients within one month of the sale. It is urged that the fixing of the time in this case at three months, no interest being charged on the sum due, together with the offer to grant further time if a guarantor were furnished, are facts bearing on the decision of the point whether the contract between the parties was the usual one between auctioneer and clients, and the decision should have been left to the Jury; or, at any rate, that the willingness to grant time on guaranatee points to a fresh contract made after the three months expired, and that whether thereunder the relation-

ship of trust was retained was a question for the Jury.

It cannot be gainsaid that the ordinary relationship between auctioneer and client is one of trustee and *cestui que trust*, both as regards the goods made over by the latter to the former to sell for him and also as regards the money produced by the sale and received by the auctioneer. [*Crowther* v. *Elgood.* (1)]. What the Magistrate, in effect, told the Jury was that the admitted facts as to the original transaction between the parties, would constitute a trust; but that appellant relied upon further facts as pointing to special conditions entered into between the parties in consequence of which appellant did not hold the sale-proceeds, as the money of the complainant, and he left the question of the existence of such special conditions and the inference to be drawn from them to the Jury. In this I am unable to hold that there was misdirection. No doubt, it is desirable to remind the Jury that they were the sole Judges of fact and that any expression of opinion by the Judge upon the facts is not binding upon them. But, in this case, I am of opinion that the questions of facts, which should properly have been left to the Jury, were, in fact, expressly so left.

3. Some alleged minor errors in the charge to the Jury have been referred to *viz.*, that certain arguments used by the Prosecuting Counsel were attributed to the defence. It is not, however, suggested that they were erroneous nor that their being attributed to the wrong side has, in fact, occasioned a failure of justice, without being satisfied as to which an Appellate Court is prohibited from interfering.

4. Lastly, it is argued that section 297 of the Criminal Procedure Code was not complied with, in that the Magistrate did not sufficiently lay down the law by which the Jury were to be guided. It appears that the laying down of the law consisted merely in reading out sections 405 and 409 of the Indian Penal Code It is urged that this was an insufficient explanation of constituents of the offence, reliance being placed on *Briscoe Birch, J. S.* v. *Emperor* (2) and also *Taju Pramanik* v. *Queen-Empress* (3) and *Mari Valayan* v. *Emperor* (4) and in particular that the Jury were not told the meaning assigned in the Indian Penal Code to the word "dishonestly," which, as in the first case cited above, is an essential part of the definition of the offence. It can hardly be necessary in every instance when laying down the law to go back to absolutely first principles and give the definition of every expression used in the section dealing with the offence. To do so might savour of an insult to the intelligence of the Jury. For instance, I doubt whether Judges often, if ever, tell the Jury that the word "death," in sections 299 and 300 of the Indian Penal Code denotes the death of a human being. Similarly, in a simple case of theft where a pick-pocket steals a man's watch and runs away with it and the defence is one of mistaken identity, the omission to define "dishonestly" might well be held not to be misdirection which had in fact caused a miscarriage of justice. But, though in many cases the popular meaning of the word and that assigned to it in the Indian Penal Code coincided, there were certainly instances in which they did not. Men's standards of honesty and straightforwardness differ and so consequently do their opinions of other persons' conduct. Instances are common of transactions, which are discreditable, dishonourable, even fraudulent but which nevertheless fall short of being dishonest within the definition of that term as given in the Indian Penal Code.

In the present instance, there were circumstances which bore upon the question as to whether appellant's action was or was not dishonest within that definition, and though I think the attention of the Jury was called to most, if not all, of them in the course of the summing up, yet they were not expressly told that the test they were to apply was whether those circumstances showed an intention of causing wrongful gain or wrongful loss, nor were they told what those terms meant. It may be that they

(1) (1887) 34 Ch. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; 35 W. R. 369.

(2) 5 Ind. Cas. 981; 5 L. B. R. 149; 11 Cr. L. J. 340.

(3) 25 C. 711; 2 C. W. N. 369.

(4) 30 M. 44; 1 M. L. T. 399; 5 Cr. L. J. 78.

thought appellant untrustworthy in business matters, that his conduct in not paying complainant as soon as he received the money was discreditable or even dishonourable; but it is impossible to say that they considered the facts in the light of the definition and came to the finding that he acted with the intention of causing wrongful loss or wrongful gain, and I am, therefore, constrained to hold that there had not been a sufficient compliance with section 297 of the Criminal Procedure Code and that the verdict cannot stand. The finding and sentence are reversed; and appellant will be committed for trial. Bail in Rs. 3,000 with two sureties jointly and severally in that sum may be accepted.

Appeal accepted.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION APPLICATION No. 87B OF 1913.

June 26, 1913.

Present:—Mr. Justice Twomey.

AH YWAY AND ANOTHER—APPELLANTS

versus

MA GYI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *ss.* 133, 135, 138—*Time for setting up* bona fide *claim to property.*

Where a conditional order is passed under section 133, Criminal Procedure Code, and the person against whom the order is made raises a *bona fide* claim that the subject of contention is private property, the Magistrate is bound to investigate the claim and cannot leave it to a Jury appointed under section 138. But when a Jury has once been appointed it is not open to the person, against whom the order is made under section 133, to set up such a claim and to have it determined by the Magistrate before the Jury proceeds with the matter.

Luckhee Narain Banerji v. *Ram Kumar Mukherji*, 15 C. 564, followed.

Obiter.—If the Jury decided that the order was reasonable and proper the appellant would not be estopped from bringing a civil suit to establish his right to exclusive enjoyment of the land.

Muttyram Sahoo v. *Mohi Lall Roy*, 6 C. 291, referred to.

Application for review of the order of the Eastern Sub-Divisional Magistrate of Rangoon, dated 2nd April 1913, ordering the case against the appellants under section 133 of the Code of Criminal Procedure to be tried by Jury appointed under section 138 of the Code of Criminal Procedure.

Mr. *Lentaigne*, for the Appellants.

Mr. *Maung Kin*, for the Respondent.

ORDER.—The rulings cited by the learned Advocate for the applicant show conclusively that where a conditional order is passed under section 133 of the Criminal Procedure Code and the person against whom the order is directed raises a *bona fide* claim that the subject of contention is private property, the Magistrate is bound to investigate the claim, and if he finds it established to stop further proceedings. Where such a claim is raised the Magistrate cannot leave it for decision to a Jury appointed under section 138.

But in the present case the applicant made no such claim when he appeared to answer the conditional order. The order was issued on 2nd December 1912 and the applicant's Advocate applied to the Magistrate on 19th December to appoint a Jury under section 135. It was not till the 2nd April 1913 when the Jury had been constituted and were ready to go into the matter in dispute that the Advocate raised this point, and asked the Magistrate to go into the question of title to the land over which a public right of way is claimed. I think that it was then too late. This view is supported by the following passage in *Luckhee Narain Banerji* v. *Ram Kumar Mukherji* (1): "The rule, however, that a *bona fide* claim of title ought not to be determined in summary proceedings before the Magistrate is subject to this, that the objection must be raised by the defendant at or before the hearing; he cannot be heard afterwards to object to the result of proceedings to which he has deliberately submitted himself". I can find no authority in any of the cited rulings for holding that once a Jury is appointed on the application of the person against whom an order under section 133 has been made, it is open to him at a later stage to set up a claim of right to the subject of contention and to have this claim determined by the Magistrate before the Jury proceed with the matter.

It appears to me that there is no alternative now but to let the Jury try the issue whether the Magistrate's order under section 133 is reasonable and proper.

I may note, however, that if the Jury should decide that the order is reasonable and proper

(1) 15 C. 564.

and the Magistrate should then make the order absolute, the applicant will apparently not be estopped thereby from bringing a civil suit to establish any right he may claim to the exclusive enjoyment of the land. *See Muttyram Sahoo* v. *Mohi Lall Roy* (2).

The application is dismissed.

Application dismissed.

(2) 6 C. 291.

PUNJAB CHIEF COURT.

CRIMINAL REVISION CASE No. 1950 OF 1913.

January 9, 1914.

Present:—Mr. Justice Johnstone.

EMPEROR—PROSECUTOR

versus

Lala HARKISHEN LAL—ACCUSED.

Companies Act (VI of 1882), s. 74—Penalty of Rs. 1,000 is fixed and irreducible—Criminal Revision—Enhancement of sentence.

Under section 74 of the Companies Act the fine of Rs. 1,000 is a *fixed* one and a Magistrate cannot impose a lesser fine where the offence is proved.

The Chief Court enhanced the fine from Rs. 300 to Rs. 1,000.

Case reported by the Sessions Judge of the Lahore Division with his No. 1222, dated 8th November 1913.

FACTS.—It is alleged that Lala Harkishen Lal as Managing Director of the Golden Ginning and Press Company, Limited, Lahore, failed to call a general meeting of the shareholders in and to publish a balance-sheet annually between 8th August 1910 and 2nd January 1913.

The accused, on conviction by Mr. J. D. Anderson, exercising the powers of a Magistrate of the 1st class in the Lahore District, was sentenced, by order dated 17th July 1913, under section 74 of the Indian Companies Act, to a penalty amounting to Rs. 300 or to undergo simple imprisonment for three days.

The proceedings are forwarded for revision on the following

GROUNDS.—This is a petition for revision of the order of a first class Magistrate, dated 17th July 1913, sentencing the respondent, Lala Harkishen Lal, to a penalty of Rs. 300 under section 74 of the Indian Companies Act (VI of 1882). The respondent was Managing Director of the Golden Ginning and Press Company, Limited, Lahore.

And he admitted, through his Counsel, the facts alleged by the prosecution, *viz.*, that no general meeting was called in January 1911, and that no balance-sheet of the company was published during the year. Apparently no balance-sheet was published between 8th August 1910 and 2nd January 1913. The Magistrate, exercising his discretion, inflicted a penalty of Rs. 300. Counsel for the Crown has urged that the penalty under section 74 of the Act now in force is a *fixed penalty* of Rs. 1,000; and that the Magistrate could not exercise discretion so as to inflict the lesser penalty. Counsel relies on *Dina Nath* v. *Emperor* (1).

Respondent's Counsel has not wished to oppose the point that Rs. 1,000 is the *fixed penalty*; but has cited *Abdul* v. *Emperor* (2), *Emperor* v. *Hari Singh* (3), *Crown* v. *Chuni Lal* (4), *Crown* v. *Saif Ali* (5) and *King-Emperor* v. *Maidhan* (6). His point is that, as the Chief Court has, in certain cases, declined to interfere on revision there is no necessity for this Court to send the present proceedings to the Chief Court. I see no force in this argument, it is not for this Court to decide whether the Chief Court be likely to interfere, or not. It appears that section 74 of the Act of 1882 contemplates a *fixed penalty*, consequently, the Magistrate's order was wrong, and there is a case for enhancement.

I may, however, note that in the new Act (VII of 1913), not yet in force, the words "not exceeding" have been inserted in section 131 (4) thereby allowing a Court discretion as to the amount of the penalty, and possibly indicating what was the intention of section 74 of the Act of 1882.

As no ruling of the Punjab Chief Court exists on the point I report the case for the

(1) 18 Ind. Cas. 665; 35 A. 173; 14 Cr. L. J. 105; 11 A. L. J. 196.

(2) 6 Ind. Cas. 639; 19 P. W. R. 1910 Cr.; 11 Cr. L. J. 389.

(3) 21 Ind. Cas. 471; 29 P. W. R. 1913 Cr.; 14 Cr. L. J. 599; 313 P. L. R. 1913.

(4) 7 P. R. 1889 Cr.

(5) 17 P. R. 1898 Cr.

(6) 19 P. R. 1905 Cr.; 46 P. L. R. 1905 Cr.; 2 Cr. L. J. 228; 31 P. W. R. 1905 Cr.

orders of the Chief Court, under section 438, Criminal Procedure Code.

The *Government Advocate*, for the Crown.

Lala *Dharm Das Suri*, for the Accused.

ORDER.—It is admitted that according to law the fine should have been Rs. 1,000 and that a fine of Rs. 300 is illegal. The question is whether this Court should exercise its extraordinary revisional jurisdiction and interfere. The rulings quoted by the learned Sessions Judge as having been cited by accused's Counsel are beside the mark, except perhaps *Abdul* v. *Emperor* (2) and *Emperor* v. *Hira Singh* (3). I was responsible for the earlier of those rulings myself and I am still of opinion that I have the power to refuse to interfere; but in the present case, notwithstanding the recent change in the law referred to by the Sessions Judge, I think the full fine should be levied. The offence was a very serious one. The neglect to hold a general meeting and to publish a balance sheet must have misled, or at least have left in the dark, very many share-holders and the public as to the true situation of the Company's affairs, and no lengthy argument is required to show how disastrous such neglect must prove in the case of a Company moving towards insolvency. I direct that the fine be enhanced to Rs. 1,000 and that in default of the payment of the unpaid portion (Rs. 700) the accused do suffer 15 days' simple imprisonment.

Petition accepted.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 119 OF 1913.

November 28, 1913.

Present:—Mr. Justice Beadon.

MAKHAN SINGH—ACCUSED—PETITIONER

versus

GUNNER JEPSON—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 190(c), 191—Report by Cantonment Magistrate to Assistant Commissioner — Cognizance whether under section 190 (c).

Where a Magistrate on receiving information from another Magistrate about the commission of an offence by *A* thought *B* to be the real culprit and consequently proceeded to try *B* in his own Court:

Held, that the Magistrate took cognizance of the case under section 190 (*c*) of the Criminal Procedure Code, 1898, and that the accused was entitled to have the case transferred to another Magistrate.

Petition, under sections 439 and 526 of the Criminal Procedure Code, 1898, for quashing the proceeding of the Magistrate, 1st Class, Murree.

FACTS.—A gunner reported to the Officer Commanding the Rawalpindi Cantonment that one *B* assaulted him and also used abusive language. That officer examined a few witnesses in support of the report and then addressed the following letter to the Assistant Commissioner in charge of Sub-Division, Murree:—

No. 2497.

From

THE CANTONMENT MAGISTRATE,
Muree Cantonment.

To

THE ASSISTANT COMMISSIONER.
Murree, 2nd September 1913

The attached reports are forwarded for such action as you consider desirable to take in this matter.

The name of the native, who, it is alleged, made the assault on Gunner Jepson is reported to me as Bishan Singh employed as compounder in the shop of Juggat Singh and Brothers. There appears to be ample evidence as to the abusive language used, and I would suggest that he may be proceeded against for using language likely to cause a breach of the peace.

(Sd). H. A. KANE, MAJOR,
Cantonment Magistrate.

Upon the receipt of this letter the Assistant Commissioner, Murree, made some further inquiry into the matter in which he examined *M* as a witness who gave evidence against the gunner. The Assistant Commissioner thinking that in reality *M* and not *B* had assaulted and used the abusive language proceeded to prosecute *M* under section 504, Indian Penal Code, in his own Court.

M then unsuccessfully objected that the Magistrate could not himself take cognizance of the case. An application by *M* to the District Magistrate for transferring

it to some other Magistrate was also rejected.

Lala *Hukam Chand*, for the Petitioner.

ORDER.—A reference to the record shows that the Magistrate, Mr. Hearn, took cognizance of the case under section 190 (*c*), Criminal Procedure Code, and under section 191, Criminal Procedure Code, the accused is entitled to have the case transferred to another Magistrate.

I accordingly direct that the case be transferred from the Court of Mr. Hearn to the Court of such other Magistrate having jurisdiction as may be nominated by the District Magistrate.

Application accepted.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 12 OF 1914.
February 6, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
MAKUND SAHU—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Excise Act (B. C. V of 1909), s. 46—Cocaine—Illicit possession—Possession of cocaine exceeding five grains—Burden of proof of authority under which cocaine was obtained.

Under the Government Notification of November 20th, 1911, it is an offence for any person other than those specified to have any cocaine at all except with medical man's prescription, and then only five grains. In all cases, the burden of proof to show under what authority he obtained cocaine lies on the accused.

This is a reference made by the Sessions Judge of Mozafferpore recommending that the order of the Deputy Magistrate of Mozafferpore, dated September 16th, 1913, convicting the accused under section 46 of Act V of 1909 of possessing cocaine and excisable article, in contravention of the Act and of the Board's Notification No. 5978, dated November 27th, 1909, read with section 19 of the Act, and sentencing him to six weeks' rigorous imprisonment may be set aside.

FACTS.—The facts appear from the following reference:—

On the morning of the 18th July 1913, on receipt of certain information Excise Sub-Inspector Mahabir Prosad (P. W. No. 1) with his *jemadar* and peon (P. W. No. 3) searched the shop of accused in his presence and in that of search witnesses, and in a narrow room a large wooden box was found. The box was brought out of the room and in it were found (1) a small wooden box (Exhibit VI) and (2) a cylindrical tin box (Exhibit II). In the small box (Exhibit VI) were found one dram glass phial full of a white powder (Exhibit 1) and two blue labels (Exhibits III and VI) bearing on them the printed word *cocaine*. In the cylindrical tin box (Exhibit II) were found 31 small paper packets of a similar white powder containing about two grains each. The phial and packets were forwarded to the Chemical Examiner, whose report runs: "Cocaine Hydrochlorate has been detected in the contents of the glass phial and of the 31 paper packets".

The accused on inquiry pleaded not guilty. stating that the phial (Exhibit I) and the 31 packets were not found in his shop. He put in a petition praying that a reference might be made to the Chemical Examiner in order that the quantity of cocaine found in the phial and packets might be ascertained, but his petition was rejected.

The trying Magistrate on the 16th September 1913 found the accused Makund Sahu guilty under section 46, Act V of 1909, of possessing cocaine, an excisable article, in contravention of the Act and of the Board's Notification No. 5978B, dated 27th November 1909, read with section 19 of the Act and sentenced him to undergo six weeks' rigorous imprisonment, the quantity of cocaine found being confiscated and sent to the Collector.

2. The order recommending for revision.

The order of the Magistrate, dated 16th September 1913, finding the accused to be in possession of more than 20 grains of cocaine without a license, pass or permit, and sentencing him as above.

3. In what particular portion of that order this Court considers an error on a point of law to exist.

DAYA RAM *v.* EMPEROR.

The lower Court has erred in holding that the accused was in possession of more than 20 grains of cocaine, there being no evidence to that effect.

4. The grounds upon which in the opinion of this Court the order should be reversed.

Applicant has been convicted under section 46 of the Excise Act, 1909, of possessing more than 20 grains of cocaine without a license, pass or permit. The learned Magistrate states in his judgment that the Chemical Examiner's report shows that the powders in the one dram phial and also in the paper packets are cocaine. This is incorrect. The report is as follows: "Cocaine Hydrochlorate has been detected in the contents of the glass phial and of the 31 paper packets." Nothing is said as to the quantity. The offence charged has not, therefore, been established, and the missing link in the evidence should now be supplied. It has been urged in support of the motion that the facts found do not constitute such exclusive possession on the part of applicant as is necessary for conviction and that the present recommendation should be that the conviction and sentence may be set aside. I cannot accept this view. The articles in question were found in a box in a closed room in applicant's house. *Queen-Empress* v. *Sangam Lal* (1), which has been cited in support of the motion, is in reality against applicant. The ground on which it is urged that applicant's possession should be held not to be established is that some labourers were working on the thatch of his house, and may possibly have had access to the box. Whether they had such access or whether the possession of applicant is established is a question of fact on which the Magistrate has found against applicant. In these circumstances I have the honour to recommend that additional evidence be directed to be taken under section 428 of the Criminal Procedure Code in order that the amount of cocaine found in possession of the accused may be ascertained.

5. The explanation of the trying Magistrate is herewith enclosed.

Babus *Shorashi Charan Mitter* and *Heramba Chandra Guha*, for the Accused.

(1) 15 A. 129.

Mr. *Sultan Ahmed*, for the Crown.

JUDGMENT.—We have only to point out to the learned District Judge that his attention does not appear to have been called to the Government Notification of November 20th, 1911, which will be found in part I of the Calcutta Gazette of November 22nd, 1911, at pages 1586 and 1587. In a case decided by us last year on reference made by the Fifth Presidency Magistrate as to whether the possession of 20 grains of cocaine can be allowed with impunity the judgment was as follows:—There can be no doubt as to the answer. We were not referred to the Government Notification of November 20th and were not aware of its existence. Under the powers conferred by section 19 clause (4) the Notification has the force of law, and it is an offence for any person other than those specified to have any cocaine at all except with a medical man's prescription, and then only 5 grains. In all cases the burden of proof to show under what authority he obtained cocaine lies on the accused. The learned Judge will, therefore, see that his reference has been made under a misapprehension, and as we do not feel inclined to interfere in any way with the sentence the papers must be returned.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1362 OF 1913.

January 9, 1914.

Present:—Sir Alfred Kensington, Kt., Judge.

DAYA RAM—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 210—*Decree-holder mi stating decretal amount—Duty of executing Court to find out proper amount.*

Where a decree-holder drew the executing Court's attention to the final decree both in the heading and at the foot of his application for execution, but misdescribed its precise terms:

Held, that he could not be made criminally liable under section 210, Indian Penal Code, for such a mistake, particularly as it was a business of the executing Court to verify the amount due to him in terms of the decree sought to be executed.

DAYA RAM v. EMPEROR.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Divisional Judge, 1st class, Jullundur Division, dated 12th June 1913, affirming that of the Sub-Judge, first class, Jullundur, dated 3rd May 1913, granting sanction for the prosecution of the petitioner under section 195 of the Criminal Procedure Code.

FACTS.—Harnam Singh and others, 105 persons, in all sued Daya Ram. Their suit was dismissed with costs. Eleven of them appealed to the Divisional Court. The appeal, too, was dismissed with costs. The applicants were not among the appellants. The costs of the first Court were Rs. 72-9 6 and the costs of the Appellate Court were Rs. 46-8-0. Daya Ram tried to recover the whole sum from Harnam Singh, Bur Singh, Suba Singh and Sher Singh. The Chief Court decided on 15th April 1912, that the four above-named were liable for Rs. 55-5-9 only. Daya Ram, however, applied on 7th October 1912, for execution of the sum of Rs. 129 against the applicants among others who were plaintiffs in the original case. Daya Ram did not bring to the notice of the Court the Chief Court's order mentioned above. The order had not then been given effect to in the Court register. Daya Ram obtained a warrant of attachment for Rs. 130-8-9 including costs of execution against the applicants amongst several others. He attempted to have the warrant executed against the applicants only. They, however, paid the money on the spot and obtained a receipt from Daya Ram, and avoided attachment of their property. They then applied for the refund of the extra money paid by them and brought the order of the Chief Court mentioned above to the notice of the Court for the first time. Daya Ram was then ordered to refund the sum he had realised in excess of Rs. 55-5-9. Against this order he appealed to the Divisional Court but the appeal was dismissed. Daya Ram has now deposited the money he was ordered to refund. In the application for refund of the excess money it was prayed that sanction for the prosecution of Daya Ram under section 210, Indian Penal Code, be granted. This prayer was not considered then because Daya Ram's appeal before the Divisional Court was pending. After the dismissal of the appeal, applicants have renewed their application for sanction. Several attempts were made to serve Daya Ram with a notice of this application. He, however, studiously kept himself out of the way. He has, however, had notice of the original application of 30th October 1912. There seems to be no doubt that Daya Ram intentionally concealed the order of the Chief Court and fraudulently obtained a warrant of attachment from this Court against the applicants for a sum of Rs. 130 8-9 which was much in excess of the sum really due from them. I, therefore, sanction under section 195, Criminal Procedure Code, the prosecution of Daya Ram under section 210, Indian Penal Code. The applicants can file a complaint.

Mr. *Nand Lal*, for the Petitioner.

Mr. *Asquith*, for the Respondent.

ORDER.—The Divisional Court has not brought independent judgment to bear in this matter, and the Sub-Judge appears to me to be wrong in sanctioning a complaint under section 210, Indian Penal Code.

The petitioner certainly did draw the executing Court's attention to the Chief Court orders of 15th April 1912, in his application of the 7th October 1912, both in the heading of that application and at the foot. He possibly misdescribed the precise terms of the Chief Court decision, but this appears to have been through misunderstanding, not fraud. It was the business of the executing Court to verify the amount due to the decree-holder in terms of the orders, and the petitioner cannot be held criminally responsible for such mistake as was made.

The assumption of fraudulent intent is not justified by the facts. The revision is allowed, and sanction for prosecution of this petitioner, granted by order dated 3rd May 1913, is revoked.

Petition accepted.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 449 OF 1912.
February 6, 1914.
Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.
EMPEROR—PROSECUTOR
versus
RAMCHANDER—ACCUSED.

Penal Code (Act XLV of 1860), *ss.* 361, 362, 366—*Minor girl leaving her husband's house of her free will —Abduction or kidnapping.*

A girl under sixteen years of age left the guardianship of her husband and her father-in-law out of her own free will. On the way she met the accused and stayed with him for a few days quite voluntarily, without any force or fraud having been practised upon her:

Held, that the accused was neither guilty of abduction nor of kidnapping.

Criminal appeal by the Local Government against the order of acquittal passed by the Sessions Judge of Mirzapur, on 15th March 1912, acquitting the accused under sections 346 and 368 of the Indian Penal Code.

Mr. *W. Wallach*, for the Crown.

JUDGMENT.—This is an appeal by Government against the acquittal of Ram Chander of an offence under section 366 of the Indian Penal Code. It appears that a young woman under sixteen years of age of the name of Gutri ran away from her father-in-law's house. She was met by the accused, who is a Brahmin, and she spent a few nights in a lodging house at Benares with the accused. From thence they removed to Mirzapur when the girl apparently became dissatisfied and made complaints which led to the arrest of the accused. The girl was examined at length and the learned Sessions Judge was of opinion, *first* that she had left the guardianship of her husband and father-in-law of her own free will and not for the first time; *secondly*, that she stayed with the accused quite voluntarily, and that her staying and going with him was not the result of force exercised or deception practised. We think that for the purposes of the present appeal we ought to assume that the conclusions which the learned Judge arrived at on questions of fact are quite correct. The question then is was an offence under section 366 committed? The section is as follows:—"Whoever kidnaps or abducts any woman

with intent * * *" The expression "kidnap" is defined by section 391 as follows:—"Whoever takes or entices any minor * * * out of the keeping of the lawful guardian of such minor." Section 362 thus defines the expression "abduct": "Whoever by force compels or by any deceitful means induces any person to go from any place." It is clear on the finding of fact of the Court below that there was no "abduction" in the present case. Can it be said that the accused "took or enticed" that girl out of the keeping of her lawful guardian? On the admitted facts the leaving and the removal out of the keeping of the lawful guardian was the act of the girl herself long before she met the accused. We think that it would be straining the plain meaning of the words of the section if we held that under the circumstances of the present case the offence of "kidnapping" had been committed. We need hardly point out that the case would be very different if the girl had been going on a visit or message or any such like occasion. We dismiss the appeal. The accused, if in custody, will be released. If he is on bail his bail-bonds will be discharged.

Appeal dismissed.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 1442 OF 1913.
February 4, 1914.
Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.
ABDULLAH—CONVICT—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860) *ss.* 420, 511—*Cheating—Attempt—Definition of "attempt"—Spurious trinkets—False representation—Untrue statement to support.*

A manufactured spurious trinkets, and took them to *N* saying they were of gold, and that they were stolen property (which was also not true) and that he (*A*) did not like to sell them in bazar and asked him to buy. *N* did not buy, but *A* was arrested.

It was argued that no attempt to cheat had been proved, because more had to be done by *A*, such as, weighing the articles etc., etc., before wrongful loss would fall upon *N*:

Held, that the act of *A* amounted to an attempt of cheating punishable under sections 420/511, Indian Penal Code.

ABDULLAH *v.* EMPEROR.

Held, also, that in cases of cheating the essential thing is the deception of the victim, the dishonest causing to arise in the victim's mind of an impression, the reverse of truth, calculated to induce him to give up something he would not otherwise give up, or to do, or refrain from doing something, he would not otherwise do or refrain from doing, or to enter into a bargain he would not enter into, if he knew the real facts.

Held, further, that definitions in such matters are dangerous things, and the only safe way of deciding in any particular case, whether an "attempt" to commit a crime has been made or not, is to consider the facts of that particular case, and to decide in accordance with the dictates of common sense.

Queen-Empress v. *Dhundi*, 8 A. 304; *Ghulam Mahomed* v. *Emperor*, 13 P. R. 1879 Cr.; *Megraj* v. *Queen-Empress*, 13 P. R. 1881 Cr.; *Sukha* v. *Empress*, 40 P. R. 1885 Cr.; *Paira Ram* v. *Emperor*, 25 P.R. 1902 Cr.; 7 P. L. R. 1903; *Walidad* v. *Emperor*, 15 P. R. 1907 Cr.; 44 P. W. R. 1907 Cr.; 6 Cr. L. J. 444; *Queen Empress* v. *Tejman*, A. W. N. (1886) 290; *Government of Bengal* v. *Umesh Chander Mitter*, 16 C. 310; *Queen-Empress* v. *Kalyan Singh*, 16 A. 409 and *In the matter of the petition of R. MacCrea*, 15 A. 173, refererd to.

Petition, under sections 435, 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge of the Lahore Division, dated the 21st of July 1913, affirming that of the Magistrate, 1st class, at Kasur, District Lahore, dated the 29th May 1913, convicting the petitioner.

Lala *Moti Lal*, for the Petitioner.

JUDGMENT.—In this case the only point for decision is whether on the facts as found below the offence of attempting to cheat has been brought home to the accused person, or whether at most he has only been shown to have made preparation for cheating. The facts are that petitioner, having at home manufactured certain spurious trinkets, took them to Nabi Bakhsh goldsmith, showed them to him, said they were of gold (which they were not) and that they were stolen property (which was also untrue), said he did not wish to sell them "in the bazar," and said to Nabi Bakhsh—"*kharid lo*," Nabi Bakhsh did not buy and the negotiation went no further. He spoke to Lal, witness for prosecution, and to Buta Singh, constable, and, when the things were found to be spurious, petitioner was arrested.

Mr. Moti Lal's argument is that no "attempt" to cheat has been proved because more had to be done by petitioner before wrongful loss would fall upon Nabi Bakhsh, *e.g.*, statement of weight of the articles and of price or rate, weighment, and so forth; and he strives to maintain the argument by quoting a number of rulings, namely:—

Queen-Empress v. *Dhundi* (1), *Gulam Mahomed* v. *Emperor* (2), *Megraj* v. *Queen-Empress* (3); *Sukha* v. *Empress* (4), *Paira Ram* v. *Emperor* (5), *Walidad* v. *Emperor* (6), *Queen-Empress* v. *Tejman* (7), and he essays to distinguish *Government of Bengal* v. *Umesh Chunder Mitter* (8), *Queen Empress* v. *Kalyan Singh* (9) and *In re matter of the petition of R. MacCrea* (10) which seem to us to be against him.

Now there may be cases in which "attempt" is not complete until the actor has done each and every act requisite for the perpetration of the crime; but we do not think it can be laid down that this is a principle governing all cases. In each and every case the Court has to consider the facts and decide on the merits, not upon any pedantic or hard and fast rule, but in accordance with common sense. In cases of cheating the essential thing is the deception of the victim, the dishonest causing to arise in the victim's mind of an impression, the reverse of truth calculated to induce him to give up something he would not otherwise give up, or to do or refrain from doing something he would not otherwise do or refrain from doing, or to enter into a bargain he would not enter into, if he knew the real facts. Here the petitioner had clearly said things to Nabi Baksh, which, if believed by him, would have caused such an impression as that to arise in his mind. The attempt to deceive was complete, and we are unable to see why it should be held that to complete that attempt such further acts as statement of price and rate and weighment were essential. The analogies Mr. Moti Lal would draw from the rulings quoted above are not of much value owing to the want of similarity in the facts, and, in our opinion, it would be a useless waste of time to discuss those rulings at length here.

(1) 8 A. 304.
(2) 13 P. R. 1879 Cr.
(3) 13 P. R. 1881 Cr.
(4) 40 P. R. 1885 Cr.
(5) 25 P. R. 1902 Cr.; 7 P. L. R. 1903.
(6) 15 P. R. 1907 (Cr.); 44 P. W. R. 1907 Cr.; 6 Cr. L. J. 444.
(7) A. W. N. (1886) 290.
(8) 16 C. 310.
(9) 16 A. 409.
(10) 15 A. 173.

S. N. Dar
Advocate High Court
Jammu & Kashmir

Mr. Moti Lal has also referred us to certain attempted definitions of the word "attempt" to be found in legal commentaries. We see nothing adverse to our views in the present case in the definition stated by Stephen, which runs thus:—"an act done with intent to commit a crime and forming *part* of a series of acts which would constitute its actual commission, if not interrupted". According to this definition, the acts done by petitioner clearly amount to an "attempt" to cheat; though we realise that this definition is by no means perfect and might in certain cases let in what was only "preparation." On the other hand, unless cautiously employed, the definition given by Cockburn, C. J., in Mr. Pherson's case, [*Reg.* v. *M'Pherson* (11)] quoted in notes under section 511, Indian Penal Code, in Rattan Lal's Book, 2nd Edition, 1912, might shut out much that we are inclined to think should in certain circumstances be called "attempt." The learned Judge remarked:—"The word attempt clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged". We do not know what the facts of that case were; but it seems clear to us that cases can and do arise in which the offence of "attempt" to commit an offence has been committed, even though, in order to the completion of the offence, something more remained to be done by the offender.

In short, definitions in such matters are dangerous things, and the only safe way of deciding in any particular case whether an "attempt" to commit a crime has been made or not is to consider the facts of that case and to decide in accordance with the dictates of common sense.

For these reasons we decline to interfere and so reject this petition.

Petition rejected.

(11) Dears. & B. 197; 26 L. J. M. C. 134; 3 Jur. (N. S.) 523; 5 W. R. 525; 7 Cox. C. C. 281.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 84 OF 1914.

February 26, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

JADU GHOSH AND ANOTHER—ACCUSED—PETITIONERS

versus

DISTRICT BOARD OF MURSHIDABAD—COMPLAINANT—OPPOSITE PARTY.

Local Self-Government Act (III B. C. of 1885)—By-laws—District Board Roadside Land, encroachment on—Acquisition of right by District Board over land adjacent to road, how to be made.

A District Board can only take action and acquire right over a *zemindar's* land adjacent to its road under Act III B. C. of 1885.

Where some accused were convicted under sections 15 and 19 of the District Board By-laws for having encroached upon and cultivated land claimed by the District Board to be their roadside land from which its officers had been taking earth, although there had never been any formal acquisition of these lands by the District Board:

Held, that the conviction must be set aside.

FACTS.—The case against the accused is that they encroached upon and cultivated land which is claimed by the District Board to be their roadside land. The encroachment and cultivation are admitted by the accused, who claim to be the tenants under the *zemindars* who are the owners of the roadside lands, and the only question for decision is whether the land is District Board roadside land or not. The *zemindars* claim that the District Board has no side land and that all the lands by the side of the road are *khas patil* lands belonging to the *zemindars*.

The first Court, the Sub-Divisional Magistrate of Jangipur, found the accused guilty. It remarked:

"It is not at all probable that the District Board has no roadside land as it would then be practically impossible for them to repair the road at all. In fact it is admitted by defence witness No. 2, that the District Board Officers take earth from the *patil* land of the *zemindars*. It is clear that this very portion which is claimed by the *zemindar* as his *khas patil* is the sideland from which the District Board Officers take earth. Of course, there has never been any formal acquisition of these lands by the District Board, but it is clear that these lands have all along been in the possession of the District Board. * * * I also inspected the

road in question and found that there is land on both sides of the road lying waste in many places, though in some cases the landlord appears to have annexed them without meeting with any objection from the District Board Overseer. This land appears to have been newly cultivated. * * *

"Under the circumstances I find that the accused encroached on the District Board roadside lands and ploughed it and are, therefore, guilty under sections 15 and 19 of the District Board By-laws."

The accused, Jadu, was sentenced to a fine of Rs. 40, and Rajani to a fine of Rs. 5, under section 19. No separate sentence was passed under section 15

The accused moved the High Court on the principal grounds, *first* that the By-laws under Act III of 1885 do not apply to lands situated within a Municipality, and *secondly*, that in the absence of any finding that the disputed land was the District Board roadside land and in the face of the finding that there has never been any formal acquisition of the lands in dispute by the District Board, there should not have been any conviction; and obtained a Rule on the District Magistrate of Murshidabad to show cause why the conviction and sentence should not be set aside on the ground, *firstly* that the By-laws under Act III of 1885 do not apply to lands situated within the Municipality and *secondly*, that the District Board not having acquired the land in the Municipality adjacent to their road can have no prescriptive right for taking earth from the petitioners' land and that the petitioners cannot be convicted for taking steps to prevent their criminal trespass which is a matter for the Civil Court.

The Magistrate submitted the following explanation:

"From the evidence it does not appear that the land in question lies within the jurisdiction of any Municipality. It is on the old Badshahi roadside which is in charge of the District Board and is at least four miles from the limits of the Municipality where the District Board By-law is in force. There is further evidence to the effect that the land in question has been in possession of the District Board for a long time and that the District Board Officials have been taking earth therefrom all along for repair of the road. It is also in evidence that the accused cultivated the land this year."

Mr. *Caspersz*, Counsel, and Babus *Atulya Charan Bose* and *Birbhushan Dutt*, Vakils, for the Petitioners.

JUDGMENT.—We are of opinion that these three Rules must be made absolute. Although it is now established that the lands adjacent to the District Board road are not, as a matter of fact, situated within the limits of the Municipality, still the District Board can only take action and acquire right under the Act of 1885 It does not appear that they have ever taken steps to acquire the *zemindar's* land adjacent to the road. The Magistrate in his explanation speaks vaguely of evidence to the effect that the land in question has been in the possession of the District Board for a long time and that the District Board Officials have been taking earth therefrom all along for repair of the road. But this does not establish a right by prescription and such a right is a matter which the District Board must establish in the Civil Court. The petitioners cannot be criminally convicted for taking steps by cultivating this land to assert their right to it and prevent civil trespass.

The convictions and sentences must, therefore, be set aside and the fines, if paid, must be refunded.

This judgment applies to Revision Case Nos. 84, 158 and 159 of 1914.

Convictions set aside.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 396 OF 1913.

February 6, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

JIVANATHA AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 112—Good behaviour—Qualifications of sureties—Conditions, validity of.

Sureties for good behaviour ought not be rejected merely on the ground that they are caste-fellows or relatives of the accused.

JIRA NATHA *v.* EMPEROR.

The condition that a surety for good behaviour must be capable of controlling the accused is on general grounds undesirable and open to a practical objection, but the condition that he should be of the landholding class is unobjectionable.

Criminal application for revision from an order passed by the Sub-Divisional Magistrate, Sub-Division Kaira.

Mr. *G. N. Thakore*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—The applicants were called on to give security under section 112 of the Criminal Procedure Code and afterwards an order was made under section 118. We are not now concerned with the order so far as it requires security, beyond this that we see no ground to interfere in that matter. But the sureties were required to fulfil two conditions: *first*, that they should be of the land-holding class, and to that we see no objection; *secondly*, that they should be able to control the persons for whom they were sureties. To that condition I do see objection—not a theoretical objection, because it is true that underlying the idea of a surety is the idea that he should be able in some way to control the person for whom he stands surety. The objection is a practical one. If this condition is expressly described in such terms as were adopted in this case, it is likely to lead to very serious hardship, *e.g.*, those persons, who *prima facie* would most probably be able to control another, are his relatives, his caste-fellows, and those who are closely associated with him. Yet we find the fact of being of the same caste and of being a relative is regarded as a disqualification for a surety. So that in practice this condition seems to me not only to be likely to lead to undesirable results but almost certain to do so. In this very case, for instance, though several sureties were offered, they were at first, all of them, refused and the result was that these men were in Jail for upwards of six months. After that they offered sureties who were accepted and the applicants were released from Jail.

Now, this is undoubtedly an unfortunate result, especially as the intention of the law in the matter of sureties, for good behaviour and so forth, is not that the person called on to give sureties should be sent to Jail but that, if possible, he should be kept out of Jail. I do not think the materials on the record enable me to criticize in detail the cases of the sureties who were rejected. The inquiry in such a matter is necessarily summary and its results are very briefly recorded. But I do think that this case appears to illustrate the inadvisability of prescribing such a condition as that under consideration. As I have said, on general grounds such a condition is undesirable and I do not think that it is a condition of the kind which is contemplated by the words of section 112.

I, therefore, think that this particular condition that sureties must be capable of controlling the applicants should be deleted.

SHAH, J.—I agree that the condition requiring the sureties to be able to control the petitioners should be deleted. In this case several sureties were offered by the petitioners; but they were all rejected by the trial Magistrate. Some were rejected on the ground that they were caste-fellows or relatives of the petitioners. The result was that the petitioners were sentenced to one year's rigorous imprisonment and had to remain in Jail for over six months until their sureties were accepted on the 24th November 1913. The record shows that the petitioners apparently were men who were not unable to furnish sureties. It does not appear from the record that the sureties offered were not men of substance or that they did not belong to the land-holding class. In my opinion the Magistrate was not justified in refusing to accept certain persons as sureties merely on the ground that they were caste-fellows or relatives of the petitioners. It is not necessary to examine in detail the grounds upon which other sureties were rejected. I feel satisfied on a careful examination of the record that the condition in question is onerous and has been enforced with undue severity. This case illustrates that such a condition, if not enforced with due care and caution, is apt to operate harshly against the parties concerned. It may lead—as it has done in this case—to the rejection of any number of sureties with the result that the provisions,

which are designed to be preventive are easily turned to punitive purposes.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION NO. 141B OF 1913.
May 29, 1913.
Present:—Mr. Justice Twomey.
EMPEROR—PROSECUTOR
versus
NGA TAUNG THU AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 215, 494, 537—Commitment order—Reason for quashing.

A commitment order can be quashed under section 215, Criminal Procedure Code, only on a point of Law. The want of territorial jurisdiction in the Magistrate who holds the inquiry is a point of law. But the commitment is valid in spite of the want of territorial jurisdiction unless a failure of justice has in fact been caused by such commitment. A commitment order cannot be quashed merely on the ground that the evidence was doubtful. The proper course would be for the District Magistrate in such case to instruct the Public Prosecutor to withdraw under section 494, Criminal Procedure Code.

Review of the order of the 1st class Township Magistrate of Ramree, dated the 8th May 1913, passed in Criminal Regular Trial No. 95 of 1913.

ORDER —The three accused have been committed to Sessions on a charge of murder. The order of commitment was passed by the 1st class Magistrate, Ramree. The case did not occur within the limits of his territorial jurisdiction. He held the inquiry because an order was passed transferring the case from the Cheduba Magistrate to the Ramree Magistrate. But this order of transfer was passed by the Sub-Divisional Magistrate, Kyaukpyu, who had no power to pass it. The Sub-Divisional Magistrate purported to sign the order "for the District Magistrate", the District Magistrate being on tour at the time. But this device would not overcome the difficulty. It was only the District Magistrate who could pass the order and the officer who was carrying on the District Magistrate's current duties was not vested with the District Magistrate's powers under the Criminal Procedure Code.

A commitment order can be quashed under section 215, Criminal Procedure Code, only on a point of law. The want of territorial jurisdiction in the 1st class Magistrate who held the inquiry is a point of law. But the commitment is valid in spite of the want of territorial jurisdiction unless a failure of justice has in fact been caused by such commitment (see section 537, Criminal Procedure Code.) If a failure of justice did occur in this case it is clear that it was not due to the fact that the Committing Magistrate had no territorial jurisdiction to inquire into the case. The commitment order cannot be quashed on this ground.

The District Magistrate recommends that it should be quashed on the ground that the commitment should not have been made and that there should be further investigation. He forwards a note by the Police Superintendent pointing out that the evidence is insufficient and untrustworthy. There is certain direct envidence that the accused beat the deceased but the Committing Magistrate disbelieved this evidence. Apart from this evidence he thought that there was nothing but suspicion and he remarked that the accused should get the benefit of the doubt. Nevertheless he proceeded to commit the three accused men for trial.

I should be glad to quash the commitment order in the circumstances. But I find myself unable to do so as no question of law is involved. A commitment order cannot be quashed merely on the ground that the evidence is doubtful.

It is open to the District Magistrate if he thinks fit to instruct the Public Prosecutor to withdraw under section 494, Criminal Procedure Code.

The records are returned.

In re NARAYANA NADAN.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 428 OF 1913.

March 18, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

In re NARAYANA NADAN—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 195, 476 Sanction—Preliminary inquiry—Notice—Materials, which authority granting sanction may consider—Revision—Grounds on which High Court should interfere.

The words of section 476 of the Criminal Procedure Code "After making any preliminary *inquiry that may be necessary*" show that a preliminary inquiry is not essential in all cases when a Court takes action under that section.

Abdul Ghafoor v. *Raza Hussain*, 13 Ind. Cas. 829; 34 A. 267; 9 A. L. J. 231; 13 Cr. L. J. 141, followed.

A fortiori, under section 195, in which there is no reference at all to preliminary inquiry, such an inquiry is unnecessary.

Want of notice to an accused does not invalidate a grant of sanction under section 195 of the Criminal Procedure Code.

In the matter of Govindu, 26 M. 592, followed.

When granting sanction, a Magistrate should not substitute the judgment of the Police for his own judgment and accord sanction merely upon a Police report.

Section 195 of the Criminal Procedure Code does not state that the authority giving sanction should act only upon legal evidence, and there is no warrant in the Code for the proposition that if other improbabilities, based on evidence which would not be admissible at the trial of the person against whom sanction has been given, are also referred to by the authority giving sanction, the grant of sanction becomes illegal and ought to be revoked.

Queen-Empress v. *Sheikh Beari*, 10 M. 232, distinguished.

A High Court should not interfere with the discretion of a subordinate Court in the matter of the grant of a sanction unless there is some *prima facie* strong ground for holding that there is no reasonable probability of having a conviction on the sanction or that it is otherwise inexpedient to award the sanction on the facts of the particular case or that the party against whom sanction is granted was probably innocent.

An accused person was prosecuted for stabbing and was convicted of the offence, his defence version having been found by the Magistrate to be false. He afterwards brought a complaint against his prosecutors on the same facts as were urged by him in his defence. The Magistrate sent for the records of the previous case, examined the complainant on oath and, having patent doubts as to the correctness of his story, referred his complaint to the Police. The Police reported his complaint to be false and the Magistrate while dismissing his complaint under section 203, Criminal Procedure Code, also sanctioned his prosecution:

Held, that the order granting sanction was legal.

Bapu alias *Audimulam Pillay* v. *Bapu* alias *Krishnayen*, 14 Ind. Cas. 305; 22 M. L. J. 419 at pp. 427, 428, 430; 11 M. L. T. 367; (1912) M. W. N. 499; 12 Cr. L. J. 209, followed.

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order, dated 10th September 1913, of the Sessions Court of Tinnevelly, in Criminal Miscellaneous Petition No. 22 of 1913, (in Sessions Case No. 61 of 1913) presented against the order of the District Magistrate of Tinnevelly.

Mr. *A. Swaminadha Aiyar*, for the Petitioner.

Mr. *C. Sidney Smith* (for the Public Prosecutor), for the Crown.

ORDER.

WALLIS, J.—The petitioner has been convicted of stabbing a certain person about sunset on 28th September 1912 in the course of a dispute about cattle. On that day, his father-in-law sent a telegram to the Police at Tuticorin to say that the petitioner's house had been dacoited by some persons, unnamed, in the absence of the petitioner, though this is not expressly stated. On 20th October 1912, nearly a month later, the petitioner put in a complaint in which he charged the man, who has since been convicted, of stabbing and others of having committed the dacoity while he was away at a distant village, and named nine witnesses. The Sub-Magistrate examined the complainant and doubting the truth of the complaint which was put in very late and appeared to be intended as a counter-charge to the charge of stabbing which was then pending against the complainant, referred it to the Police for investigation and report on 28th October 1912. The Police apparently did nothing until the petitioner had been tried and convicted on the stabbing charge on 13th December 1912. At the trial, as appears from the judgment, the petitioner's case was that he was absent on the day in question, that his house was dacoited in his absence that day by prosecution witness No. 1 and others and that it was in the course of this affray that prosecution witness No. 1 was stabbed somehow or other. With the exception of this last addition, his story was the same as that told in his complaint dated 20th October

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1912. He called several witnesses including four of those mentioned in the complaint and the Court found his defence to be false and convicted him on the charge of stabbing.

Subsequently to his conviction, the Police referred his complaint as false on the ground among others that it had been brought as a counter-charge to the charge on which he had been convicted and a new Sub-Magistrate on 14th January 1913 passed an order setting out the substance of the Police report and dismissing the complaint under section 203 of the Code of Criminal Procedure. Sanction to prosecute the petitioner was granted subsequently on 16th April 1913 on the ground that the charge was a mere concoction intended to meet the charge on which the petitioner had been convicted and reference was made to the order of 14th January 1913 dismissing the complaint.

On this it is argued that the Sub-Magistrate has granted sanction merely on the Police report contrary to the Full Bench ruling of *Queen-Empress* v. *Sheikh Beari* (1) but as pointed out by the District Magistrate and the Sessions Judge in their orders confirming the sanction, the Sub-Magistrate had much more before him, because the Police report refers to the conviction of the accused subsequent to the filing of the complaint as going to show that the complaint was merely concocted as a counter-charge. A reference to the judgment convicting the petitioner shows, as already pointed out, that before the Police referred the complaint as false, the allegations it contains had been set up by the petitioner by way of defence in the stabbing case and investigated by the Court in that case and found to be false, and they held that it was not necessary that the evidence in that case should be taken all over again for the purpose of deciding whether or not sanction should be granted against the petitioner.

In my opinion the decision of the lower Courts was right. Section 195 (*b*) of the Code of Criminal Procedure, which relates to sanction for certain offences "committed in or in relation to any proceeding in any Court," does not say by what considerations the Court is to be guided, nor does it prescribe as indispensable that the Court should hold a fresh inquiry and take evidence for the complainant before granting sanction, a proceeding which would be quite unnecessary in cases where the Court has acquired a knowledge of the facts in the course of the proceeding in or in relation to which the offence is alleged to have been committed. All that is decided by the Full Bench in *Queen-Empress* v. *Sheikh Beari* (1) is that the Court should not grant sanction to prosecute for preferring a false complaint merely on the ground that the complaint had been referred by the Police as false and dismissed under section 203 of the Code of Criminal Procedure. There are, no doubt, certain dicta in the judgment of the learned Judges which have been repeated in some subsequent cases that the order should be made on judicial evidence or legal evidence, but those dicta do not mean, as has been contended before us, that such evidence must have been given on the application for sanction or even on the hearing of the complaint itself. This is clear from the order of the Full Bench with reference to the first of the three cases referred to in it. There they upheld a sanction given for the prosecution of a complainant who had preferred a charge of house-breaking and theft against a constable and others, which was referred as false by the Police who suggested that the complainant should be prosecuted. Before disposing of the application for sanction the Magistrate tried and acquitted the constable and others on a charge of assault preferred by the same complainant, her son and brother. It was held by the Full Bench that the sanction so granted merely on the strength of the Police report and of the result of the investigation in the other case was not illegal. In the present case the evidence in the other case was taken by the Court before the Police referred the complaint now in question as false, and the result of those proceedings was one of the chief grounds on which they referred the case as false. No doubt the Magistrate who granted the sanction was not the same as the Magistrate who tried the counter-case against the present complainant, but the Court was the same, and the judgment of the Court in that case was on record and the result of that case was, in my opinion, a matter which might properly

(1) 10 M. 232.

be taken into consideration in granting sanction in this case. I may add that I agree with the observations of my learned brother which I have had the advantage of reading and would dismiss the petition.

SADASIVA AIYAR, J.—Though this is called a Criminal Miscellaneous Petition, it is practically a third appeal from the order of the 2nd class Magistrate of Srivaikuntam sanctioning the prosecution of the petitioner for an offence under section 211, Indian Penal Code. The petitioner put in a complaint on the 20th October 1912 accusing ten persons of having committed dacoity in his house on the 28th September 1912. The complaint was a very deliberate one as his father-in-law had on the 28th September itself sent a telegram to the Assistant Superintendent of Police charging about fifty persons with having committed dacoity, and this complaint of 20th October 1912 was practically a detailed expansion of that telegram. Then he was examined by the 2nd class Magistrate on the 26th October 1912 as a complainant and he deposed that the facts stated in his complaint were quite true. The Magistrate felt doubt as to the truth of the accusation on two grounds: (*a*) on account of the long delay in preferring the complaint and (*b*) as the complaint was put in as a counter-case to the Calendar Case No. 483 of 1912 against the petitioner. In that Calendar Case No. 483 of 1912 his defence was based upon almost the same allegations as formed the basis of his complaint that defence was found false in that Calendar Case No. 483 of 1912 after an elaborate inquiry and after the examination of the witnesses whom he produced as defence witnesses in that case. His complaint of the 20th October 1912 was forwarded by the Magistrate to the Police for investigation and the Police reported the case to be false. The Magistrate's similar view (that the complaint was probably false) which had been arrived at by him on looking into the complaint and on examining the complainant was thus confirmed by the Police report and he dismissed the complaint on the 14th January 1913. On 10th March 1913, notice was sent to the petitioner to show cause why he should not be prosecuted for having brought a false complaint of dacoity. He appeared on the 28th March 1913 to show cause and he was heard. The Magistrate considered that the petitioner's allegation that without a proper inquiry he (the Magistrate) had dismissed his complaint was not accurate and that it was only after proper inquiry that he dismissed the complaint as false and he, therefore, granted the sanction on the 16th April 1913. As I said before, this Criminal Miscellaneous Petition before us is a sort of 3rd appeal from the 2nd class Magistrate's order, a petition to the District Magistrate to revoke the sanction and a petition to the Sessions Judge to revoke the District Magistrate's order refusing to revoke the sanction having been unsuccessful.

While I admit that under the law, as now settled, the petitioner has a right to come up on a sort of third appeal to the High Court, I am strongly of opinion that such petitions by way of third appeal, should, as a matter of practice, be rejected, unless the records show not merely a mere technical illegality or irregularity, but that a palpably innocent man is sought to be prosecuted out of private grudge by his enemies. Here the Police have obtained the sanction to prosecute the petitioner. The facts stated in his complaint have been inquired into in the counter-case brought against the petitioner and have been found to be false; the petitioner's complaint was, after his examination as complainant, strongly suspected to be false; it was found by the Police also to be false when it was referred to them for investigation, and the improbabilities in his case were set out by the Magistrate in his order dismissing the case as false. Even supposing that the three lower Courts did not strictly act according to the instructions given for the guidance of the lower Courts in some decisions of the High Courts, I do not think that this is a fit case in which the High Court should interfere on a petition. When the Criminal Procedure Code says in section 195, clause 6, that a sanction given may be revoked by the appellate authority, I do not think it was intended that the higher authority was bound to revoke the sanction whenever some irregularity or even illegality is shown in the proceedings of the lower authority giving sanction.

Even if I am wrong in this above view, I am not satisfied that in this case any

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illegality has been committed in the granting of the sanction though the petitioner's learned Vakil, Mr. A. Swaminadha Aiyar, argued the case of his client with much persistency and ability and raised several nice points of law. One of his arguments was that because section 476 of the Criminal Procedure Code refers to a preliminary inquiry before any steps are taken under it, there ought to be also a preliminary inquiry before sanction is granted under the analogous section 195 of the Criminal Procedure Code. Even as regards section 476 of the Criminal Procedure Code, the words of the section are, "after making any preliminary inquiry that may be necessary." This shows that a preliminary inquiry is not essential in all cases even when the Court takes action under section 476.

In *Abdul Ghofoor* v. *Raza Hussain* (2) it was held that no such preliminary inquiry was necessary. *A fortiori*, of course, under section 195 in which there is no reference at all to "preliminary inquiry" such an inquiry is unnecessary. In fact, it has been held in *In the matter of Govindu* (3) that even want of notice to the accused does not invalidate the grant of sanction under section 195 of the Code of Criminal Procedure.

The next contention was that under the Full Bench ruling in *Queen-Empress* v. *Sheikh Beari* (1) the sanctioning of the prosecution of a man for an offence is a judicial act and that that act must be performed after forming a judgment upon legal evidence. In that case it was held, as I understand the points on which all the learned Judges were agreed, that the Magistrate should not substitute the judgment of the Police for his own judgment and cannot accord sanction merely upon the Police report.

This case in *Queen-Empress* v. *Sheikh Beari* (1) was considered by Spencer, J., in *Bapu* alias *Adimulam Pillay* v. *Bapu* alias *Krishnayen* (4). I adopt his reasoning so far as this point is concerned. I think that it is impossible for us to discriminate and say how far the Magistrate's order was based upon the patent unreliability of the statement made by the complainant when he was examined by the Magistrate (which statement is legal and material evidence) and how far it was based upon the Police report or upon the fact that the facts mentioned in the complaint were found to be false in the counter-case. In the present case the records show, I think, that the Magistrate did not substitute the judgment of the Police for his own judgment and that one of the material facts which induced him to grant the sanction was that, in his own judgment after he had examined the petitioner as complainant, he thought that the case was false. Even if there was any irregularity in his referring to the Police report and to the fact that the petitioner's case was found false in the counter-case, that irregularity has not, in my opinion, occasioned any failure of justice and under section 537, Criminal Procedure Code, even if we were deciding an appeal, we cannot interfere with his order on that ground. I might, however, be permitted to say that, in my opinion, section 195 of the Criminal Procedure Code does not state that the authority giving sanction should act only upon legal evidence. So far as the Madras cases go, while they say that if the authority giving sanction is a judicial authority it should not grant sanction unless there is some legal evidence in support of the *falsity* of the complaint, those cases ought not to be treated as enunciating the much wider proposition that if other probabilities based on evidence which would not be admissible at the trial of the petitioner are also referred to by the authority giving sanction, the grant of sanction becomes wholly illegal and ought to be revoked. I am not sure that for the purpose of coming to a conclusion whether the complaint was *prima facie* false, the finding in the connected case will not be evidence under section 11, clause (2), of the Evidence Act, though it may not be evidence in the case instituted on that sanction. I do not think that we should be astute to impose more restrictions on the discretion of the sanctionary authority in the grant of sanctions than are contemplated by the legislature. The legislature itself in section 195, Criminal Procedure Code, has given no indications whatever as to the materials on which the Court can be justified in awarding sanction and has imposed no such restrictions as are contended for. In

(2) 13 Ind. Cas. 829; 34 A. 267; 9 A. L. J. 231; 13 Cr. L. J. 141.

(3) 26 M. 592; 2 Weir 297.

(4) 14 Ind. Cas. 305; 22 M. L. J. 419 at pp. 427, 428, 430; 11 M. L. T. 367; (1912) M. W. N. 499; 13 Cr. L. J. 209.

Queen-Empress v. *Sheikh Beari* (1) the learned Judges refer without disapproval to the sanctioning Magistrate in one of the cases having taken into consideration the fact that the complainant was unsuccessful in a connected case. I think that we ought not to interfere with the discretion of the Subordinate Courts in the matter of the grant of sanction unless there is some *prima facie* strong ground for holding that there is no reasonable probability of having a conviction on the sanction or that it is otherwise inexpedient to award the sanction on the facts of the particular case or that the party against whom sanction was granted was probably innocent.

In the result I would dismiss this petition.

Petition dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1493 OF 1913.

February 4, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

GHULAM MUHAMMAD AND OTHERS—PETITIONERS

versus

KARAM SINGH—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 522—Order passed twenty months after decision of Criminal case, whether legal.

Section 522 of the Criminal Procedure Code is not mandatory but merely says a Court *may* pass a possession order. Such an order under it need not be passed simultaneously with the conviction in the criminal case. Therefore, where an order was passed twenty months after, but the delay was duly explained, the order was upheld as properly passed.

Mohan Theta v. *Rai Chandra Basui*, 4 C. W. N. 308, *Ram Chandra Boral* v. *Jityandria*, 25 C. 434; 2 C. W. N. 305; *Ishan Chandra Kalla* v. *Dina Nath Badhak*, 27 C. 174; 4. C. W. N. 307, *Churamani* v. *Ram Lal*, 25 A. 341; A. W. N. (1903) 59, cited.

Narayan Gobind v. *Visaji*, 23 B. 494, *Jatindra Nath Chakravarti* v. *Emperor*, 19 Ind. Cas. 172; 14 Cr. L. J. 172, followed.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Honorary Magistrate, 1st Class, Kalar, dated 2nd of July 1913, ordering that anorder for delivery of possession be sent to the Police with the intimation that possession of the land be delivered to the complainant.

Mr. *Fazal-i-Ilahi*, for the Petitioners.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—On 18th January, 1912, the complainant applied for possession. He had successfully prosecuted the accused persons under section 447, Indian Penal Code, for forcible seizure of his land, and accused on 20th November 1911 had been convicted and fined, and a petition for revision had been rejected. The aforesaid application for possession under section 522, Criminal Procedure Code, was, on 24th September 1912, consigned to the record room, because it was held undesirable to proceed with it while a civil proceeding concerning the same land between the parties was going on in the Chief Court. When that civil proceeding was disposed of in favour of complainant, he renewed his application by a petition dated 19th June 1913. The 1st Class Magistrate has allowed the application and has passed the order asked for, with the result that the opposite party asks for revision on the ground that the Magistrate had no jurisdiction because of the lapse of time between conviction and order for possession.

The Hon'ble Judge who heard the case in chambers has referred it to a Division Bench in view of a conflict of authority; and we have now examined the matter ourselves and have heard arguments.

The petitioner quotes:—*Mohan Theta* v. *Rai Chand Basui* (1); *Ram Chandra Boral* v. *Jityandria* alias *Faring Bhuttacharjee* (2); *Ishan Chandra Kalla* v. *Dina Nath Badhak* (3); *Churaman* v. *Ram Lal* (4).

Of these the second ruling is useless because, though the point was stated, it was not decided, and the third and fourth are useless because they never mention the point at all. The first, however, certainly does lay it down that a legal order under section 522, Criminal Procedure Code, must be an order passed simultaneously with the conviction in the criminal case and not as a separate proceeding. No reasons for this view are assigned in the very brief judgment, and we

(1) 4 C. W. N. 308.
(2) 25 C 434; 2 C. W. N. 305.
(3) 27 C. 174; 4 C W. N. 307.
(4) 25 A. 341; A. W. N. (1903) 59.

can find in the section itself no warrant for it. No doubt, the section is not mandatory, but merely says the Court *may* pass a possession order; and we can easily imagine circumstances in which it would be right for the Court to decline to pass such an order. But at all events there is no *illegality* in passing such an order; and in this view we are confirmed by a perusal of *Narayan Govind* v. *Visaji* (5) and *Jatindra Nath Chakravarty* v. *Emperor* (6), which are both directly in point.

Nor can we find that here the Magistrate has erred in the exercise of his discretion. No doubt twenty months had passed when he made the order but this delay is fully explained and complainant seems to have moved the Court promptly enough.

For these reasons we reject the petition.

Petition rejected.

(5) 23 B. 494.
(6) 19 Ind. Cas. 172; 14 Cr. L. J. 172.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 330 OF 1913.

January 19, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

RAM NEWAZ LAL AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Gambling Act (II B. C. of 1867), *ss.* 10, 11—*Gambling—Ring-game—Game of mere skill—Meaning of "mere"—Evidence Act (I of* 1872), *s.* 105—*Onus that game is game of "mere" skill.*

The words "mere skill" in section 10 of the Bengal Gambling Act of 1867 import the meaning "pure skill." No form of the ring-game can be a game of pure skill.

Hari Singh v. *Emperor*, 6 C. L. J. 708; 6 Cr. L. J. 421, dissented from.*

The games of skill spoken of in section 10 obviously refer to games where there are two parties pitting their skill against each other. Therefore, a ring-game kept for the profit of a man who does not play himself and does not pit his skill at all against anybody cannot fall within the exception to section 10 of the Act.

The onus to show that any offence falls within a general exception of the Gambling Act is upon the accused and it is for him to show, in order to bring the case under section 10 of the Gambling Act, that the game played is a game of mere skill.

Where in a ring-game it was found that the particular position in which the table was slanted rendered it a matter of almost mere chance whether any ring alighted on the peg or encircled the coin:

Held, that the game was not a game of mere skill and did not fall under section 10 of the Gambling Act.

Reference by the Sessions Judge of Rangpur.

FACTS.—The accused have been convicted of an offence under section 11 of the Bengal Public Gambling Act (II of 1867) as having been concerned in conducting a game known as the ring-game. The material portion of the judgment of the first Court is as follows:—

"The accused had a *takhtaposh* covered with red cloth on which were fixed six iron pegs with wooden knobs. Near each of these was a watch. The players were required to throw rings slightly bigger than the knobs from a barrier at some distance from the *takhtaposh*. Any one putting a ring into the peg was entitled to the watch near it. Coins of various denominations were also scattered about the table at random. Any one encircling any of these coins with a ring was entitled to get that particular coin. Rings were being sold for one pice each. The *takhtaposh* was kept in a slanting position, the side closest to the player being lower than the side away from him by $1\frac{1}{2}$ inches. A number of persons played in the presence of the prosecution witnesses, but none of them won anything. All the accused persons pleaded not guilty. No defence witnesses have been offered by the accused persons. The learned Pleader for the defence who has argued the case, however, urged that the accused have not committed any offence as the game was merely a game of skill and not one of chance. The whole case hinges on the question whether or not this was a game of mere skill. Since in every game there is some element of chance the words "mere skill" must be taken to mean the preponderance of the element of skill over the element of chance. The point, therefore, to be decided is whether in this particular game the element of skill preponderates the element of chance. Considering all the circumstances of the play, I am of opinion that the element of chance is present in a greater degree than the element of skill. The fact that the rings

*But this case was incidentally approved of in *Bengali Shah* v. *Emperor*, 20 Ind. Cas. 612; 14 Cr. L. J. 452, 17 C. W. N. 883; 40 C 702.—*Ed.*

RAM NEWAZ LAL v. EMPEROR.

are only very slightly bigger than the wooden knobs of the pegs makes it supremely difficult even for the most practised players to put in the ring. On the other hand, the slanting position of the board makes the encircling of the coins more a matter of chance than that of skill. The onus of proving the game to be a game of skill lies on the defence. They have not discharged this onus. Considering all the facts and circumstances of the case I hold this to be a game of chance more than a game of mere skill. I find the accused persons guilty under section 11 of Act II of 1867, and convict them under that section. I sentence Ram Newaz, the principal accused, to pay a fine of Rs. 20 or in default of payment to suffer rigorous imprisonment for ten days. I sentence the remaining accused persons, who helped Ram Newaz in picking up coins, selling the rings, etc., to pay a fine of Rs. 10 each or in default of payment to suffer rigorous imprisonment for five days each.

"I further order that the instruments of gambling seized by the Police be destroyed forthwith."

From the above convictions and sentences the accused moved the Sessions Judge of Rangpur who made the following reference to the High Court:—

"The conviction is, in my opinion, bad in law on the authority of the case of *Hari Singh* v. *Emperor* (1).

"The present case is on all fours with the case just cited. The evidence shows that the accused used a *takhtaposh* (wooden platform), 6 feet long, 4 feet 1½ inches broad, the height from the ground being 3 feet 3 inches on one side and 3 feet 1½ inches on the opposite side. There was a red cloth gummed on the top of the *takhtaposh*. There were six wooden knobs on as many iron pegs fixed on the *takhtaposh* with a watch near each. There were also coins of various denominations scattered over the *takhtaposh*. There was a barrier 3 feet 7 inches high at a distance of 5 feet 9 inches from the *takhtaposh*. A competitor for any of the above watches and coins had to buy from the accused a ring weighing about 8 annas and described as slightly bigger than the knob on each of the iron pegs. He had to throw this ring from the above barrier and he won a watch or a coin according as the ring encircled one of the knobs or one of the coins. The learned Deputy Magistrate who tried the case held that in the game described above there was a preponderance of the element of chance over the element of skill and hence he convicted the accused. The view taken by him is not, however, supported by that laid down in the case of *Hari Singh* v. *Emperor* (1), which runs thus:—'It seems to us that although there is an element of chance in throwing a ring over the pins in some cases, the element of the game is one of skill.' The learned Public Prosecutor has relied on a contrary view expressed by the Allahabad High Court in the case of *Ahmad Khan* v. *Emperor* (2). As I am, however, bound to follow the case of *Hari Singh* v. *Emperor* (1), I am submitting this reference with the recommendation that the conviction of the four petitioners and the other accused, Charan Das, be set aside. I may add that the case of *Hari Singh* v. *Emperor* (1) has been approvingly referred to in the case reported as *Bengali Shah* v. *Emperor* (3)."

Babu *Tarakeshwar Pal Chowdhury*, for the Accused.

Mr. *B. C. Mitter*, Standing Counsel, for the Crown.

JUDGMENT.—This is a reference made by the learned Sessions Judge of Rangpur inviting us to set aside the conviction and sentence of fine passed under section 11 of the Bengal Public Gambling Act II of 1867 by the Deputy Magistrate. The matter concerns the game known as ring-game, and the learned Judge has referred the case to us holding on the authority of *Hari Singh* v. *Emperor* (1) that this particular game has been held to be within the exception in section 10 of the Act, that is to say, that it is a game of mere skill and not a game of chance.

In the first place we desire to point out that the mere fact that the Judge speaks of this game as ring-game is no evidence whatever that it is the same game as was before this Court in *Hari Singh's* case (1).

(1) 6 C. L. J. 708; 6 Cr. L. J. 421.

(2) 12 Ind. Cas. 988; 34 A. 96; 8 A. L. J. 1262; 12 Cr. L. J. 612.

(3) 20 Ind. Cas. 612; 17 C. W. N. 883; 14 Cr. L. J. 452; 40 C. 702.

The report which we have before us is not the authorised report in the Indian Law Reports and the original judgment has not been laid before us. The facts as stated in the report do not show that as in this case the table was slanting, nor do they give us the size of the pegs or the rings. The facts found in this case by the lower Court include the size of the pegs and the rings upon the board, and it is found that the particular position in which the board in this case was slanted rendered it a matter almost of mere chance whether any ring alighted on the peg or encircled the coin. On the findings of fact, therefore, alone in this case it would be impossible for us to interfere.

But we desire to point out although under the circumstances it is unnecessary to make any reference to the Full Bench that our view of the law is somewhat different to that enunciated by Mr. Justice Fletcher in *Hari Singh's* case (1). It is there stated that if it is a game of skill it is not an offence under the Gambling Act; if it is a game of mere chance it is. Now we turn to the exception created by section 10 of Act II of 1867 and that section says:—"Nothing in the foregoing provisions of this Act contained shall be held to apply to billiards, whist or any other game of mere skill wherever played." The criterion is not whether it is a game of mere chance, but whether it is a game of mere skill, and we may point out that the word "mere" is used in legal language in its meaning derived from its Latin origin and imports the meaning "pure skill." It is impossible to say that any form of the ring game can be a game of pure skill, and for this reason we could not have followed the reasonings in *Hari Singh's* case (1) had it been necessary for us to consider it as a point of law.

There is a further point which we wish to set out and which was not apparently discussed in *Hari Singh's* case (1), and that is that the games of skill spoken of in section 10 obviously refer to a game where there are two parties pitting their skill against each other. In billiards two men play against each other for money and in whist one pair of persons plays as partners against the other pair pitting their skill in a fair contest against the skill of the others. But in this case the owner of the site where this gambling is carried on does not pit his skill at all against any body. He does not play but takes the money of the public for a consideration which on the facts found in this case amounts to nothing at all; it being found that no body ever wins or has the slightest chance of winning except by pure accident. If the matter, therefore, was *res integra* we should be prepared to hold as a matter of law that neither this ring-game as described in this case, nor any other ring-game kept for profit of a man who does not play himself, can fall within the exception in section 10 of the Act.

But there is still a further point which has not been dealt with in the previous decision, and that is that the onus to show that any offence falls within a general exception of the Act is upon the defence, and it is for the defence to show in order to bring the case under section 10 of Act II of 1867 that the game played is a game of mere skill. This certainly has not been shown in this case, nor does the learned Judge who made the reference pretend that it has. But it is unnecessary for us to go further into the question of law, inasmuch as in this case at any rate the findings of fact conclude the matter, it being found as a fact that this particular game was not a game of mere skill. It cannot be said to fall within the exception.

The conviction and sentence must, therefore, be upheld and the papers returned to the learned Sessions Judge.

Conviction and sentence upheld.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION CASE No. 559 OF 1913.

October 30, 1913.

Present:—Mr. Saunders, A. J. C.

MI THEIN—APPLICANT

versus

NGA PO NYUN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance of child—Mother's ability to maintain—Father's obligation—Bona fide offer to maintain if child lives with him.

MUHAMMAD SHARIF *v.* DHANPAT RAI.

A father is bound to maintain his child whatever the position of the mother may be and merely sending a man to go and ask the child to come and live with the father does not amount to an offer to look after him and cannot absolve the father from his responsibility to maintain him.

Mr. *Bose*, for the Applicant.

Mr. *M. S. Mukerjee*, for the Respondent.

ORDER.—The applicant sought to obtain an order for the maintenance of her son aged about 12 from the respondent. The paternity of the child is not denied and the respondent said that he had never neglected to maintain the child, that he had asked for the custody of it and made several offers to maintain the child on condition that he lived with him. The Magistrate after recording evidence declined to make an order and the applicant now comes to this Court in revision.

Most of the reasons given by the learned Magistrate appear to be erroneous. "I consider that the complainant is able to maintain Tha Gyaw without assistance from accused." This is no reason. The father if he is able to do so is bound to maintain his child whatever the position of the mother may be. Whether she makes the application to annoy the father or not is immaterial. It is also immaterial that when the boy goes to see his father, the father gives him a little money and once gave him a *longyi*. Obviously the father does not provide sufficient funds for his maintenance. It is not necessary for a mother to prove that she had asked the father to support the son and the father has refused. The mere fact that it is necessary to institute proceedings may be taken to prove the neglect of the father.

The property which was made over to the mother at the time of the divorce, she says, has all been dissipated, and this is borne out by the evidence of the respondent's own witnesses, Mg. Yo and Mg. Shwe Tin.

There does not appear to be any evidence of any *bona fide* offer to support the son if he would live with his father. Mg. Si, the respondent's witness, says that he went and asked Tha Gyaw, the child, and Tha Gyaw replied: "I won't live with him." This man is the respondent's tenant. It is obviously absurd to suggest that this invitation given to the child can amount to an offer to look after him, and on the authority of *Mi Saw* v. *S.* (1) such an offer cannot absolve the father from his responsibility to the latter.

The respondent is bound to maintain the child. The appellant says that it costs her Rs. 7-8 a month. From the evidence the respondent is clearly able to pay this sum, but there has been some exaggeration on the appellant's part and I think it will be sufficient if the father pays Rs. 6 a month. There will be an order, therefore, for the payment of this amount.

Application accepted.

(1) 7 Ind. Cas. 460; 11 Cr. L. J. 488; 1 U. B. R. (1910), I, 1.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1113 OF 1914.

January 24, 1914.

Present:—Mr. Justice Johnstone.

MUHAMMAD SHARIF—ACCUSED—PETITIONER

versus

Lala DHANPAT RAI—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Omission to record preliminary order before summoning opposite party—Omission to affix copy on the property in dispute, effect of—Revision, parties to.

An omission to record a preliminary order before issue of summons to the opposite party or to affix a copy of it to a conspicuous place at or near the subject of dispute, as required by clauses (1) and (3) of section 145, Criminal Procedure Code, is not fatal to the jurisdiction of the Court to proceed with the case under section 145, Criminal Procedure Code, when an order directing the parties to put in written statements has been once recorded in the presence of the parties and they have understood the nature of the proceedings.

The Chief Court will not interfere on revision with the order of a Magistrate under section 145, Criminal Procedure Code, where it is inconvenient and unnecessary to do so, even though such order is based on irregular procedure, as it is not usually the practice of the Chief Court to interfere on revision in a civil or *quasi* civil case when the party asking for revision has got a regular remedy at his command.

An omission to make a joint owner of the property a party to the revision is immaterial where no mention is made of such joint owner in the order of the Magistrate and only one man has been declared to be in possession.

Sheikh Munglo and *Peer Khan* v. *Durga Narain Nag*, 25 W. R. 74 Cr., referred to.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Magistrate, 1st Class, Lahore, dated 23rd June 1913, declaring Lala Dhanpat Rai complainant to be entitled to the possession of the plot of land, marked 'A on the plan, until evicted therefrom in due course of law.

Mr. *Michael*, for the Petitioner.

The Hon'ble Mr. *Shadi Lal*, R. B., for the Respondent.

JUDGMENT.—The records were sent for in this case by the Hon'ble Mr. Justice Rattigan in order to verify grounds 1 and 2 which are connected with matters of procedure. I have now heard the case argued and have examined the record. On 15th November 1912, Lala Dhanpat Rai preferred a complaint under sections 448, Indian Penal Code, and 145, Criminal Procedure Code, against Muhammad Sharif and others and his statement was recorded on solemn affirmation. No order on this complaint is apparent on the record, but we must assume that summonses were issued to the accused persons, because on the 20th of November 1912, the parties were all present and certain orders were passed. The case was adjourned two or three times, and on 18th of January 1913 evidence was taken. After that from time to time evidence was taken on various dates and finally on the 23rd of June, 1913, the order was passed against which the present revision is filed. That order is to the effect that Lala Dhanpat Rai is entitled to the possession of the plot of land marked 'A' on the plan, Exhibit P1, until evicted therefrom in due course of law, and that all parties are forbidden to make any disturbance of such possession until such eviction.

Muhammad Sharif comes up to this Court and objects, *firstly*, that the Magistrate made no preliminary order in writing as is required by section 145, clause 1, Criminal Procedure Code, and, therefore, the whole proceedings are void. It is true that there is no such order as is contemplated by section 145, clause 1, as having been written before the accused persons were summoned; but in the presence of the parties there is no doubt that orders were recorded to the effect that they should put in written statements as required by the said clause 1, and it seems lear that the parties quite understood the nature of the proceeding which was going on. It may be, in view of such rulings as *Sheikh Munglo* and *Peer Khan* v. *Durga Narain Nag* (1) that, strictly speaking, the Magistrate had no jurisdiction to summon the parties; but when the parties were once before him, he seems to have recorded an order which essentially complies with clause 1, section 145, aforesaid. Therefore I am not disposed to hold that his proceedings, thereafter, were wholly without jurisdiction on this account.

It is next objected that the provisions of clause III, section 145, Criminal Procedure Code, have been completely ignored. There is no doubt that no copy was affixed to any conspicuous place at or near the subject of dispute, but here again it does not seem to me that this omission is fatal. The parties were present in the Court and they had every opportunity of knowing what the dispute was about.

Mr. Shadi Lal for the respondent objected that Manohar Lal, who seems to be a joint owner of the house with the respondent, should have been made a party to this revision. I overrule this objection, because the order of the Magistrate does not mention Manohar Lal at all, and it is Lala Dhanpat Rai alone who has been declared to be in possession of the land in dispute.

There is no sufficient ground for interference on the merits, and even if my opinion was that the order of the Magistrate was wrong it seems to me that it would have been inconvenient and unnecessary for me to interfere. The proper course for Muhammad Sharif to adopt is to bring a civil suit to prove his title to the property. This is an easy and straightforward remedy for him to adopt, and it is not usually the practice of this Court to interfere on the revision side in a civil or *quasi* civil case when the party asking for revision has got a regular remedy at his command.

For these reasons I reject this petition and decline to interfere.

Petition rejected.

(1) 25 W. R. 74 Cr.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 562 OF 1913.
CRIMINAL REVISION CASE No. 455 OF 1913.
January 23, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

PARVATANENI KAMAYYA AND OTHERS—ACCUSED—PETITIONERS

versus

KASINADUNI TRIPURANTAKAM—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 499—*Defamation—Privileged—Imputation contained in petition to higher authorities for redress of grievances.*

A statement made by a villager casting imputation on the character of a co-villager in a complaint to the higher authorities is privileged *only* if the imputation is *substantially true* and made in good faith.

Abdul Hakim v. *Tej Chandar Mukarji*, 3 A. 815; A. W. N. (1881) 81; 6 Ind. Jur. 320, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint 1st Class Magistrate of Bezwada, in Calendar Case No. 122 of 1912.

The Hon'ble Mr. *T. Richmond*, for the Petitioners.

Mr. *V. Ramesam*, for the Respondent.

ORDER.—I am naturally not inclined to put any discouragement in the way of villagers courageously representing in their own names (and not anonymously or pseudonymously) to the proper authorities their views and grievances in connection with their village politics even if such representation involves imputations against a co-villager. I am also inclined to agree with *Abdul Hakim* v. *Tej Chandar Mukarji* (1), that a person may be held to have acted "in good faith for the protection of his interests" even if he has not established "that every word he has spoken or written is literally true", provided his imputation is substantially true. But, in the present case, the learned Magistrate in a very carefully considered judgment has found that the imputations were not substantially true and also he found absence in the accused of good faith (that is, absence of due care, attention and caution) having regard to the previous conduct of the village faction to which they belong, and I am not satisfied that interference in revision with that finding of fact is called for.

I, therefore, dismiss the petition.

Petition dismissed.

(1) 3 A. 815; A. W. N. (1881) 81; 6 Ind. Jur. 320.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 888 OF 1913.
July 14, 1913.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

RAJ RAJESWARI DEBI AND CHAROO-BALA DEBI—ACCUSED—PETITIONERS

versus

THE EMPEROR, AT THE PROSECUTION OF ROHINI KUMAR CHATTERJEE—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *ss.* 205, 526—*Dispensing with personal attendance of accused*—Pardahnashin *lady—Permission to appear by Pleader—Transfer of criminal case.*

The accused, respectable *pardahnashin* ladies, were charged with offences under sections 307, 308, 325 and 326, Indian Penal Code. The High Court allowed them to appear at the inquiry or trial by their Pleader or Pleaders, subject to their having to appear before the Court to hear the sentences passed, should the case be proved against them and the trial end in a conviction and also directed that should the case be committed to the Court of Session, the personal appearance of the ladies should be dispensed with till the Sessions Judge passes his order.

The case was transferred from the Magistrate who had refused to dispense with the personal appearance of the ladies.

FACTS.—The facts will appear from the following petition of the accused to the High Court:—

That your petitioners are *pardahnashin* ladies of respectability and belong to the well-known Mookerjee family of Krishnaghur, your petitioner No. 1 being the mother and your petitioner No. 2 being the wife of one Sarcda Prosad Mookerjee.

That the said Saroda Prosad Mookerjee has married another wife, named Sachindrabala Debi *alias* Jaya.

That it appears that on the 5th May 1913 the opposite party, by a petition in writing, charged your petitioners and the said Saroda Prosad Mookerjee and his sister Hari Dasi Debi with offences under sections 326, 307, 308 and 325, Indian Penal Code, to wit, with having voluntarily caused grievous hurt to his sister, the said Sachindrabala Debi, by setting fire to her cloth with the result that she was burnt in some portion of her body.

That the Sub-Divisional Magistrate of Sudder Sub-Division of Nadia, to whom the above petition was presented, held an inquiry into the matter prior to the issue of

processes on your petitioners, without examining the said complainant on oath under section 200 of the Criminal Procedure Code.

That it appeared during the course of the said inquiry that the said Schindrabala Debi had made conflicting statement as to the occurrence at different times and places, sometimes attributing the burns to an accident and sometimes to your petitioners.

That it is admitted by the prosecution that when the said Sachindrabala Debi first met the opposite party on the 25th April last she ascribed the whole thing to an accident and repeated the same thing to the Sub-Inspector.

That the said complainant alleges that the said Sachindrabala Debi after her removal from her husband's house by the opposite party gave out that your petitioners had tortured her by burning her, as she had wasted some kerosene oil in attempting to light the oven.

That the complainant further alleges that she related the said version to the Civil Surgeon and the Assistant Surgeon who were called in to attend upon her but the said Civil Surgeon, in his deposition given on the 15th May 1913, does not state that he was told any such thing, and the Assistant Surgeon in his evidence stated that on the first day she had said that the burning was accidental but after a few days when in the house of her brother's relations, she spoke of violence.

That it will appear that the said Magistrate before recording the evidence of the said Medical Officers, which he did on the 15th May 1913 in the course of his inquiry, had privately interrogated them as to the said allegations from a perusal of some Police papers, as will appear from his order dated the 9th May 1913, which is as follows:—

"Some Police papers have been sent to me but not all. I want all the Police papers positively to-day. I interrogated the Assistant Surgeon on the 6th instant and came to know that the injured woman had made conflicting statements before him regarding the injuries on her person at different times. I also saw the Civil Surgeon on the 7th instant and came to know that he knew nothing personally about the torture".

That by his order dated the 15th May 1913 the Magistrate summoned your petitioners to take their trial under section 326, Indian Penal Code.

That on the 16th May 1913 the complainant by a petition prayed that warrants instead of summonses should be issued against your petitioners alleging that they were not likely to appear on mere summons, but the Magistrate recorded the following order: "I see sufficient reason for issuing warrants against the accused in the first instance."

That on the 27th May 1913 your petitioners prayed that they may be allowed to appear by a Pleader, regard being had to their status in society and to the fact that they are *pardahnashin* ladies of respectability and to the fact that they will be greatly humiliated in society, if compelled to appear in person in Court.

That in making his submissions to the said petition your petitioners' Counsel drew the attention of the Court to the conflicting statements of the said Sachindrabala Debi and denied that a *prima facie* case had been made out against your petitioners, but the Court remarked that the statements said to have been made by the girl in the first instance were due to the fact of her being then under your petitioners' influence and under the same roof with them, and they are not to be relied on.

That on the said date the Court below rejected your petitioners' prayer to be excused from personal attendance.

That your petitioners maintain that they are totally innocent, that this false case has been brought by the brother and relations of the said Sachindrabala Debi on account of private spite and family quarrel. Your petitioner, Charoobala Debi, who is the co-wife of the said Sachindra Bala Debi, having been reconciled with and taken back by her husband Saroda Prosad Mookerjee, the object of the opposite party is to bring disgrace upon the women of the household by insisting on their personal attendance in Court.

That your petitioners further apprehend that they will not have a fair and impartial trial before Baba N. K. Chaudhry, Deputy Magistrate, regard being had to the part which he has taken in the inquiry and

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to the extra-judicial information which he has sought for and received by interrogating persons on matters connected with the case behind the back of your petitioners.

That the said Magistrate has further disqualified himself from trying the case by reason of his observations referred to in paragraph 13 which makes it doubtful whether he has an open mind in regard to the case.

That your petitioners are advised and submit that the order of the 27th May 1913 should be set aside and the case transferred from the file of the said Babu N. K. Chaudhuri.

The following is the order of N. K. Chaudhuri, Esquire, Deputy Magistrate of Krishnagar, dated 27th May 1913:—

"Accused Saroda Prosad Mukhopadhya appears. Raj Rajeswari Debi and Charoobala Debi do not appear. They apply to appear by Pleader. Their Counsel urges that they should be allowed to appear by Pleader unless some legal and satisfactory evidence has been adduced against them. But in this case I have already held a preliminary inquiry and have issued process after careful consideration. Moreover, the complainant and the accused are all *pardahnashin* ladies of the same status and position in society and I see no sufficient reason why I should dispense with the personal attendance of the accused ladies in this case. The complainant is lying ill and from the report of the Assistant Surgeon it appears that she won't be able to appear for a fortnight more. The case is accordingly adjourned to 10th June 1913. Saroda Prosad Mukhopadhya undertakes to produce the other accused in Court on that day. Warrant need not be issued against them. Saroda Prosad Mukhopadhya may be released on bail of Rs. 200."

The accused moved the High Court and obtained this Rule.

Mr. *J. N. Roy*, Counsel and Babu *Abani Bhushan Mukherjee*, Vakil, for the Petitioners.

Babu *Srish Chandra Chowdhury*, Junior Government Pleader, for the Crown.

JUDGMENT.—We have considered the facts of this case, so far as they appear, on the two questions before us, namely, *first*, the appearance of the petitioners before the Magistrate by a Pleader and *secondly*, the transfer of the case from the Court of Mr. N. K. Chowdhuri to some other Magistrate for inquiry or trial. On both these points, our view is in favour of the petitioners.

We direct that the two petitioners be allowed to appear at the inquiry or trial by their Pleader or Pleaders, subject to their having to appear before the Court to hear the sentences passed, should the case be proved against them and the trial end in a conviction. Should the case be committed to the Court of Session, the personal appearance of the ladies may be dispensed with till the Sessions Judge passes his order.

As regards the second question, we direct a transfer of the case from the Court of Mr. N. K. Chowdhuri to such other Magistrate as the District Magistrate may appoint for the purpose of the inquiry or trial of the case.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 351 OF 1913.

December 19, 1913.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

In re KSHATRI SIVA SINGH—PETITIONER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 476—Steps taken five months after close of trial—Order without jurisdiction.

Where a Magistrate acts under section 476 of the Code of Criminal Procedure, five months after the close of the trial, and there is no explanation for the delay, the Magistrate acts without jurisdiction.

Aiyakannu Pillai v. *Emperor*, 1 Ind. Cas. 597; 32 M. 49 (F. B.); 4 M. L. T. 404; 19 M. L. J. 42; 9 Cr. L. J. 41, followed.

Petition praying that in the circumstances stated therein the High Court will be pleased to revoke the sanction accorded by the Deputy 1st Class Magistrate of Ellore Division, in Miscellaneous Case No. 7 of 1913 (C. C. No. 4 of 1913.)

Mr. A. *Venkatarayaliah*, for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—The case against the petitioner closed on 28th December 1912; but the order under section 476, Criminal Procedure Code, was only passed on 7th June 1913 and the notice to the petitioner to show cause against the passing of such an order only

issued on 3rd May 1913. There is no satisfactory explanation for the delay.

Following the Full Bench ruling in *Aiyakannu Pillai* v. *Emperor* (1), we must set aside the Magistrate's order as one passed without jurisdiction.

Order set aside.

(1) 1 Ind. Cas. 597;32]M. 49 (F. B.); 4 M. L. T. 404; 19 M. L. J. 42; 9 Cr. L. J. 41.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 133 OF 1914.
March 19, 1914.
Present:—Mr. Justice Tudball.
WILLIAM CECIL KEYMER—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust.

The complainant gave money to the accused on condition that he would purchase a motor car and sell it and return her the money with half the profits. The accused applied the money to other purposes:

Held, that the accused was not guilty of criminal breach of trust.

Appeal against an order of conviction passed by the Joint Magistrate of Benares on 15th January 1914.

Mr. *S. C. Mukerji*, for the Appellant.

The *Government Advocate*, for the Crown.

JUDGMENT.—The appellant William Cecil Keymer has been convicted of the offence of criminal breach of trust under section 406 of the Indian Penal Code and sentenced to one day's imprisonment and a fine of Rs. 250. The offence charged against him was in respect of a sum of Rs. 182 which he admittedly received from the complainant Mrs. Williams. The question which arises for decision is, whether under the circumstances of the case, the appellant is criminally liable or only civilly liable. He went to Mrs. Williams and told her that it was possible to purchase a motor car at an auction sale in Calcutta for a certain sum of money, that he was short of money by a certain amount and she agreed to let him have as much as she could, the condition being that half the profits of the transaction should be paid to her for the use of the money. The idea was that the car should be bought cheap and sold at a higher price. If Mrs. Williams was merely asked for a loan then it is quite clear that the appellant could have committed no criminal breach of trust with respect to the money. It is an admitted fact that he purchased no car, that he put the money into his own pocket and applied to other purposes. His case is that she lent the money to him. The Magistrate has held that the money was entrusted to him for a specific purpose, that is, in other words, that Mrs. Williams and he entered into partnership for the purpose of carrying out the purchase and sale of the car in question, that he took her share of the capital and instead of attempting to carry out the agreement applied the money to other purposes. Mrs. Williams' evidence as to the transaction leaves the matter in considerable doubt as to whether the transaction was a loan or the entering into a partnership between the parties. She said: "He told me at my own house that he was going to Mackenzie Lyall's auction and was going to buy a motor car. He said he had not got enough money. He said if I could let him have the money he would share the profits with me after the car was sold. I said I would give him some money. He let me to suppose that the car was to be had for Rs. 460, but as I had only Rs. 182 I gave him that." The language of Mrs. William's evidence is perfectly consistent with her meaning that the accused asked for a loan and that she gave him a loan on condition that he would carry through the transaction and would return the money and half the profits to her. If this was the transaction between the parties then in the eyes of the law there was no partnership between them and the appellant cannot be said to have been guilty of criminal breach of trust if he applied the money, which he borrowed for one purpose, to another purpose. In a criminal case the charge must be clearly made out against the accused person before he can be convicted. In the present case it is extremely doubtful what the actual transaction was. The Magistrate ought to have taken greater trouble in clearly ascertaining from the witnesses what was the exact nature of the transaction between her and the accused. I allow the appeal, set aside the conviction

and sentence and direct that the fine, if paid, be refunded.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 385 OF 1913.

CRIMINAL REVISION PETITION No. 311 OF 1913.

October 21, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

November 7, 1913.

Present:—Mr. Justice Miller.

In re VILLAGE MUNSIF RAMASWAMI GOUNDEN AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), *s.* 439—*Misappreciation of evidence—Revision.*

Miller and *Ayling, JJ.*—In revision, it is in the discretion of a High Court to exercise its power of going into the question of appreciation of evidence.

K. C. Roy v. *Akhil Metey,* 22 C. 998, followed.

Sankaran Nair, J.,(dissenting).—Where there has been misappreciation of evidence, and a convicted person claims to be heard to shew that the lower Courts have misappreciated that evidence, and that he has been unjustly convicted, it is not open to a Judge to say that it is within his discretion to permit or refuse him to do so or not.

No doubt, the sections only say that the High Court may interfere in revision, but "may" is the only word that could be used.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the District Magistrate of Salem, in Criminal Appeal No. 8 of 1913, preferred against that of the Sub-Divisional 1st Class Magistrate of Sankari in Miscellaneous Case No. 59 of 1912.

This case coming for hearing on 15th October 1913, upon perusing the petition and the judgments of the lower Courts and the record in the case and upon hearing the arguments of Mr. *T. Rangachariar* for the petitioners and of the *Public Prosecutor* on behalf of the Government and the case having stood over for consideration till this day, the Court made the following

ORDER.

SANKARAN NAIR, J.—The facts are thus briefly stated by the District Magistrate: "The case is a serious one. For years the villagers of Edhagansalai have kept down the prices of the local toddy shops by combination, using their ill-gotten gains for various communal purposes. An attempt was made by an outsider three years ago to defeat the combination but failed." It appears from the evidence that the villagers refused him land, food and water and he had to give up his business and pay a fine. In 1913, another outsider, who is the complainant in the case, came forward at re-sale of the shop. The District Magistrate finds that on that occasion threats of a sinister character were used to deter him from bidding, and accused Nos. 14 to 18 and 26 are the persons who are found by the District Magistrate to have used such threats. After the re-sale to the complainant he had difficulty in getting the trees marked and in getting a shop in the village for the sale of toddy. Three of the petitioners here, who are accused Nos. 4, 5 and 19, are amongst the persons who endeavoured to thwart him. The District Magistrate then states: "The villagers had the audacity to hold a *panchayat* and pass resolutions to take every possible means of ostracising him and rendering his position insupportable;" and the persons who took a prominent part in doing so are the petitioners Nos. 1, 2, 3, 5, 7, 11, 12, 15 and 16.

In the case of the persons above-named, he confirmed the order of the Sub-Divisional Magistrate directing them to execute bonds to keep the peace for a period of one year.

So far as the accused Nos. 12, 14 to 18 and 26 are concerned the finding of the District Magistrate is supported by the evidence of the complainant and certain other witnesses, who, no doubt, are interested persons. But their evidence is corroborated also by other witnesses; and though the evidence appears to be suspicious in some respects, in revision I am not prepared to say that the lower Courts should not have accepted it. I confirm the order of the lower Court.

Next, as regards the petitioners Nos. 4 and 19, the finding is based upon the evidence of the 8th witness for the prosecution. His evidence is to the effect that he allowed the complainant to mark 6 cocoanut trees that belonged to him for toddy, but on the

accused Nos. 4 and 19 with another accused remonstrating with him and telling him that the villagers had decided not to give any trees to the complainant he told him that he could not give the trees. He says that he was afraid of going against the wishes of the villagers. Subsequently the Station House Officer and others went to him and at their request he says he gave him three trees. It may be that the complainant has a cause of action against the accused Nos. 4 and 19, or those for whom they acted for having interfered with him, but I do not see how this is any evidence against these accused that they are likely to commit any breach of the peace. I would, therefore, set aside the order of the lower Court so far as these accused are concerned.

As to the other accused persons Nos. 1, 2, 3, 5, 7 and 11 the District Magistrate does not find that the villagers did anything illegal or that they were not within their rights in holding a *panchayat* and passing resolutions to ostracise the complainant. Of course, if they did anything illegal for the purpose of ostracising the complainant, then they will be guilty. Otherwise I do not see why they were not entitled to do so. The villagers are entitled to hold a *panchayat* to prevent a stranger from coming to their village to sell toddy and to take any steps not illegal or unlawful, even to the extent of rendering his position insupportable. The evidence against them is to the effect that they said: "We should decide that nobody should let their trees to him for being tapped. We should not give a site for the shop. We should not pay for toddy if we drink in the shop. We should have our trees marked for Pothanur and other trees and thus spoil him. We should damage the spathes." The sentence which is material is that last one in which they say they should damage the spathes. The other witnesses give similar evidence. There are a few incriminating words amidst a large number of others which are not illegal or unlawful. The witnesses do not say whether all of them spoke the same words or whether some of these sentences were spoken by a few of the accused and the rest by others. In fact the evidence is indefinite and vague. It does not bring home to any one of the accused the incriminating words, and a person should be responsible only for the words he used or spoken with his consent, express or implied. The District Magistrate has rightly found that the *panchayat* are not responsible for the words spoken by some and accordingly set aside the order against many of them. It follows it appears to me that, unless the evidence is clear that these accused spoke the incriminating words, no order should be passed against them. The evidence, moreover, is of interested witnesses. The truth appears to be that these villagers adopted towards the complainant the same tactics which were successful in the case of his predecessor. But the witnesses have put a few incriminating words in their mouths to bring them within the clutches of the criminal law. I am, therefore, of opinion that the order of the lower Court so far as these accused are concerned must be set aside.

It was then suggested that in revision we are not entitled to interfere with the order of the lower Court, if there is evidence to support the finding. I am not prepared to say that so far as these accused are concerned that there is no evidence to support the findings. But it has now been settled by a series of decisions of this Court and of the Bombay and Calcutta High Courts that in revision it is open to the High Court to consider whether there has been any misappreciation of evidence; and if the Court has power to do so and if a convicted person claims to be heard to show that the lower Courts have misappreciated the evidence in the case and that he has been unjustly convicted, it is not, in my opinion, open to a Judge to say that it is within his discretion to permit or refuse him to do so or not. No doubt the sections only say that the High Court *may* interfere in revision, but I think the word "*may*" is the only word that could be used in the sections. It is to be remembered that a difference of opinion in the appreciation of evidence does not necessarily require an interference with the order of the lower Court which may be upheld on other grounds.

I would, therefore, modify the order of the lower Court as indicated above.

In re VILLAGE MUNSIF RAMASWAMI GOUNDEN.

AYLING, J.—As regards the accused Nos. 4, 12, 14 to 19 and 26, I agree in the view taken by my learned brother. There is undoubtedly sufficient evidence on record to justify the order for security in the case of accused Nos. 12, 14 to 18 and 26; and I would decline to interfere.

Against the accused Nos. 4 and 19 there is nothing but the evidence of the prosecution witness No. 8 to the effect that they and the 5th accused asked him not to give trees to the prosecution witness No. 1 for tapping, as the villagers had decided that no trees should be given. No threat is alleged, and I do not consider that this evidence is such that any Court could legitimately draw the inference that these accused were likely to commit a breach of the peace. I agree that the order as regards these accused (Nos. 4 and 19) should be set aside.

There remains the case against the other accused Nos. 1, 2, 3, 5, 7 and 11. The evidence against them relates to the *panchayat*, in which the District Magistrate finds them to have taken a prominent part. The proceedings at this *panchayat* are described by the prosecution witnesses Nos. 1, 3, 4 and 7. Naturally the accounts given by these witnesses of what was said are not identical: it would be very suspicious if they were.

The prosecution witness No. 1's account has been given in the judgment of my learned brother. The prosecution witness No. 3, after referring to a special threat of the 12th accused to set fire to the shops, continues: "They (the villagers) also said that if liquor was ever drunk, no payments should be made, that no site should be given for locating the shop. They also said we should be beaten when going to our houses from the shops. They said that I should be treated like Sengoda Pathan in the matter of cattle. I am afraid of the villagers. Now I always go with two or three people from my shop to the village. It is all out of fear for their threats."

The prosecution witness No. 4 says that, when the prosecution witnesses Nos. 1 and 3 refused to give up the shops, "Then the villagers threatened them. They said that none should drink at their shops, that none should exchange fire and water with them, that they should be subjected to all losses, that none should pay for liquor drunk, that the spathes of the marked trees should be damaged, that site should not be given for the location of the shop, and that the shops, if constructed, should be set fire to."

The prosecution witness No. 7's account is much like that of the prosecution witness No. 1.

It seems to me that if the general sense of these four accounts be regarded, it shows that such threats were expressed and such a spirit manifested on the part of those assembled as to render it likely that a breach of the peace would be committed by any of them and especially by those who took the most prominent part in the proceedings. The District Magistrate has, in the exercise of his powers under section 125, cancelled the bonds of those who are simply stated to have been present, taking a lenient view of their conduct, but the six persons whose case I am now considering are stated to have been the prominent members of the *panchayat* both by the prosecution witness No. 7 and by the prosecution witness No. 1, who represents them as the spokesmen. I do not think it is necessary in a case of this kind to prove the words uttered by each individual.

This evidence appears to have been accepted in the Courts below, and in my opinion, it affords a sufficient basis for the order sought to be revised.

It seems to me that this is as far as we need go. I may remark that I see no reason why the evidence I have referred to should not be accepted: but I certainly do not think this is a case in which the Court is called to exercise its power (in my view a discretionary power) of going into the question of appreciation of evidence. I would refer to a single case only, *Keshab Chunder Roy* v. *Akhil Metey* (1), for a succinct summary of the general principles which should guide a High Court in the exercise of its powers under section 439, Criminal Procedure Code.

With great respect, therefore, I feel con-

(1) 22 C. 998.

strained to differ from the view taken by my learned brother: and would dismiss the petition in so far as it relates to these accused.

BY THE COURT.—The case of the accused Nos. 1, 2, 3, 5, 7 and 11 will be posted before a third Judge under section 429, Criminal Procedure Code. The order of the lower Courts so far as the accused Nos. 4 and 19 are concerned is set aside and as against the rest confirmed.

This case coming on for hearing under sections 439, 429 of the Criminal Procedure Code, upon perusing the petition and the judgments of the lower Courts and the opinions of the Hon'ble Mr. Justice Sankaran Nair and the Hon'ble Mr. Justice Ayling in respect of the case of the accused Nos. 1, 2, 3, 5, 7 and 11, embodied in the judgment of the Court herein dated 21st October 1913 and the record in the case and upon hearing the arguments of Mr. *T. Rangachariar* for the Petitioners and of the *Public Prosecutor*, for the Government the Court made the following

ORDER.

MILLER, J.—Both the learned Judges who heard the case were of opinion that it cannot be said that there is no evidence to justify the order: I agree with Ayling, J., that the evidence of the prosecution 1st, 3rd, 4th and 7th witnesses is credible, and I consider it extremely probable that the threats which they describe were uttered by persons in the *panchayat*. The *panchayat* was convened for the purpose of intimidating the purchaser at the auction, and that it did its work by threats is only what one would expect. The prosecution 1st witness says the 1st, 2nd, 3rd, 5th, 7th and 11th accused were among the persons who called him up and put the matter to him and actually threatened him with mischief to the trees which he should mark. General corroboration is afforded by the prosecution 3rd, 4th and 7th witnesses, and I can see no sufficient reason to hold that the District Magistrate was wrong in accepting it.

I agree with Ayling, J., that there is no ground for interfering with the order of the District Magistrate in regard to the accused before me.

As to the power of the Court hearing a case in revision, I do not propose to say anything, but I desire to guard myself from being taken to concur in the proposition of law laid down by Sankaran Nair, J.

The petition of the accused Nos. 1 to 3, 5, 7 and 11 is dismissed.

Petition dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1215 OF 1913.

March 5, 1914.

Present:—Justice Sir George Knox, KT.

RAMESHWAR AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 112, 167—Remand to Police custody—Magistrate—Jurisdiction—Action under Chap. VIII, when justified.

Section 167 of the Code of Criminal Procedure does not appear to have been framed for cases in which action is taken under section 112 of the Code.

A Magistrate acting under Chapter VIII of the Code has no power to act until after he has recorded an order in writing under section 112. No person is to be called upon to show cause why an order should not be made against him until there is before the Magistrate some information which such Magistrate has reason to believe.

The Code gives a Magistrate no power to issue summons, warrant or order of detention until he has first upon his table something recorded by him in writing showing the ground upon which he is taking action.

Criminal revision from an order of the Magistrate of Gorakhpur.

JUDGMENT.—Rameshwar and two others were arrested by the Police presumably in exercise of powers either under section 54 or 55 of the Code of Criminal Procedure on the 23rd of June 1913. They were not produced before the Court until the 25th of June 1913. The Police upon producing them before the Magistrate asked for an order of remand, that order of remand was granted. So far as the record shows the order of remand was the usual order passed under section 167 of the Code. Section 167 does not appear to have been framed for cases in which action is taken under section 112 of the Code. In any case a Magistrate acting under Chapter VIII of the Code has no power to act until after he has recorded an order in writing under section 112. If this case had been properly dealt with, the Magistrate should under section 112 have made an order in writing setting forth the

substance of the information received, the amount of the bond to be executed, the term for which it was to be in force, and the number, character and class of sureties required. That order should then and there have been read over to Rameshar and others under section 113. The case was not one which fell under section 114, for Rameshar and others were present in Court. After the order had been read over the Magistrate should have proceeded to inquire into the truth of the information upon which action had been taken and to take such further evidence as might appear necessary. In brief no person is to be called upon to show cause why an order should be made against him until there is before the Magistrate some information which such Magistrate has reason to believe. The Magistrate has only to read section 114 carefully and he will see that even when immediate arrest of the person is considered expedient there must be before the Magistrate a report or information and the substance of that report or information must be recorded by the Magistrate. The Code gives the Magistrate no power to issue summons, warrant or order of detention until he had first upon his table something recorded by him in writing showing the grounds upon which he is taking action. No possibility is given or intended to be given for persons to be detained by orders of a Magistrate, until the Magistrate has first by a separate order in writing shown that he has considered over the order which he is about to make and has reason to believe that such an order is required in the interests of the public. The detention between the 25th June and the 2nd of July 1913 was action not warranted by law. The errors pointed out by this Court in *Queen-Empress* v. *Babbua* (1), *In the matter of the petition of Daulat Singh* (2) and *Emperor* v. *Paimal Nai* (3) have been repeated in the present case, and as long as they continue to be repeated so long will persons whose cases should be promptly considered and decided, be kept in custody while the Police lay themselves open to suspicion of ransacking the country round in order to justify the action they have taken. In the present case these persons were detained in custody for all but two months. Now if the Police had got together the information before they proceeded to arrest Rameshar and others this case could easily have been decided well before the 24th of June 1913.

Let the record be returned.

Record returned.

(1) 6 A. 132; A. W. N. (1883) 260.
(2) 14 A. 45; A. W. N. (1891) 179.
(3) 17 Ind. Cas. 571; 10 A. L. J. 351; 13 Cr. L. J. 827.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 57 OF 1914.
CRIMINAL REVISION PETITION No. 49 OF 1914.
January 23, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re THIRUVENGADA MUDALI—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), *s.* 162—*Right of accused to get copies of statements to Police—Refusal—Reason—Statements under section* 162, *Criminal Procedure Code.*

An accused person is not entitled as of right to be furnished with copies of statements made under section 162, Criminal Procedure Code, to the Police and if a Magistrate refuses to furnish him with copies of such statements, it is not necessary for him to say in so many words that he does not think it expedient in the interests of justice to grant the copies to the accused.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Chingleput, in Criminal Appeal No. 25 of 1913, confirming the conviction and sentence by the 1st Class Deputy Magistrate of Saidapet, in Calendar Case No. 120 of 1913.

Messrs. *Osborne* and *P. R. Narayanasami Aiyar*, for the Petitioner.

ORDER.—Though if the prosecution case is wholly true or the defence is wholly true, there could have been only one occurrence and either the occurrence now charged must be false or the counter-case in which some of the prosecution witnesses in this case were convicted must have been false, the learned Sessions Judge's opinion that both the occurrences are true cannot be said to be an illegal finding, as each of the two contending parties would naturally try to make out that the only occurrence that took place was the only one in which their party received injuries.

In re C. M. RAMASAMIER.

As regards the statements made to the Police, "the Court" [under section 162 (1) of the Criminal Procedure Code] "may, if it thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof." Here, all that appears is that the Magistrate refused to furnish a copy of such statements to the accused. I must take it that he did not consider it expedient in the interests of justice to direct copies to be furnished. The accused is not entitled, as of right, to be furnished with any such copies and (as I understand section 162) it is only if the Magistrate considers it expedient in the interests of justice to grant such copies that the accused can obtain or use such copies. I do not think that *Dadan Gazi* v. *Emperor* (1) or *Salt* v. *Emperor* (2) is against this view of mine, and I do not accept the argument that unless the Magistrate says that it is *not expedient* in the interests of justice to grant copies to the accused, the accused is entitled to get such copies or use them as evidence.

I reject this petition.

Petition rejected.

(1) 33 C. 1023; 10 C. W. N. 890; 4 Cr. L. J. 79.
(2) 2 Ind. Cas. 591; 36 C. 560; 10 Cr. L. J. 88.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 675 OF 1913.
CRIMINAL REVISION PETITION No. 546 OF 1913.
February 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re C. M. RAMASAMIER—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), s. 426—Mischief—Wrongful loss—Mortgagee cutting trees to repair house, whether guilty.

A mortgagee openly cutting a few trees on the land mortgaged to him in order to repair another part of the mortgaged premises is not guilty of mischief.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Malapuram, in Criminal Appeal No. 62 of 1913, preferred against the conviction and sentence by the Court of the Stationary 2nd Class Magistrate of Walluvanad in Calendar Case No. 128 of 1913.

NANHEYLAL *v.* *Musammat* RANIBAHU.

Messers. *C. V. Ananthakrishna Aiyar* and *T. K. Govinda Aiyar*, for the Petitioner.

The *Public Prosecutor*, for the Crown.

ORDER.—When the mortgagor has got the security of the mortgage-money to compensate him for any damage caused by the mortgagees committing small wastes, it would require very strong evidence to justify the conclusion that a mortgagee openly cutting a few trees from the mortgaged premises to repair a house on another portion of the same premises was guilty of an intent to cause wrongful loss and damage to the mortgagor when he so cut them down or that he knew it to be likely that such loss will be caused.

The conviction for mischief cannot be supported and I set it aside and order the fine to be refunded if levied.

Conviction set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 149 OF 1913.
September 11, 1913.

Present:—Mr. Batten, A. J. C.

NANHEYLAL—APPLICANT

versus

Musammat RANIBAHU—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 250, 537—Order awarding compensation not contained in order of discharge—Jurisdiction—Irregularity, fatal.

Where a Magistrate discharged an accused and ordered payment of compensation to him, under section 250 of the Criminal Procedure Code, at a later stage when another co-accused against whom a charge had been framed was acquitted:

Held, that the order awarding compensation was without jurisdiction as it was not contained in the order of discharge.

Held also, that this was not a mere irregularity which could be covered by section 537 of the Criminal Procedure Code.

Criminal revison against the order of the Sub-Divisional Magistrate, Saugor, dated the 27th February 1913.

Mr. G. L. Subhedar, for the Applicant.

JUDGMENT.—In this case the Magistrate in a summary trial discharged the 2nd and 3rd accused by an order recorded in the order sheet on the 29th January. He

acquitted the 1st accused on the 27th February. The reasons for the discharge are given in the proceedings of the 27th February, but the 1st and 2nd accused were nevertheless discharged by the order of the 29th January. In the final proceedings of the 27th February the Magistrate after calling on the complainant to show cause against action being taken under section 250, Criminal Procedure Code, ordered him to pay compensation to each of the three accused. The provisions of section 250, Criminal Procedure Code, are perfectly clear; 'the Magistrate may in his discretion by his order of discharge or acquittal direct' compensation to be paid. Here, in the case of the 2nd and 3rd accused, the order for payment of compensation was not made by the order of discharge. The circumstances are not identical with those in *Kashinath* v. *Zincke* (1) or with those *In the matter of the complaint of Safdar Husain* (2), but in those cases it is clearly laid down that the order for compensation must be contained in the order of discharge or acquittal and cannot be made subsequently. The Magistrate's order was without jurisdiction, and was not a mere irregularity covered by section 537, Criminal Procedure Code. The order awarding compensation to the 2nd and 3rd accused is set aside, and the compensation, if paid, must be refunded.

Application accepted.

(1) 14 C. P. L. R. 37.
(2) 25 A. 315.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 314 OF 1913.
CRIMINAL REVISION PETITION No. 260 OF 1913.
September 5, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

C. A. SUBRAMANIA AIYAR—PETITIONER

versus

MUTHU AMBALAM—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *s.* 144 (2) —*Dispute likely to be settled in Civil Court—No apprehension of breach of peace.*

An order of a Magistrate directing a party to open a channel in his own land is not an order of the kind contemplated by section 144 (2) of the Code of Criminal Procedure.

In the matter of Lindsay, 4 M. 121, followed.

Ambica Prasad Singh v. *Gur Sahai Singh*, 13 Ind. Cas. 1000; 13 Cr. L. J. 184; 39 C. 560, dissented from.

Where a dispute between the parties is likely to be settled by a Civil Court, before the cultivation season and there is no immediate apprehension of a breach of the peace, it is not a case for interference of the Magistrate under section 144 (2) of the Code of Criminal Procedure.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate, Melur Division, in Miscellaneous Case No. 17 of 1912.

Mr. *K. N. Aiyar*, for the Petitioner.

Mr. *Sidney Smith*, for the Public Prosecutor.

Mr. *C.S. Venatachariar*, for the Respondent.

ORDER.—The order of the Magistrate is opposed to the ruling in *In the matter of Lindsay* (1), which is still applicable. The Magistrate had no power, if that decision is correct, to make an order directing the party No. 2 to make a channel through his land. Our attention has been invited to *Ambika Prasad Singh* v. *Gur Sahai Singh* (2), but we think we should follow the decision of our own Court. Here, moreover, we are not satisfied that there was any necessity for any order at all. The party aggrieved by the closing of the channel had prosecuted his opponent unsuccessfully, the Court finding that the dispute was purely a civil matter, and we do not see any evidence that there was likely to be any breach of the peace before the cultivation season, by which time the matter might be settled by the Civil Court.

We set aside the Magistrate's order.

Order set aside.

(1) 4 M. 121.
(2) 13 Ind. Cas. 1000; 39 C. 560; 13 Cr. L. J. 184.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 32 OF 1914.
January 13, 1914.

Present:—Mr. Justice Rafique.

SAT NARAIN PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Agra and Oudh Water Works Act (I of 1891), *s.* 46(*a*) —*Water used in repairing house, whether used for domestic purposes—Construction of statute—Person on whose behalf but without whose knowledge or sanction water used for other than domestic purposes, whether guilty.*

Municipal water used in repairing a house is not used for domestic purposes. A penal enactment should be construed strictly.

GENDLAL CHIMANBHAI v. EMPEROR.

Section 46 of Act I of 1891 does not impose any penalty on a person on whose behalf but without whose knowledge or sanction water is used.

Application, against an order of the Magistrate of Allahabad.

Mr. *C. Dillon*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate) for the Crown.

JUDGMENT.—The applicant in this case is one Sat Narain Prasad who has been convicted under section 46 (*a*) of Act I of 1891 under the following circumstances: Sat Narain Prasad is the owner of a house within the Municipal limits of Allahabad, but he does not live in it. That house was under repairs, and the masons and the workmen doing the repairs used the Municipal filtered water in their work. Thereupon the Municipal Board prosecuted Sat Narain Prasad for using Municipal filtered water for other than domestic purposes. In his defence he pleaded that he had not himself used the Municipal filtered water for repairs nor was it used with his sanction or to his knowledge. It was also contended that the use of the Municipal filtered water for repairs was not excluded from the definition of "domestic purposes." The learned Joint Magistrate convicted Sat Narain Prasad, and fined him Rs. 15 or in default one day's simple imprisonment. The same grounds as were urged in defence before the learned Magistrate are taken in revision before this Court. I do not think that the contention with regard to the definition of domestic purposes is valid. It cannot be said that water used for repairs of a house is used for domestic purposes. But I think that the other contention of the applicant, namely, that he is not liable under section 46 (*a*) of Act I of 1891 inasmuch as he did not himself use the water nor was it used with his knowledge or sanction, must prevail. An Act which imposes penalty is to be construed strictly and section 46 (*a*) expressly says that the person using the Municipal water is liable to a fine. The said section does not impose any penalty on the person on whose behalf the water is used. I, therefore, allow the application in revision, and setting aside the conviction and sentence I direct that the fine, if realised, be refunded.

Application allowed.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No 323 OF 1913.

November 26, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

GENDLAL CHIMANBHAI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 436—*Commitment, power to order—District Magistrate.*

Where a Magistrate of the first class, after holding an inquiry into offences under sections 408 and 477A of the Indian Penal Code, discharged the accused and the District Magistrate, acting under section 436, committed the accused to the Court of Sessions on the same charges and the accused applied to the High Court contending that the order of the District Magistrate was without jurisdiction, as primarily the case against him was under section 408 which was not triable exclusively by the Court of Sessions:

Held, (1) that the District Magistrate was competent to commit the accused as in this case the charge of falsification of accounts was one of the substantial things against the accused;

(2) that the District Magistrate could add a charge under section 408 if it was so intimately connected with the charge under section 477A as to form part of the same transaction.

Criminal application for revision against the order passed by the District Magistrate of Nasik, setting aside the order of discharge passed by the First Class Magistrate of Nasik.

Mr. *Jinnah* (with him Mr. *P. D. Bhide*,) for the Accused.

Mr. *K. N. Koyajee*, for the Complainant.

Mr *S. S. Pathar*, (Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—In this case the applicant has been committed to the Court of Session by the District Magistrate of Nasik acting under the powers conferred upon him by section 436 of the Code of Criminal Procedure. The applicant had previously been discharged by a Magistrate.

On the merits of these orders I shall not say a word, I mean on the merits in so far as they are affected by the evidence in the case and considerations arising purely out of the evidence. It is, however, contended that the District Magistrate was without authority to make this order, because the case against the applicant is primarily one of criminal misappropriation or breach of trust, and such a case is not triable exclusively by the Court of Session. However the accusa-

tion against him is that this criminal misappropriation was enabled to be done or was concealed or facilitated by making false entries in accounts. That is, the falsification of accounts was not only a substantial part of the affair, but so substantial and so necessary that the misappropriation could not have been effected in the way it was done without this falsification. Therefore, I am quite satisfied that the case was one in which the District Magistrate had jurisdiction under section 436; that is to say, it was a case in which it was open to him to consider that the case was triable exclusively by the Court of Session. But it is contended, even if that be so, yet although the District Magistrate might have authority to commit on a charge under section 477A of the Indian Penal Code, he could still be without authority to add a charge under section 408. Personally I hold that provided the commitment under section 477A is a proper commitment, it opens up the whole case and the District Magistrate can, if so minded, add a charge under section 408, if the charge under section 408 is so intimately connected with the charge under section 477A as to form part of the same transaction. If, however, the charge as framed is liable to other criticisms, that is a matter which can be brought to the consideration of the Sessions Judge who will have trial of the case, for on him rests the ultimate responsibility of settling the charge on which this applicant will come to trial.

I am not at all unmindful that we have to be very cautious in dealing with section 436 so as not to allow the power to commit to be used where the offence triable exclusively by the Court of Session is not the substantial thing or not one of the really substantial things against an accused person. But here, as I have said, I am quite satisfied that the charge of falsification of accounts is one of the substantial things against the accused.

Therefore I should discharge the Rule.

SHAH, J.—I agree that the Rule should be discharged.

In this case the District Magistrate has come to the conclusion that the accused has been improperly discharged by the enquiring Magistrate and under the circumstances of this case he considers that the case is exclusively triable by the Court of Session.

Both the conditions required by section 436 being satisfied, I am of opinion that it was open to him to make an order of commitment under the section. I do not desire to say anything on the merits of the case in spite of the fact that an attempt has been made in the course of the arguments to show that the order of discharge by the trial Magistrate was proper, particularly as the whole evidence will have to be considered at the trial by the Sessions Court. I confine myself to the consideration of the legal argument urged that the order was not justified by the terms of the section.

Rule discharged.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 249 OF 1914.

March 6, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

CHIRAGUDDIN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Circumstantial evidence, nature of—Theft of currency notes—Opportunity of entering room not accused's exclusively—Encashment of stolen notes in presence of accused's relation—Money in accused's possession after theft, not accounted for satisfactorily—Sufficiency of evidence.

Circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person,

or must point conclusively to the complicity of the accused.

Therefore, where in a case of theft of currency notes and cash from an office the evidence against the accused was that he was one of those who entered the office in the absence of the complainant, that a relation of his was present when two of the notes were cashed by that relation's relative and that the accused was after the theft in possession of money for which he could not satisfactorily account, it was *held* that this evidence did not fulfil the conditions of circumstantial evidence.

Babu *Nagendra Nath Ghose*, for the Petitioner.

JUDGMENT.—This was a Rule calling upon the Deputy Commissioner of Ranchi to show cause why the conviction and sentence passed on the petitioner should not be set aside on the ground that there is no incriminating finding against him in the judgments of the Courts below.

The petitioner was sentenced to two years' rigorous imprisonment under section 380, Indian Penal Code, for complicity in a theft of currency notes from the office of the Secretary, Public Works Department, Behar and Orissa Secretariat. That sentence was reduced in appeal by the learned Judicial Commissioner of Chota Nagpore to one of 18 months' rigorous imprisonment and a fine of Rs. 200, in default six months' additional rigorous imprisonment; and the findings against the petitioner were three in number and amounted in the learned Judicial Commissioner's opinion to exhaustive circumstantial evidence that he was one of the guilty parties.

Now the three points are these, *first*, the opportunity, in that he entered the room at about the time the money was stolen and in Mr. Friday's absence. But the learned Judicial Commissioner himself holds that there were at least five other persons who entered the room during Mr. Friday's absence, and it is clear in fact that the opportunity was not the petitioner's exclusively.

The second point is that the petitioner's brother-in-law, Tuni, was present when two of the stolen notes were cashed in Calcutta two months later at the shop of Jamaluddin by one Alijan who is Tuni's brother-in-law in circumstances which indicate dishonest knowledge on the part of Tuni. It is perfectly clear that this cannot be any evidence whatever against the petitioner. No man can be responsible for the dishonest acts of his brother-in-law; and no connection in time or place is shown between the petitioner and Tuni with reference to the changing of these notes.

The third and final ground against the petitioner is that shortly after the theft he was in possession of a large sum of money for which he cannot satisfactorily account. The defence account for it in a rather curious way. It is suggested that the petitioner being a peon on Rs. 5 a month may have derived the money from some other illegitimate sources. That obviously is a very sound if not a very moral argument, and there is nothing whatever to indicate that the money which was in the possession of the petitioner was a portion of the stolen money. Indeed the facts seem to negative it, for the theft was in respect of currency notes in the denomination of Rs. 150 to the value of Rs. 350 and a sum of Rs. 210 in cash and ten rupee notes; and the evidence against the petitioners is that on the 12th and 21st May he deposited in the Post Office Savings Bank the sums of Rs. 29 and Rs. 155 respectively, total Rs. 184. The learned Judge remarks that this closely corresponds with the sum of Rs. 210 stolen in cash and ten rupee notes. This is obviously not sufficient to show that this money was derived from the proceeds of this particular theft. The circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person, or must point conclusively to the complicity of the accused. It is obvious that this evidence does not fulfil the conditions of circumstantial proof at all.

The Rule must, therefore, be made absolute. The conviction and sentence are set aside and the petitioner will be released from bail. The fine, if paid, will be refunded.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 98 OF 1914.

CRIMINAL REVISION PETITION No. 86 OF 1914.

March 25, 1914.

Present:—Mr. Justice Tyabji.

In re SIVANUPANDIA THEVAN *alias* APPAVU THEVAN—ACCUSED—PETITIONER.

Madras Estates Land Act (I of 1908), ss. 73, 212—Penal provisions not exclusive—Penal Code (Act XLV of 1860), s. 424.

The penal provisions of the Estates Land Act I of 1908 are in addition to, and not in substitution for, those contained in the Indian Penal Code. Where, therefore, an act is an offence under the Penal Code, but not punishable under the Estates Land Act, the accused can be tried for it.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment in Criminal Appeal No. 68 of 1913 on the file of the Sub-Divisional Magistrate of Koilpatti preferred against that of the 2nd class Magistrate of Sankaranainar Koil, in C. C. No. 365 of 1913.

Mr. *G. S. Ramachandra Aiyar*, for the Petitioner.

JUDGMENT.—It is argued that sections 73 and 212 of the Estates Land Act prevent the applicability of section 424 of the Indian Penal Code, because, it is argued, the Estates Land Act must be construed as a complete Code relating to offences between landlord and tenant in cases where the latter Act applies. I am unable to accede to the contention. It seems to me that the proper construction of these sections is that certain acts which might not come within the definition of any offence referred to in the Indian Penal Code are also made punishable; and that the penal provisions of the Estates Land Act leave the provisions of the Indian Penal Code intact. I am of opinion, therefore, that this case must be dismissed.

Petition dismissed.

BOMBAY HIGH COURT.

CRIMINAL REVISION No. 319 OF 1913.

December 4, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re MIR HUSEN ABDUL RAHIMAN—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 514, 529, 531, 537—Bond for appearance—Non-appearance, forfeiture for—Court to order forfeiture, jurisdiction of.

Where the accused gave a personal bond for appearance before a Magistrate and failed to appear before him on the date fixed and a notice was issued to him to show cause why the bond should not be forfeited and in the meantime the case was transferred to another Magistrate:

Held, that the latter Magistrate had no jurisdiction to order the forfeiture of the bond under section 514 of the Criminal Procedure Code.

Section 531 of the Criminal Procedure Code relates only to proceedings in a wrong place and cures defects as to local jurisdiction.

Criminal application for revision from an order passed by the Second Class Magistrate of Khalapur.

Mr. *B. V. Desai*, for the Petitioner.

Mr. *S. S. Patkar*, (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—This is an application for the revision of an order made under section 514 of the Criminal Procedure Code by the second Class Magistrate of Khalapur ordering the petitioner's recognizance bond to be forfeited and directing him to pay Rs. 25 as penalty. Admittedly the bond in question was taken by the second Class Magistrate at Karjat for appearance before him and the default in appearance had taken place before that Magistrate. The notice to the petitioner to show cause was issued by the Magistrate at Karjat, and the subsequent proceedings with reference to the bond under section 514 of the Code were before the Magistrate at Khalapur.

The learned District Magistrate in appeal was of opinion that legally the forfeiting Magistrate was not empowered under section 514 of the Criminal Procedure Code, but that irregularity was cured by section 531 of the Code.

I think that the Magistrate at Khalapur had no jurisdiction to make the order under section 514, as he was not the Magistrate who had taken the bond or before whom the petitioner had to appear on the date of

the default. Section 531, in my opinion, has no application to this case. It only relates to proceedings in a wrong place and cures defects as to local jurisdiction. It does not touch a case of this kind where under the specific provisions of section 514 only a particular Court is empowered to make the order. Such an order is not included in the specific things mentioned in section 529 of the Code. It is quite true that it is not mentioned specifically in section 530 of the Code, but in the absence of any provision which could cure such a defect of jurisdiction as we have in the present case, I am of opinion that the order should not be allowed to stand. The learned District Magistrate has referred to section 530, clause (9), as suggesting that the proceedings taken by a Magistrate under section 514 not duly authorised would not be void. But, in my opinion, the inference is not right. This is really a case of a particular Court being authorised to deal with a particular matter, and there is no provision in the Code which could excuse a departure from a specific provision of that character.

The learned Government Pleader has relied upon section 537 of the Code in support of the argument that it is merely an irregularity, and no failure of justice having been occasioned thereby, the order should not be set aside. But the section contemplates an order passed by a Court of competent jurisdiction, and as the order in this case has not been made by a Court of competent jurisdiction, in my opinion, section 537 has no application.

Therefore without going into the question as to whether there has been any failure of justice in consequence of the Magistrate at Khalapur having made the order, I am of opinion that the order should be set aside as having been made without jurisdiction. The penalty, if recovered, should be refunded.

HEATON, J.—I am of the same opinion. It is quite plain that the Magistrate had no jurisdiction to inflict this penalty and his want of jurisdiction is not one of those matters which is cured by any provision of the Criminal Procedure Code.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 898 OF 1913.

October 14, 1913.

Present:—Mr. Justice Ryves.

BANKAT LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Income Tax Act (II of 1886), ss. 35, 36—False statement—Prosecution, who can direct.

No person can be prosecuted under section 35 of the Income Tax Act except at the instance of the Collector under section 36 of the Act.

Criminal revision from an order of the District Magistrate of Azamgarh.

Mr. *Satya Chandra Mukerji* (with him Dr. *S. N. Sen*), for the Applicant.

Mr. *L. M. Banerji*, (Government Pleader), for the Crown.

ORDER.—This is an application to revise an order which runs as follows:—"The prosecution of Pandit Bankat Lal, under section 177 of the Penal Code, read with sections 35 and 36 of the Income Tax Act, is sanctioned. The case will be tried by the Sub-Divisional Magistrate of P. Mohamadabad."

There is no heading to this document and there is nothing to show in what capacity Mr. Smith passed the order. The document on which this endorsement is made is also without heading and is signed by one A. K. Mohammad Zubair.

As far as I can gather from the papers from this record it appears that a firm of Nathu Ram-Deokinandan carry on a branch of their business in the Azamgarh district. Pandit Bankat Lal is apparently in charge of the Mau branch, whether he is a partner or a mere servant does not appear. Pandit Bankat Lal made some return for the purposes of the income tax purporting to show the profits of the branch at Mau. The report on which Mr. Smith's order is endorsed purports to show that the return furnished by Bankat Lal does not accurately shew the income of the branch at Mau. I gather that it is believed that Bankat Lal has committed an offence under section 35 of the Income Tax Act. If this is so he cannot be proceeded against, except at the instance of the Collector under section 36 of the Income Tax Act. There is nothing to show that Mr. Smith's order was passed as Collector; the whole of that order could not have been passed as Collector

but only in his capacity as District Magistrate.

On the face of it the order appears not to be legal. I, therefore, set it aside. It will be open to the Collector to institute proceedings according to law under the provisions of the Income Tax Act.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL REVISION No. 403 OF 1913.

January 9, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

PANDURANG BALKRISHNA PATHAK —ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Press Act (I of 1910), ss. 3 cl. (1), 23—Exemption from security—Cancelment of exemption—Order for security for Newspaper—Newspaper stopped—Press used—Conviction, whether sustainable—Press Act (XXV of 1867), ss. 4, 5.

The accused, who owned a printing press and printed a newspaper, made declarations under sections 4 and 5 of Act XXV of 1867 after coming into force of Act I of 1910. The Magistrate made an order under clause (1) of section 3 of Act I of 1910 dispensing with the deposit of any security. Later on the Magistrate required security for the newspaper. The accused stopped publishing the newspaper but used the press. For this use of the press the accused was convicted under clause (1) of section 23 of Act I of 1910:

Held, that the conviction could not be upheld for clause (1) of section 23 of Act I of 1910 covers the disobedience of an order under section 3 or section 5 of the Press Act and the order disobeyed was not such an order.

Criminal application for revision from conviction and sentence passed by the District Magistrate of East Khandesh.

Messrs. *D. A. Khare* and *P. D. Bhide*, for the Accused.

Mr. *S. S. Patkar*, (Government Pleader), for the Crown.

JUDGMENT.—In this case we only deal with the particular point which we decide.

The applicant had since the coming into force of Act I of 1910 made declarations under sections 4 and 5 of Act XXV of 1867. The Magistrate had made an order under the proviso to clause 1 of section 3 of Act I of 1910 dispensing with the deposit of any security. Subsequently the Magistrate, for reasons with which we need not concern ourselves, came to the conclusion that he would cancel that order and require security. He did this by an order dated the 6th of August 1912; but in requiring security he did not require it for the purpose contemplated by section 3, clause 1, that is to say, he did not require it in respect of the press but in respect of the newspaper which was published at the press and he directed accordingly. After that time the newspaper was not published, but the press was used. For this use of the press the applicant was prosecuted for an offence under clause 1 of section 23 of Act I of 1910. That clause only covers the disobedience of an order under section 3 or section 5. The order which was disobeyed, if it be assumed that there was disobedience, was not an order covered by either section 3 or by section 5. Therefore, the conviction cannot stand. As a matter of fact there is no substance in this case. Therefore it is quite unnecessary to inquire whether it would be possible to show that there might be a justifiable conviction under some other section of the Act.

For these reasons we set aside the conviction and sentence and direct the fine, if paid, be refunded.

Conviction and sentence set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 143 OF 1913.

July 16, 1913.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

A. A. M. CLARKE—ACCUSED—PETITIONER

versus

BALADEB MISRA—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), Ch. XXXIII—European British Subject—Special procedure—When accused European British Subject, he must be informed of his right to be tried according to special procedure.

Where the accused, a European British Subject, was not informed of his right under the law to be tried according to the procedure laid down for the trial of European British Subjects the trial was *held* to be bad.

FACTS.—This was a reference from the Sessions Judge of Sylhet (H. E. Stinton, Esquire,) dated the 27th May 1913, for setting aside the order of the Sub-Divisional Magis-

trate of Habiganj, dated the 10th April 1913, convicting the accused under section 323, Indian Penal Code, and sentencing him to pay a fine of Rs. 8 or in default to undergo simple imprisonment for three days and also directing the accused to pay the Court fees Rs. 2-12-0 to the complainant.

The complainant, Baladeb Misra, lodged a complaint before the Sub-Divisional Officer of Habiganj, alleging that the petitioner, the Assistant Manager of Satchuri garden, beat him on his back with a cane. The petitioner pleaded not guilty and denied having beaten the complainant. He stated that he heard that some coolies of his garden had beaten the complainant. The complainant was formerly the coolies' priest at Satchuri but it was found out that he had kept a Mussalman woman. The complainant was threatened and he, therefore, fled away to the Surma garden. Some time before the present occurrence the complainant came to Satchuri garden accompanied by a large number of men, assaulted several coolies of the Satchuri garden and carried away the Head Babu to the bungalow of the Surma garden. On the day of the occurrence Baladeb had come again to the Satchuri garden and was, therefore, beaten by some of the coolies of the garden.

The Magistrate found that the complainant's object in coming to the Satchuri garden was not honest, but he held that the accused had beaten the complainant on the back with a cane for which there was no justification, and he convicted and sentenced the accused as above stated.

The petitioner then moved the Sessions Judge of Sylhet against the conviction and sentence passed upon him, on the ground that the Magistrate acted without jurisdiction inasmuch as he did not ask the accused whether he was a European British Subject and did not explain to him his rights as such European British Subject as is required by section 454, Criminal Procedure Code. The Magistrate, although himself a European British Subject, was not a Justice of the Peace and as such was not entitled to try the accused who was a European British Subject.

The Sessions Judge made a reference to the High Court under section 438, Criminal Procedure Code, recommending the setting aside of the conviction and sentence on the ground urged by the petitioner.

Babu *Hemendra Kumar Das*, for the Accused.

ORDER.—This is a reference by the Sessions Judge of Sylhet sent up to us for setting aside the sentence of fine passed upon one Mr. A. A. M. Clarke for the offence of assault. The ground on which the order is attacked is that the accused was not informed of his right under the law to be tried according to the procedure laid down for the trial of European British Subjects.

The law is quite clear and distinct on the subject and the error in the procedure of the Magistrate in the trial of the accused is apparent.

We, therefore, accept the reference and set aside the conviction of the accused Mr. A. A. M. Clarke. The fine, if paid, will be refunded.

Conviction set aside.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1050 OF 1913.
August 20, 1913.
Present:—Mr. Justice Coxe and Mr Justice Mullick.

HARENDRA NARAYAN DAS—ACCUSED—PETITIONER

versus

RAMJAN KHAN—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 109, 379—Theft, abetment of—Charge of theft of wood without pass—Claim of accused to take wood without pass—Decision of claim necessary before conviction.

Where a person alleges his right to a property, he cannot be convicted of theft for removing it unless it has been found as a matter of fact that he is not entitled to it.

Mr. *H. N. Sen*, Counsel, and Babu *Sahay Ram Bose*, for the Petitioner.

Mr. *C. R. Das*, Counsel, and Mr. *Bardalois*, for the Crown.

JUDGMENT.

COXE, J.—This was a Rule on the District Magistrate of Goalpara to shew cause why the conviction of the petitioner for an offence under section 379 read with section 109, Indian Penal Code, should not be set aside on the ground that there was no dishonest intention in the act complained of. The petitioner has been convicted of abetment of theft and the property said to have been stolen was wood taken from the forest.

PARAMANANDA NADAR *v.* KARUNAKARA DOSS.

It appears from the judgment of the Magistrate that it was urged on behalf of the petitioner that he had a right to take wood without a pass. The Magistrate, however, refused to decide whether the petitioner had such a right or not. He says "I think it is beyond the province of this Court to adjudicate whether such right exists or not", and in the conclusion of his judgment he also refused to go into the question "whether the tenants have any such right as has been set up in this case". But he found that inasmuch as the accused had himself taken passes of the removal of wood from the forest, his claim to take wood without a pass could not possibly have been made in good faith. It does not appear to me that the question of good faith really arises in this case. From the passage I have quoted it is clear that it was the petitioner's case in the Court below that he had a right to take this wood. Before he can be convicted of theft or of causing wrongful gain or wrongful loss it must, in my opinion, be found that he had not this right to take the wood. The Magistrate carefully guarded himself from coming to any decision on this point and, therefore, it appears to me that whatever the intention and knowledge of the accused was, he cannot be convicted of theft, when it has not been found as a matter of fact that he was not entitled to the property which he took.

In my opinion the Rule must be made absolute and the conviction and sentence set aside and the fine, if paid, refunded.

MULLICK, J.—I agree.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 305 OF 1913,
CRIMINAL REVISION PETITION No. 253 OF 1913.
February 19, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

S. PARAMANANDA NADAR—COMPLAINANT—PETITIONER

versus

KARUNAKARA DOSS (DIED) AND ANOTHER—ACCUSED—RESPONDENTS.

Madras District Municipalities Act (IV of 1884), *ss.* 10*A*, 39*A*, 268 *and* 280—*Complaint by Secretary, withdrawal of—Municipal Council — Criminal Procedure Code (Act V of* 1898), *s.* 248.

It is not open to a Municipal Council to withdraw a complaint duly instituted by the Secretary of the Municipality under section 248 of the District Municipalities Act (Madras).

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the second class Magistrate of Palamcottah, in C. C. No. 49 of 1913.

FACTS.—This is a complaint against a voter at an election for being guilty of illegal practices. The Secretary instituted the complaint under section 280 of the Act. The Municipal Council by a resolution, subsequently passed, withdrew the complaint and the Magistrate passed an order acquitting the accused. The present appeal is against the order of acquittal.

Mr. *V. K. Venkatarama Aiyar*, for the Petitioner.—Complaint was instituted under section 280 of the District Municipalities Act. The Secretary was authorized to institute it under section 10B. The Municipal Council, by a subsequent resolution, disapproved of the action of the Secretary, and withdrew the complaint. This the Municipal Council has no power to do, as the Chairman can delegate his powers under section 268 of the District Municipalities Act to the Secretary. This power of delegation is given to the Chairman by the G. O.

The *Public Prosecutor*.—Under section 39A of the District Municipalities Act, it is a power vested in the Municipal Council, and it cannot be delegated to anybody else. The use of the words "in this behalf" means, that it must be a special authorisation and not a general one.

[AYLING, J.—Then, in that view, there is no valid complaint at all].

The *Public Prosecutor*.—Where the section authorizes the Chairman to institute the complaint, it shall not be delegated to anybody else.

[SANKARAN NAIR, J.—All that we can do is to dismiss the complaint, as one not validly instituted].

AYLING, J.—Powers once delegated cannot be withdrawn.

Mr. *V. K. Venkatarama Aiyar*, for the Petitioner.

Mr. *M. D. Devadoss*, for the Respondents.

The *Public Prosecutor*, for the Government.

ORDER.—The complaint in this case was preferred by the present petitioner purporting to act in virtue of an express authorisation by the Municipal Secretary to whom the powers of the Chairman under section 280, District Municipalities Act, are said to have been delegated under section 39 A. It is clearly not competent for the Municipal Council to withdraw the complaint and the complainant has not withdrawn it.

We set aside the order of acquittal passed under section 248 of the Criminal Procedure Code and direct the Magistrate to restore the case to his file and dispose of it according to law.

Prosecution ordered.

OUDH JUDICIAL COMMISSIONER'S COURT.

[CRIMINAL APPEALS NOS. 253 AND 263 OF 1913.

September 18, 1913.

Present:—Mr. Lindsay, A. J. C.

DEBI DAYAL—PRISONER

versus

EMPEROR—PROSECUTOR

Criminal Procedure Code (Act V of 1898), s. 35—Concurrent sentences, validity of.

The power of passing concurrent sentences is confined to cases where a person is convicted at one trial of two or more distinct offences.

Appeal against an order of the Sessions Judge, Rae Bareli, dated 12th August 1913.

The *Government Pleader*, for the Crown.

JUDGMENT.—These are two appeals preferred by Debi Dayal from Jail against the convictions and sentences passed upon him by the Sessions Judge of Rae Bareli. Appeal No. 253 relates to a case in which the appellant was convicted under section 420 in Criminal Trial No. 37 of 1913 on a charge of cheating. The complainant in that case was one Badri Kabaria Appeal No. 263 is an appeal against the conviction in Sessions Trial No. 39 in which the prisoner was found guilty of theft of a pony belonging to one Jagannath. In each of these cases the appellant has been sentenced to seven years' transportation and in each case the Judge has directed that these sentences of transportation should run concurrently with other sentences of transportation awarded to the appellant in two separate trials for other offences which were held at the same Sessions. I have admitted both these appeals on the question of the legality of the sentences. About the facts there can be no doubt. The prisoner has been properly convicted in both cases. It was not, however, competent to the Sessions Judge to make an order in each of these cases now under appeal that the sentences for transportation should run concurrently with sentences which had already been passed in separate trials. The only power conferred by the Code of Criminal Procedure on Courts in the matter of passing concurrent sentences is that referred to in section 35 of the Code of Criminal Procedure and from the perusal of the language of that section it is clear that such a direction can only be given in cases where a person is convicted at one trial of two or more distinct offences. The sentences are, therefore, illegal. I, therefore, modify the order of the Court below by directing that in each of these cases, that is in Appeals Nos. 253 and 263 the accused be sentenced to one day's rigorous imprisonment. These sentences will take effect in the order named on the expiry of the sentences awarded to the appellant in the other two cases. In other respects the appeals are dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITIONS NOS. 1966 AND 2049 OF 1913.

March 12, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

IN NO. 1966.

CHHABIL DAS—CONVICT—PETITIONER

IN NO. 2049

CHANDAR BHAN HOOJA—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Companies Act (VI of 1882), ss. 48, 50—Officers of Company resigning their positions as such without resigning directorships—Liability under section 50 not affected—Plea of ignorance of law.

Where a paid Managing Director and the Chief Secretary of a Company were prosecuted for an offence under section 48, and convicted under section 50 of the Indian Companies Act, VI of 1882:

Held, that the fact of their having resigned their positions as Managing Director and Chief Secretary,

CHHABIL DAS *v.* EMPEROR.

before the prosecution was started, without resigning thereby their posts as Directors would not free them from their liability under section 50 of the Act.

The plea of ignorance of law cannot be accepted.

Petition for revision, under sections 435/439 of the Criminal Procedure Code, of the order of the Sessions Judge, Lahore Division, dated the 8th August 1913, affirming that of the Magistrate, 1st class Lahore, dated the 26th May 1913 convicting the petitioners.

Mr. *Gokal Chand Narang*, for the Petitioner in No. 1966.

Lala *Amar Nath Chopra*, for the Petitioner in No. 2049.

JUDGMENT.

IN No. 1966 OF 1913.

RATTIGAN, J.—(*3rd March* 1914).—This judgment will dispose of this and the connected petition for revision (No. 2049 of 1913).

The petitioners are Chhabil Das, Nandwani, and Chandar Bhan, Hooja, and they apply to this Court on the revision side to set aside the order of the Sessions Judge, Lahore Division, confirming the order of the Magistrate, 1st Class, who convicted the petitioners of an offence punishable under section 50 of the Indian Companies Act, 1882, and sentenced each of them to pay a fine of Rs. 300.

The petitioners are comparatively young men, and in the year 1911, they were fired with ambition to amass wealth quickly by what then appeared to be the easy and lucrative means of "company promoting." The Magistrate describes them as "intelligent and well educated men with a good knowledge of English," but judging from their letters which are on the record and from the other facts before us, we have no hesitation in saying that they appear to be devoid alike of intelligence and of education. The Company with which we are now concerned and which they recklessly brought into being was called the "Hindustan Business Company, Limited," and according to the articles of association the objects for which it was established were entirely unlimited. Nothing was outside the scope of its business and the only check upon its efforts was lack of means. Upon the present petitions we are not concerned with this aspect of the case, as we have nothing to do with the facts which we must accept as found by the Magistrate and the Sessions Judge, and we refer to it only as illustrating the mischief which has been caused in this Province by half-educated persons essaying, with reckless disregard of consequences, the difficult and dangerous task of Company promotion.

As regards the particular offence of which the petitioners have been found guilty, there is, upon the facts, nothing to be urged in their favour. Chandar Bhan was the Managing Director of the Company and Chhabil Das was the "Chief Secretary" and also a Director. The Magistrate and the Sessions Judge are satisfied that they in their said capacities knowingly and wilfully authorised or permitted a default in complying with the provisions of section 48 of the Act which require that a list of members of the Company and a summary of certain specified particulars shall be submitted to the Registrar of Joint Stock Companies "forthwith" after the lapse of twenty-one days from the date of the ordinary general meeting of the Company. The Company in question was registered on the 25th August 1911 and the ordinary general meeting was admittedly held on the 8th September 1911. It is further not denied that the provisions of section 48 were not complied with up to the date (25th April 1912) when the present complaint was instituted. In these circumstances we cannot, as a Court of Revision, interfere with the convictions upon the merits, though we may add, in order to remove any misapprehension, that we are satisfied that the findings of the Courts below are fully justified. The sole question before us is whether the fine imposed is excessive.

Upon this point we have to consider several matters. On the one hand, we realise the imperative necessity of impressing upon all who undertake the responsible offices of Directors and Managers of Companies, the duty which is imposed on them by law of strictly adhering to and complying with the provisions of the Act. Those provisions have been enacted for the protection and benefit of the public, and persons who undertake the management and control of Companies registered under the Act are not to be encouraged in attempts to evade their legal responsibilities and duties.

On the other hand, the petitioners before us are, as we have already remarked, young men of no commercial experience, of scant education and apparently of slender means. They have, we believe, suffered very considerably both financially and otherwise by dabbling with this very dangerous pastime of Company promotion and they are at present,

so we are informed, without employment. The offence of which they have been convicted is not in the present case one of a very serious nature, as the omission to comply with the provisions of section 48 was not likely to cause any loss to the public. The Company's general meeting took place within a few days of the registration of the Company and we see no reason to suppose that in the interval the list of members had materially altered or that the Registrar could have successfully taken any material action against the Company or its Directors if the list of members and the summary referred to in section 48 had been forwarded to him in due course.

Taking all these facts into consideration and bearing in mind that this is the first case of the kind that has come before this Court, we are of opinion that a fine of Rs. 150 will be adequate to meet the ends of justice, and we accordingly direct that in each case the fine be reduced to that amount.

In all other respects the petitions are rejected.

KENSINGTON, C. J.—(12th *March* 1914).—I entirely agree with my learned colleague but add a few words to make our position quite clear. The provisions of the Indian Companies Act, VI of 1882, concerned are contained in sections 48 to 50. The principal argument urged as freeing the petitioners from their liability under section 50 was that they both resigned their positions as paid Managing Director and Chief Secretary by the end of January 1912, when they found that things were going wrong, but it is admitted they did not thereby resign their posts as Directors. Their liability, therefore, continued, and the plea of ignorance of the law cannot be accepted.

As regards the amount of the fine to be imposed, we were pressed to hold that there was no element of intention and that the petitioners had no object to gain by evasion of their legal duties. It is true that the Magistrate has in one part of his judgment expressed the opinion that there may have been no wilful default on their part though later on he refers to the gross and wilful nature of the offence, and also true that the Company collapsed before money had been obtained from the public on any very extensive scale. At the same time such information as we can obtain about the operations of the Company indicates the most serious doubts about the good faith of these imprudent young men, and their ignorance (if it was ignorance) was due to reckless and culpable negligence. We cannot gloss over the offence and though excessive severity is not called for in this case, we must make the fines heavy enough to serve as a warning that Company gambling of the kind will not be tolerated even when the culprits are such inexperienced youths that it is difficult to understand how anyone could be induced to support a venture started under such absurd conditions.

The order is as proposed.

IN No. 2049 OF 1913.

For reasons recorded in our judgment in Criminal Revision No. 1996 of 1913 we reduce fine to Rs. 150. In all other respects the petition for revision is rejected.

Fines reduced ; Petitions rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1088 OF 1913.

August 21, 1913.

Present:—Mr. Justice Coxe and Mr. Justice Mullick.

MOHAR KHAN AND ANOTHER—ACCUSED—PETITIONERS

versus

GAYZUDDIN SHEIKH—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 503, 522—Commission—Local enquiry—Case of wrongful restraint by obstructing path—Jurisdiction of Magistrate to issue commission for local inquiry—No notice taken by Magistrate of Commissioner's report or evidence—Accused misled—Further opportunity to be given for adducing evidence.

The petitioners have been convicted of wrongfully restraining the complainant by obstructing a path along which he was entitled to pass. They applied for a local inquiry and the Magistrate ordered a local inquiry by a Pleader who ultimately made a report but no notice was taken either of the report or of any evidence on which it may have been based:

Held, that the Magistrate had no authority to issue the commission, and the accused must have been seriously misled by it, for they must have thought that the Magistrate would pay attention to its result and they might well have refrained from producing witnesses; and that, therefore, they should have a further opportunity of adducing evidence.

No order under section 522, Criminal Procedure Code, can be passed unless there has been dispossession from immoveable property.

NAWAB HOWLADAR *v.* EMPEROR.

Babu *Manmatha Nath Mukherjee*, for the Petitioners.

Babu *Shashadhar Roy*, for the Opposite Party.

JUDGMENT.—The petitioners in this case have been convicted of wrongfully restraining the complainant by obstructing a path along which he was entitled to pass. They have obtained a Rule from this Court on the District Magistrate to show cause why this conviction should not be set aside on the ground that the complainant's allegations are not borne out by the facts; and also to show cause why the order that has been passed under section 522 should not be set aside.

The first ground, in our opinion, fails. But we have heard the learned Vakil who appears for the petitioners on another point. It appears that the accused applied for a local inquiry and the Magistrate thereupon ordered a local inquiry by a Pleader as if he were directing the issue of a commission in a civil case. The Pleader ultimately reported, but no notice was taken either of this report or of any evidence on which it may have been based. It appears to us that the accused must have been misled by this procedure. The learned Vakil who appears for the opposite party tells us that he is prepared to argue the point and we think we can deal with the question without issuing another Rule. The Magistrate clearly had no authority to issue this commission, and it is natural to suppose that the accused must have been seriously misled by it and must have thought that when the Magistrate had ordered an inquiry, he would pay some attention to the results of it. In such circumstances they might well have refrained from producing witnesses. We think, therefore, that the accused should have a further opportunity of adducing evidence.

As regards the order under section 522 it is not, in our opinion, sustainable. There is no finding in this case that the complainant has been dispossessed of any immoveable property.

The Rule will accordingly be made absolute in these terms and the case will go back to the Magistrate for further inquiry. The accused will be given an opportunity of adducing such evidence as they desire.

Rule made absolute;
Case sent back for further inquiry.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 329 OF 1913.
May 23, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Sharfuddin.

NAWAB HOWLADAR—
versus
EMPEROR—

Evidence Act (I of 1872), s. 122—Communications by husband to wife—Disclosure by widow after husband's death, whether permissible.

The prohibition enacted by section 122 of the Indian Evidence Act rests on no technicality that can be waived on will but is founded on principle of high import which no Court is entitled to relax.

Therefore, where a widow disclosed certain communications which had been made to her by her husband in connection with a murder, immediately before his death, her disclosure was excluded from consideration by the High Court on the ground that not only she could not be compelled to disclose those communications but that she should not have been permitted to disclose the same, for there was no one who did or could consent to the disclosure.

Criminal appeal against the order of the Additional Sessions Judge of Bakarganj, dated March 25, 1913.

Mr. *K. N. Chaudhuri* (with him Mr. *Surita* and *Babu Brojendra Nath Chatterjee*), for the Appellant.

Mr. *C. E. Bagram*, Offg. Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

JENKINS, C. J.—The four appellants, Nawab Howladar, Zaban Ali, Abdul Malla and Araz Ali Sikdar, have been convicted under sections 302 and 460 of the Indian Penal Code, and sentenced to death under the former section. In convicting the accused the Sessions Judge agreed with both the Assessors.

From this conviction and sentence the present appeal has been preferred, and the proceedings have been submitted for confirmation of sentence.

Both sides of the case have been placed before us with care and skill by Mr. Chaudhuri for the defence and Mr. Bagram for the prosecution, and we have been much assisted by their arguments.

The story of the crime may be briefly told. On the night of Wednesday, 6th November last, two men, three women and a little girl were murdered at Rajar Char in the house of Osimuddi, one of the victims. They were

the sole inmates of the house at the time, and so the crime was not discovered until the following morning.

There can be no doubt that it was the work of more than one culprit, and the case for the prosecution is that it was committed by a party of men of whom the present appellants were some. Plunder was apparently not the motive.

Of the appellants, two confessed before a Deputy Magistrate, but they subsequently retracted their confessions. The prosecution seek also to rely on the statements ascribed to Hamju, an alleged member of the party, who has since died by his own hand.

Over and above this there is the medical evidence and the testimony of witnesses, who speak to the enmity of the appellant Nawab Howladar towards the murdered man Osimuddi, of witnesses who depose to having seen or heard some of the appellants that night in circumstances which, according to the prosecution theory, point to their presence in the neighbourhood of the crime, of the Police officers who investigated the crime, and of an eye-witness, and so forth.

This eye-witness is an approver named Abdul Karim Sardar. His evidence is strongly attacked and, apart from the criticism to which the evidence of all approvers is open, it is urged that the story of Abdul Karim is manifestly false.

I will first deal with statements attributed to Hamju by his widow Jaytun Bibi.

It was contended before the Sessions Judge, and the contention has been repeated here, that the widow's disclosure of these communications should not have been permitted by the Court. The Sessions Judge, however, overruled the objection on grounds which appear to me to be in complete disregard of the language of section 122 of the Evidence Act on which the defence relied.

The statement to which Jaytun deposed was a communication made to her during marriage by a person to whom she had been married. Not only, therefore, could she not be compelled to disclose that communication, but she should not have been permitted to disclose it, for there was no one who did or could consent to the disclosure. The prohibition enacted by the section rests on no technicality that can be waived at will, but is founded on a principle of high import which no Court is entitled to relax. Jaytun's disclosure, therefore, of Hamju's communications must be excluded from consideration.

[The remainder of the judgment is not required for the purpose of the report.—Ed].

SHARFUDDIN, J.—I agree.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 57 OF 1914.

February 6, 1914.

Present:—Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

GUR DAYAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 438, 439 (5)—Order of acquittal—Right of appeal—High Court, power to interfere in revision—Practice.

It is against the practice of the High Court to interfere in revision with orders of acquittal. The right of appeal in case of acquittal is vested in the Local Government and not in the District Magistrate, but it is always open to the latter to move the local Government to file an appeal.

In the matter of Sheikh Amin-ud-din, 24 A. 346; A. W. N. (1902), 89 and *Emperor* v. *Madar Bakhsh*, 25 A. 128; A. W. N. (1902) 200, referred to.

Reference submitted by the District Magistrate of Bareilly as per his letter No. 31/111, dated the 13th January 1914.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—It is against the practice of this Court to interfere in revision with orders of acquittal. I may refer to the cases reported as *In the matter of Sheikh Amin-ud-din* (1) and *Emperor* v. *Madar Bakhsh* (2).

In both these cases the reference was made by the District Magistrate. I may refer also to clause 5 of section 439, Criminal Procedure Code. Of course, the right of appeal is vested in the Local Government and not in the District Magistrate but it is always open to the District Magistrate to move the Local Government to file an appeal. I think it would amount to something very like an evasion of the provisions of the section above referred to if this Court were to make it a practice to entertain applications in revision like the present. Let the record be returned.

Record returned.

(1) 24 A. 346; A. W. N. (1902) 89.
(2) 25 A. 128; A. W. N. (1902) 200.

BOMBAY HIGH COURT.

EXTRAORDINARY CIVIL APPLICATION No. 92 OF 1913.

January 6, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

NARAYAN PURSHOTTAM GARGOTE —APPLICANT

versus

LAXMIBAI DATTO BHAGWAN —OPPONENTS

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 —Jurisdiction of Court to hear review application not taken away by presentation of appeal.

Per *Shah, J. (Heaton, J. dubitante)* :—

Where an application for review has been presented by a party to a suit and an appeal is preferred, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application.

Chenna Reddi v. *Padda Obi Reddi*, 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 130 (F. B.); 19 M. L. J. 388, followed.

Extraordinary Civil Application from an order passed by the District Judge, Satara, in Miscellaneous Application No. 74 of 1912.

Mr. *Jayakar* (with him Mr. *S. Y. Abhyankar*), for the Applicant.

Mr. *P. D. Bhide*, for Opponent No. 1.

Mr. *V. V. Bhadkamkar*, for Opponent No. 2.

JUDGMENT.

SHAH, J.—This application arises under the following circumstances:

The District Court of Satara having decided Appeals Nos. 67 and 70 of 1911 on its file against the plaintiff, he presented an application for review to that Court on the 10th October 1912. A rule *nisi* was granted on the 12th October; and on 14th of October he filed a second appeal in this Court against the decree of the lower Appellate Court. He also informed the Registrar, while filing the appeal, that he wanted the appeal to be kept pending until his review application to the lower Appellate Court was disposed of.

The District Court has rejected the review application on two preliminary grounds without going into the merits of the application. One of the grounds is that certain copies which ought to have been filed with the application were not filed, and that the application could not, therefore, be entertained. Without expressing any opinion as to whether it was necessary to file those certified copies with the application, I am clearly of opinion that when the Court admitted the application on the 12th of October with full knowledge of the fact that the copies were not filed along with the application, the omission was sufficiently condoned. It would not, therefore, be right to disallow the application on that ground.

The second ground, which has been the main contention between the parties on this application, is that the applicant having preferred an appeal to this Court, the lower Court had no jurisdiction to proceed with the application for review. This point has been fully argued before us and several cases have been cited. I do not propose, however, to discuss the cases in detail. It is common ground that at the date of the presentation the application was in order and that the lower Court had jurisdiction to entertain it. It is argued, however, that that jurisdiction came to an end as soon as the plaintiff preferred a second appeal to this Court. The only decision which covers this point is the case of *Chenna Reddi* v. *Pedda Obi Reddi* (1). On a full consideration of the arguments on either side of the question, I have come to the conclusion that this Full Bench decision should be followed. Accepting that view, it is clear that the learned District Judge was not right in rejecting the application on the preliminary ground raised by the defendants. There is no decision cited to us except the case of *Ramanadhan Chetti* v. *Narayanan Chetty* (2), [which in terms has been overruled by the decision in *Chenna Reddi's* case (1)], that can be said to be in any way inconsistent with the view taken by the Madras High Court. In a matter of this kind, I think, it is desirable that the practice of different High Courts should be uniform as far as possible, and I see no reason whatever to think that the practice in this Presidency has been in fact different or that it ought to be different. Apart from the decided cases, I think, on a fair reading of the provisions of the Civil Procedure Code relating to this point, it is clear that an application for review can be made before any appeal is filed by the party and I know of no reason why an application, which was perfectly competent at the date of the presentation, should not be

(1) 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 130 (F. B.); 19 M. L. J. 388.

(2) 27 M. 602; 14 M. L. J. 321.

disposed of on the merits. There certainly is no express provision in the Code which renders the application incompetent on the mere presentation of an appeal by the same party at any subsequent time. In my opinion there is no practical inconvenience so long as the appeal is not prosecuted during the pendency of the review application. The present case fairly illustrates that it is only by following the practice, which has been sanctioned by the Madras High Court, that the remedy by way of review can be secured to the aggrieved party in an appropriate case, without requiring him to jeopardize his right of second appeal.

On these grounds the Rule should be made absolute and the lower Court directed to dispose of the application on the merits.

Costs throughout to be costs in the application.

HEATON, J.—I concur in the order proposed. It does not seem to me that this matter involves any really important legal principle or that for practical purposes it is anything more than a matter of practice. The practice, which, as I understand, at present is followed, is that which was followed by the applicant in this case. He applied for a review first and afterwards he appealed. Regarding this, as a matter of practice, I can see nothing in it to object to, nothing that is in any way inconvenient to, or inconsistent with, the proper, ordinary administration of justice. Therefore I see no reason to press my own view of the meaning of rule 1 of Order XLVII.

I should only like to add this: that I think there is great force in the reasoning of the District Judge. Personally also I am not at all satisfied that the conclusion reached by the Full Bench of the Madras High Court in the case of *Chenna Reddi* v. *Pedda Obi Reddi* (1) is really correct. But for the reasons I have stated, I consider my own personal opinion in these matters as of no particular importance. Therefore I concur in the order which my learned colleague has proposed.

Rule made absolute.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 154 OF 1913.

March 19, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

MAHABIR PRASAD—PLAINTIFF—APPLICANT

versus

THE COLLECTOR OF ALLAHABAD—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 —Review, ground for.

A decree can be reviewed on such grounds only as, if tenable, would justify an alteration or cancellation of the decree. Therefore, where a review is sought on a ground, which, even if it were tenable, would not result in a modification of the decree, the application for review should be rejected.

Application for revision against an order of the Subordinate Judge of Allahabad, dated 4th April 1913.

Mr. *Hamilton*, for the Applicant.

Mr. *Ryves*, for the Opposite Party.

ORDER—This is an application in revision asking us to set aside the order of the lower Court rejecting the application for review filed by the applicant before it. It appears that the applicant instituted a regular suit in the Court of the Additional Subordinate Judge of Allahabad for the recovery of certain property on the allegation that he was the son of one Thakur Beni Bahadur Singh. The property in suit was at the time in the possession of the Court of Wards, on behalf of a minor. The claim was resisted on the ground, among others, that the notice under section 48 of Local Act III of 1899 had not been given as prescribed in the Act, and that the plaintiff-applicant was not the legitimate son of Beni Bahadur Singh. Both the pleas in defence were accepted and the claim was dismissed. About five months after the dismissal of the claim the applicant filed a petition in the Court of the Subordinate Judge under Order XLVII, rule 1, seeking to review the decree dismissing his claim, on the ground of the discovery of new and important evidence on the question of his legitimacy. The learned Subordinate Judge issued a notice to the other side to show cause against the application. At the time of hearing the learned Judge declined to record any evidence on behalf of the applicant and presumably after hearing arguments on both sides rejected the application. He gave two reasons for dismissing the application, *viz.*, (1) that on the face of it it did not disclose

any good ground for review, and (2) that even if the new and important evidence alleged to have been discovered by the applicant were to affect the decision as to his legitimacy the decree will still stand good on the other issue in the case, *viz.*, the want of proper notice. The applicant has come up to this Court in revision and contends that he should have been allowed an opportunity of producing evidence to make out a case for the granting of his application for review. It is said that if he had succeeded in persuading the lower Court to accept the new evidence the decision on the question of legitimacy would probably have been modified and given in his favour. In that case he would have had an opportunity of coming up in appeal and re-opening the question of the want of notice. We think that the application for review was rightly rejected. The decision on the question of legitimacy on the reception of new evidence would not have modified or set aside the original decree. In our opinion the provision relating to review contemplates grounds which would alter or cancel the original decree. The application, therefore, fails and is rejected with costs including fees on the higher scale.

Application rejected.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 112 OF 1912.

November 17 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

PERIASAMI KONE—DEFENDANT—APPELLANT

versus

V. P. R. M. MUTHIA CHETTIAR—PLAINTIFF—RESPONDENT.

Mortgage decree — Personal decree — Decree-holder when entitled to proceed against person or other than mortgaged property of mortgagor—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.

The holder of a mortgage decree is not entitled to proceed against other than the mortgaged properties of the judgment-debtor unless the latter has no saleable interest in the property mortgaged.

Manit Kamoji v. *Chodimalla Ramamurthy Pantulu Garu*, 3 M. L. T. 335, approved.

Kasi Krishnama Chariar v. *Bogiammal*, 12 Ind. Cas. 439; (1911) 2 M. W. N. 355; 22 M. L. J. 125; 10 M. L. T. 525, referred to.

A mortgage decree which directs payment before a fixed date and in default of payment orders the sale of the hypothecated property is a personal decree and the decree-holder can proceed against the person and other property of the judgment-debtor without obtaining a decree under Order XXXIV, rule 6, of the Civil Procedure Code.

Raja of Kalahasti v. *Rajah Kumara Venkata Perumal*, 12 Ind. Cas. 689; 10 M. L. T. 429; (1912) M. W. M. 458; 21 M. L. J. 1036, followed.

Dinabandu v. *Mashuda Khatun*, 17 Ind. Cas. 263; 16 C. L. J. 318 and *Dina Nath Mitter* v. *Bejoy Krishna Das*, 7 C. W. N. 744 and *Purna Chandra Mandal* v. *Radha Nath Das*, 33 C. 867; 4 C. L. J. 141, referred to.

Appeal against the order of the District Court of Madura, dated the 16th August 1912, in Appeal Suit No. 20 of 1912, preferred against that of the Principal District Munsif of Madura, in Execution Appeal No. 420 of 1911, (in Original Suit No. 205 of 1906).

Mr. *S. Muthiah Mudaliar*, for the Appellant.

Mr. *A. Krishnasami Aiyer*, for the Respondent.

JUDGMENT.—The view of the lower Courts that a decree-holder is entitled to abandon his claim against some of the mortgaged properties even after decree, so as to enable him to ignore the terms of the decree if those terms direct him to bring those properties to sale before he could proceed against other properties of the judgment-debtor; that view, though in accordance with certain Allahabad decisions, cannot be accepted as sound as it is against the decision of this Court in *Manit Kamoji* v. *Chodimalla Ramamurthy Pantulu Garu* (1), which has been recently followed by this Bench in the case of *Varadiah* v. *Rajah Kumara Venkata Perumal* (2).

If, of course, the mortgaged properties directed to be sold under the mortgage decree do not belong to the mortgagor, the mortgagee need not be compelled to resort to the farce of bringing them to sale and to undergo the useless delay involved in bringing them to sale, because it is an elementary principle of law that the Court will not do a vain thing, nor will it compel a man to do a fruitless thing.

(1) 3 M. L. T. 335.

(2) 21 Ind. Cas. 782; 14 M. L. T. 530; 26 M. L. J. 83; (1914) M. W. N. 157.

Lex nil facit frustra.

Lex neminem Cogit ad vana seu inutilia.

[See also *Kasi Krishnama Chariar* v. *Bogiammal* (3)].

The contention of the appellant's learned Vakil, therefore, that the decree-holder ought to go through that farce, even if no interest at all in the properties Nos. 2 and 3 ordered to be sold belongs to the mortgagors, cannot be accepted. However, the lower Courts have not gone into the question of fact whether the judgment-debtor had no saleable interest in the properties Nos. 2 and 3 ordered to be sold and we would have to call for a finding from the lower Appellate Court, if it was necessary for the decision of this case to call for such finding. It is, however, unnecessary to do so, as the case has to be disposed of on another ground, which, though not taken in the lower Courts, is a question of law depending on the construction of the decree and has been taken before us in the 7th ground of appeal to this Court. To appreciate that ground, the nature of the decree has to be stated.

The decree directs "that the defendants do pay to the plaintiff Rs. 619-1-0 etc.,....." and then it proceeds as follows "this Court doth further order and decree..... that in default of payment.....before the date specified, the hypothecated property.....shall be sold etc." A similar decree was construed by a Bench of this Court to which one of us was a party [*Raja of Kalahasti* v. *Rajah Kumara Venkata Perumal* (4)] as giving a personal decree against the defendants under which execution at the option of the decree holder can be had against the persons and other properties of the judgment-debtors without reference to the decree for sale of the mortgaged properties. If there is thus a personal decree already, no application for another personal decree under Order XXXIV, rule 6, can be granted. [See *Dinabandhu Nandi* v. *Mashuda Khatun* (5), *Dina Nath Mitter* v. *Bejoy Krishna Das* (6) and *Purna Chandra Mandal* v. *Radha Nath Das* (7).]

(3) 12 Ind. Cas. 439; (1911) 2 M. W. N. 355; 10 M. L. T. 525; 22 M. L. J. 125.

(4) 12 Ind. Cas. 689; 21 M. L. J. 1036; 10 M. L. T. 429; (1912) M. W. N. 458.

(5) 17 Ind. Cas. 263; 16 C. L. J. 318.

(6) 7 C. W. N. 744.

(7) 33 C. 867 at p. 877; 4 C. L. J. 141.

The application as it stands cannot be, therefore, granted. But we think that this is a fit case for allowing the decree-holder to amend the prayer of his petition by adding an alternative prayer that "if the Court thinks that the decree as it stands awards relief personally against the defendant, the Court will be pleased to order arrest of the defendant and attach the following properties," (to be definitely described). We think that section 153 of the Civil Procedure Code gives ample power to the Court to allow such amendment, and that this is a fit case to permit such an amendment. Four weeks from receipt of records by the Munsif is granted to make the amendment. The lower Court's orders are set aside. If the amendment is made, the Court of first instance will pass orders in due course of law on the alternative relief and on the costs of the petition in that Court. If the amendment is not made, the petition will stand dismissed with the costs of the Court of first instance. The parties will bear their respective costs in this Court and in the District Court.

Case remanded and amendment ordered.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No 117 OF 1912.

March 26, 1914.

Present:—Mr. Justice Ormond and Mr. Justice Parlett.

RAMANATHAN CHETTY AND OTHERS—APPELLANTS

versus

THE BANK OF BENGAL—RESPONDENT.

Agency—Powers of Agent—Chetty banking, usage of—Power-of-attorney — Construction — Surety—Guarantee —Agent's power to give guarantee or sign negotiable instruments—Burden of proof.

Unless expressly so empowered an agent cannot make his principal a surety for another's loan, nor can

he borrow money in his principal's name for another, nor can he thrust a partner upon his principal or sign a promissory-note for his principal jointly with another person.

It is not a necessary incident in a Chetty banking and money-lending business that the Chetty must necessarily guarantee another Chetty, that is, it is no part of the Chetty business to stand guarantee for others who are not Chetties.

Powers-of-attorney must be construed strictly and unless an express power is given to an Agent to enter into contracts of guarantee on behalf of his principal or to execute negotiable instruments for his principal jointly with others, it rests on the person alleging such power in the agent to show that in fact the agent had authority to enter into such a transaction.

Appeal from a decree on the Original Side.

Mr. *J. R. Das*, for the Appellants.

Mr. *Giles*, for the Respondent.

JUDGMENT.

ORMOND, J.—The plaintiff Bank sues the defendant firm for the sum of Rs. 50,000 with interest in the following circumstances: on the 23rd May 1908 one Hashim Ebrahim had a cash credit account with the plaintiff Bank and in order to secure the same, upon the request of the plaintiff Bank, executed a pro-note for Rs. 50,000 and interest, in accordance with the practice of the Bank, in favour of the defendant firm. The agent of the defendant firm endorsed the said pro-note over to the Bank and at the same time executed an agreement guaranteeing the payment of the said cash credit account. The defence is a denial of the authority of the agent to enter into the contract of guarantee. It is proved that the defendant's agent entered into 23 transactions with the Bank as surety for others between 1904 and May 1908, 6½ of which were guarantees of persons other than Chetties. On the 21st July 1906 the defendant's agent guaranteed this man, Hashim Ebrahim, and on the 3rd of November 1906 the defendant's agent was guaranteed by Hashim and the firm of S. R. M. The learned Judge on the Original Side in his judgment says: "Now having regard to the approved practice and to the ordinary presumptions, that must arise as to the ordinary course of business and human affairs, it is impossible to hold that these agents (defendant's agents) had never submitted accounts to their principal and that he should have remained in ignorance of the fact that they were not only carrying on this branch of Chetty banking business but were doing so to a very large extent. Defendant held out Chokalingum Chetty as his agent in Rangoon with a full general power to transact business on his behalf. The agent was guaranteeing other people's loans and no exception was taken by the principal to this conduct on his behalf for years, and, in my opinion, it must, therefore, be held that he held his agent out as having the power to guarantee the accounts, and further that the power in so guaranteeing was ratified and confirmed by him. * * * Notice was given him (defendant) to produce his account books but they have not been produced. These account books would have shown these transactions. They would have shown the receipt of commission which would be consideration. Further the agreement itself sets out a consideration. It is at the request of the defendant's agent that the cash credit account is given and that imports a consideration." The Judge, therefore, gave the plaintiff a decree. The defendant was the sole proprietor of that firm and is dead. The question of ratification was first raised by the plaintiff when the case came on for hearing. The books were not produced before, because the only question was, had the agent authority to enter into this transaction? The learned Judge has assumed that commission was charged for this transaction, that these transactions must have been entered in the books and that the agent sent the books to his principal, and, therefore, that the principal knew of these transactions of guarantee. In order to make the defendant liable upon a ratification the plaintiff must show that the defendant had full knowledge of the facts. There is no question whether there was consideration to support a contract of suretyship as between the Bank and the defendant. Mr. Giles, who appears for the plaintiff-respondent, admits that the question is not really one of ratification, but whether the authority to enter into the transaction of guarantee must necessarily be implied from the powers conferred in the power-of-attorney. The power-of-attorney is in the form generally used amongst Chetties. It recites the desire of the principal to appoint the agent his attorney for the

general management of his banking and money-lending business. It then constitutes the agent the lawful attorney to transact, conduct, and manage all and every or any of the affairs, concerns, matters and things in which the principal then was or thereafter might be in any wise interested and concerned and for that purpose to use or sign the principal's name on any documents whatsoever, to borrow money from Banks, firms or persons, either with or without a pledge of securities for money advanced to various persons, to make, draw, sign, accept, endorse, negotiate and transfer bills of exchange, pro-notes, etc., to which the principal's signature of endorsement might be required or which the attorney might in his absolute discretion think fit, in the name of the principal. The agent, therefore, had a general authority to carry on the business of a Chetty banker and money-lender on behalf of his principal as the sole proprietor of the business and an express power to borrow money and to endorse promissory-notes for the purposes of that business. He would not be authorized (without an express power to that effect) to enter into any transaction under which his principal incurred a liability, unless such transaction was a necessary incident in the carrying on of a Chetty banking and money-lending business. If the transaction entered into by the agent is on the face of it authorized by the power-of-attorney, the Bank need not look to the application of the money by the agent, but if it is shown that the Bank had notice of the real nature of the transaction and such transaction is not within the scope of the agent's authority, the principal would not be liable. In this case the agent endorsed a promissory-note in favour of the Bank in the name of his principal, and he has an express power to do so, but at the same time he signed for his principal on a letter of guarantee in favour of the Bank on behalf of Hashim Ebrahim for the whole amount for which the promissory-note was given. The Bank, therefore, knew that none of the money was being taken by the agent as a loan to his principal. The agent was given certain specified or express powers; but they do not include a power to make his principal a surety for another's loan; and they do not include a power to borrow money in his principal's name for another, or to sign promissory-notes for his principal jointly with another principal. If he had been given such a power as the last, an authority to guarantee the debt of another might well be inferred because since he clearly has no power to thrust a partner upon his principal, if he had the power to sign promissory-notes for his principal jointly with another, the manifest effect of such a transaction would be that, as between the two makers of the note each is a surety for the other as to the amount taken by that other. The sole question then is, is it a necessary incident of the business to guarantee the loans of others? If such transactions are entered into for a commission, the business would not be so much a money-lending business as an insurance business. If such transactions are merely mutual accommodations, it must be shown that such mutual accommodations are necessary. Loans can be raised on security without sureties, and the fact that the Presidency Banks Act requires two independent signatures for a loan on a promissory-note is not sufficient to show that such mutual accommodations are necessary for the business.

The Bank have called two Chetties in support of the proposition that it is a necessary incident in a Chetty's money-lending business to guarantee the debts of others. Ramanathan Chetty, the 2nd witness for the plaintiff, the agent for the R. M. M. S. T. firm says that his firm has not guaranteed overdrafts of accounts of persons other than Chetties. He has heard that some Chetties do guarantee, in such cases the Chetty gets a commission. In cross-examination he states that "those whose principals allowed them to guarantee the overdrafts of other people, they guarantee." His own principal has told him that he should not guarantee people other than Chetties. The other Chetty Udiappa, 5th witness for the plaintiff, who is the agent of the V. A. R. firm, says: "It is left to the option in Rangoon of the agents to guarantee the overdrafts of others. Some take the authority from the principal before for so doing and some do so after the transaction has been entered into. Some principals do not allow their agents to do this guarantee business at all." Mr. Giles

contends that inasmuch as the Presidency Banks Act requires the signatures of two persons (who are not partners) for a loan on a promissory-note, the defendant must have known from the cash credit account at the Bank of Bengal that other persons had stood guarantee for him and that, therefore, he must have assumed that his agent was standing guarantee for others, and that it is a normal feature to mutually guarantee in Chetty banking business. It is not shown that the defendant would know of the cash credit account at the Bank of Bengal, and I do not think it is made out that it is a necessary incident in a Chetty banking and money-lending business that the Chetty must necessarily guarantee another Chetty. It is certainly not made out in this case that it is part of the Chetty business to stand guarantee for others who are not Chetties. Powers-of-attorney must be construed strictly and unless there is an express power given to the agent to enter into contracts of guarantee on behalf of others or to execute negotiable instruments jointly with others, it rests on the Bank or other person lending the money to show that the agent had in fact authority to enter into such a transaction.

I would allow the appeal and dismiss the suit with costs in both Courts.

PARLETT, J.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2003 OF 1912.

April 1, 1914.

Present:—Mr. Justice Tyabji and Mr. Justice Spencer.

PENAMUCHA ANANDARAJU—PLAINTIFF—APPELLANT

versus

NADIMPALLI VENKATARAJU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 3, O. XVII, r. 3—Time granted to produce evidence—Adjournment of suit—Failure to appear on adjourned date—Proper order is to proceed with suit and not to dismiss it.

Where the parties to a suit agreed that the decision in that suit should follow the decision of the Appellate Court in another suit, and after producing a copy of that decision, both parties absented themselves on the adjourned date:

Held, that the proper course for the Court was to proceed to decide the suit under Order XVII, rule 3, and not to dismiss it under Order IX, rule 3, of the Code of Civil Procedure.

Second appeal against the decree of the District Court of Kistna, in Appeal Suit No. 540 of 1911, preferred against that of the Deputy Collector of Gudivada, in Summary Suit No. 179 of 1910.

Mr. *P. Nagabushanaman*, for the Appellant.

JUDGMENT.—There were two suits for rent between the same parties. The first suit was in respect of *Faslis* 1313 to 1315 and the second in respect of *Faslis* 1316 to 1318.

The suit out of which this appeal arises is the second one. It was posted for hearing on the 19th September 1910. Then the parties appeared and asked for an adjournment which was granted till the 14th October 1910, on which day the defendants applied for stay pending the decision of their appeal in the first suit. The suit which is now under appeal was consequently adjourned to the 24th March 1911, on the basis of an agreement between the parties that the decision in the present suit should follow the decision in the other suit. Accordingly on the 24th March 1911, the plaintiff appeared producing a copy of the appeal decree in the other suit which was in his favour and petitioned that a decree should be passed in the present suit in his favour. On this the defendant put in an application dated the 19th April 1911 for an adjournment and on the 29th April 1911 the hearing was adjourned for 15 days to permit the defendant to appeal to the High Court from the appellate decree in the other suit. The hearing was then adjourned to the 17th May 1911 to permit the defendant to produce evidence of his having appealed to the High Court. On that day neither party appeared. In the result the Revenue Court dismissed the suit and the dismissal was upheld by the District Court.

We think the forms of procedure have been misapplied by the lower Courts. The dismissal was apparently made under Order XVII, rule 2, and Order IX, rule 3, of the Code of Civil Procedure, 1908. In our opinion the rule applicable was Order XVII, rule 3, of the Code of Civil Procedure. The

Court should have proceeded to decide the suit and it would seem from the contention of the appellant that the plaintiff's claim to a decree could not have been resisted.

It is suggested to us that the plaintiff is entitled to a decree now. We are unable to grant him a decree without having the agreement before us on which the adjournment referred to in the plaintiff's petition of 24th March 1911 was granted, and without knowing the result of the second appeal in the other suit.

We set aside the order of dismissal. The Deputy Collector must restore the suit to his file and dispose of it in accordance with law.

Costs will abide the result.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 831 OF 1911.

January 27, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer

ALLA PICHAI THARAGANAR *alias* KADIR MIRA SAHIB THARAGANAR (DIED) AND OTHERS—APPELLANTS

versus

MAHOMAD MOIDEEN THARAGANAR AND OTHERS—RESPONDENTS.

Muhammadan Law—Gift of house—Possession, delivery of—Contingent gift—Conditional gift.

A gift of a house is not invalidated by the mere residence of the donor therein after the gift.

Kandath Veettil Bava v. *Musaliam Veettil Pakru Kutti*, 30 M. 305; 2 M. L. T. 180, followed.

Bava Saheb v. *Mahomad*, 19 M. 343, dissented from.

Contingent gifts are generally considered invalid while conditional gifts can be enforced as absolute gifts, although the condition may be bad.

Nizamuddin Gulam v. *Abdul Gafur*, 13 B. 264, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Appeal Suit No. 619 of 1909, preferred against that of the Additional District Munsif of Tinnevelly, in Original Suit No. 50 of 1908.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondents.

JUDGMENT.—The first contention is that a gift of the house under Exhibit IV is invalid by reason of the possession of the property not having completely passed at the time.

In this matter we see no reason why we should not follow the decision of *Kandath Veet til Bava* v. *Musaliam Veettil Pakru Kutti* (1) in preference to the earlier decision in *Bava Saheb* v. *Mahomad* (2). It was held in *Kandath Veettil Bava* v. *Musaliam Veettil Pakru Kutti* (1), that in certain circumstances such as those connected with the present case the residence of the donor in the house which is the subject of gift would not be a ground for invalidating the gift.

The next contention is that the condition that the defendants Nos. 1 and 2 should enjoy the properties absolutely only after the donor's death made the gift itself not an absolute gift and that conditional gifts are not recognized in the Muhammadan Law. On this question it is necessary to distinguish between contingent gifts and gifts with a condition attached. Though the former are generally considered invalid, the latter can be enforced as absolute gifts, although the condition may be bad. See *Nizamuddin Gulam* v. *Abdul Gafur* (3) and the observations at page 134, Volume I, of Ameer Ali's Muhammadan Law (4th Edition). This second appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 30 M. 305; 2 M. L. T. 180.
(2) 19 M. 343.
(3) 13 B. 264.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 227 OF 1912.

March 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

KARIA KOWNDEN *alias* ARUNACHALLA KOWNDEN AND OTHERS—APPELLANTS

versus

RAGHAVA REDDI AND OTHERS—RESPONDENTS.

Grant of land under Darkhast *rules—Rules not complied with—Jurisdiction—Adverse possession—Presumption—Confined to spot actually in possession.*

Musammat HULASO *v.* SALAMAT KHAN.

The fact that a Divisional Officer contravened certain rules framed for his guidance does not affect his jurisdiction to cancel a grant made by a Tahsildar.

The ordinary presumption that a person having title has possession over the whole if he exercises acts of ownership only over a portion leaving the rest as waste does not arise in the case of a trespasser whose adverse possession will be restricted to the particular portions in his possession.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 169 of 1910, preferred against that of the District Munsif of Tiruvannamalai, in Original Suit No. 425 of 1909.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Appellants.

The *Government Pleader* and Mr. *Jagamatha Aiyar*, for the Respondents.

JUDGMENT.—The Sub Collector on appeal from the Tahsildar's order granting the plaint lands to the appellants had jurisdiction to cancel that grant.

The fact that the Sub-Collector contravened some rules laid down for his guidance in some Standing Order No. 15 when he disposed of the appeal (assuming that he so contravened them) has nothing to do with his jurisdiction to quash on appeal the grant made by the Tahsildar. The first contention in appeal, therefore, fails.

While there is a presumption in the case of a person having title that possession of the whole is in him even if he exercises acts of ownership only over a portion leaving the rest waste, there is no such presumption in the case of a trespasser whose adverse possession will be restricted to the particular portions in his actual possession. On the finding of the District Judge that the defendants never were in possession of any portion of the plaint lands for twelve years continuously, the contention as to limitation fails.

The defendants on the facts found could have had no honest belief (we do not exclude an honest belief entertained through negligence) that they were owners of the lands, and their claim for improvements was rightly disallowed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 259 OF 1914.

March 7, 1914.

Present:—Mr. Justice Rafique.

Musammat HULASO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SALAMAT KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Burden of proof—Presumption—Limitation.

In a suit for the recovery of a house the plaintiffs alleged that the defendant had unlawfully and without any right taken possession of it ten years before suit and after the death of the plaintiffs' ancestor. The defendant pleaded more than twelve years' adverse possession. The Court found that the death of plaintiffs' ancestor took place more than twelve years prior to the institution of the suit:

Held, under the circumstances, (1) that no presumption as to continuation of the plaintiff's possession could be made in his favour;

(2) that it was for the plaintiff to prove by *prima facie* evidence that he had been in possession of the house within twelve years.

Second appeal from the decision of the District Judge of Shahjahanpur.

Mr. *Sarat Chandra Choudhuri*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of a house on the allegation that it belonged to their ancestor, Sita Ram, who had died ten years prior to the institution of the suit and that after his death the defendants-respondents had unlawfully and without any right taken possession of it. The claim was resisted on the ground among others that Sita Ram had died more than twelve years prior to the institution of the suit and that the defendants-respondents had been in adverse possession of the house for more than twelve years. The Court of first instance decreed the claim. On appeal the learned District Judge held that Sita Ram had died more than twelve years prior to the institution of the suit and that the plaintiffs-appellants had failed to prove their possession within limitation. The plaintiffs have come up in second appeal to this Court and contend that as the title to the house was obviously in them, who were the daughter and daughter's sons of Sita Ram, the presumption of possession must be made in their favour. They were not, therefore, bound to give *prima facie* evidence of their possession

within limitation. On the other hand, it was for the defendants-respondents to establish their plea of adverse possession. I do not think that the contention is correct. It was distinctly alleged in the plaint that the plaintiffs-appellants had not obtained possession of the house in suit after the death of Sita Ram and the lower Appellate Court has found that Sita Ram's death took place more than twelve years prior to the institution of the suit. It was further stated in the plaint that the defendants-respondents had taken possession of the house after the death of Sita Ram. Under these circumstances it was clearly for the plaintiffs-appellants to prove by *prima facie* evidence that they had been in possession of the house in suit within limitation. In my opinion the learned District Judge took a right view of the case. The appeal fails and is dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 16 OF 1914.

March 4, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

CHINNU *alias* SABAPATHI GOUNDEN—PLAINTIFF—PETITIONER

versus

SAMBANDA MOORTHI *alias* THANDI GAIVELA GOUNDEN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Charter Act, 24 & 25 *Vic. C.* 104, *cl.* 15—*Civil Procedure Code* (*Act V of* 1908), *s.* 115, *O. XVI, r.* 4—*Commission refused — Discretion—Revision—Abuse of process.*

A High Court ought not to sit in appeal over every exercise of discretion by the Court below, even though under the law no appeal is given to the party against whom the discretion has been exercised.

Nothing short of the conclusion that there has been a wanton abuse of the process of the Court below, would induce a High Court to interfere in revision.

Therefore, where a subordinate Court has either issued a Commission to examine certain witnesses or has refused to issue one, it cannot be said under section 15 of the Charter Act or section 115 of the Civil Procedure Code that his refusal amounts to an abuse of the process of the Court or that he has acted with material irregularity in the exercise of jurisdiction.

Petition, under section 115 of Act V of 1908 and section 15 of the Charter Act, praying the High Court to revise the order of the District Court of Salem in I. A. No. 148 of 1913, in Original Suit No. 10 of 1912.

Mr. *T. M. Krishnasamy Aiyar*, for the Petitioner.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.—Mr. Krishnasamy Aiyar invites me to say that in all cases where a Judge has either issued a Commission to examine certain witnesses or refused to issue a Commission this Court under the Charter Act has power to satisfy itself upon the facts whether that exercise of discretion by the Court below was right or not and to remedy the injustice which has been done to the party, and he quotes *Lekhraj Ram* v. *Debi Pershad* (1) for the position that the arm of the High Court is long enough to reach all cases of injustice. I cannot accede to this contention. It would virtually mean that the High Court is to sit in appeal over every exercise of discretion by the Court below, even though under the law no appeal is given to the party against whom the discretion has been exercised.

The case of *Vidya Purna* v. *Seethamma* (2) is a case where a party in order to coerce another party to enter into a compromise vexatiously summoned him as a witness where there was no necessity to summon him at all, and the learned Judges came to the conclusion that the order for the issue of a Commission in that ca must be regarded as an abuse of the process of the Court. In that case the largest extension of the power of the High Court to interfere in such matters has been reached; I feel that nothing short of the conclusion that there has been a wanton abuse of the process of the Court, to which the Court below either wittingly or unwittingly lent itself, will induce this Court to interfere in revision. That is not the case before me. All that has been said in this case is that there has been an error of judgment on the part of the learned Judge which has seriously prejudiced the petitioner. It is, no doubt, true that it was held in *Vidya Purna Thirthaswami* v. *Seethammai* (3) that every

(1) 12 C. W. N. 678; 7 Cr. L. J. 499.
(2) 28 M. 28; 14 M. L. J. 329.
(3) 12 Ind. Cas. 74; 21 M. L. J. 889.

party has a right under Order XXVI, rule 4, Civil Procedure Code, to require that a Commission should issue for the examination of witnesses, and I am inclined to think that in this case it would have been better if the learned Judge had granted the application, because there was a possibility of the Commission being returned before the hearing itself took place. Probably when an application is made afresh to the District Judge, if he is satisfied that before the case is finally heard the Commission can be returned, this order will not stand in the way of his exercising his discretion in favour of the plaintiff. But I cannot say that under section 15 of the Charter Act or section 115, Civil Procedure Code, the refusal of the District Judge amounts to an abuse of the process of the Court or that he has acted with material irregularity in the exercise of his jurisdiction. The case *In re Nizam of Hyderabad* (4) decided by Muthusami Aiyer, J., is a case in point. Following that decision I hold that this Court has no power to interfere with the order passed by the District Judge under the circumstances of this case. I, therefore, dismiss the petition with Costs.

Petition dismissed.

(4) 9 M. 256.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2527 OF 1912.

November 19, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

J. S. V. NAZARETH—DEFENDANT—APPELLANT

versus

JAFFER MEGHJI SHET—PLAINTIFF—RESPONDENT.

Specific performance of contract to sell—Variation between contract set up and contract proved—No wilful omission or concealment—Suit for the items proved maintainable.

A Court has discretion to refuse specific performance of a contract to sell, where the plaintiff fails to establish in full the agreement set up by him in his plaint; but that rule does not apply where the plaintiff does not deliberately put forward a false claim.

Where the agreement was to sell four items of property and subsequently one of the items was mortgaged to the plaintiff and in consequence the plaintiff was not in a position to state what items were sold to him, the fact that he claimed in these circumstances a larger number of items than he was found entitled to would not put him out of Court.

Appeal against the decree of the District Court of South Canara, in Appeal Suit No. 352 of 1910, preferred against that of the District Munsif of Mangalore, in Original Suit No. 305 of 1909.

Mr. *M. O. Parathasarathy Ayangar* (with him Mr. *K. P. Madhava Row*), for the Appellant.

Mr. *J. L. Rozario*, for the Respondent.

JUDGMENT.—The suit is for specific performance of an agreement to convey to the plaintiff the properties which bear the Survey Nos. 15, 16, 18, two houses and certain trees. The plaintiff has got a decree for No. 15 and some of the trees claimed. The contention in second appeal is that, as the plaintiff has failed to prove the contract set up, *i.e.*, for the sale of all the properties claimed, he is not entitled to any decree for specific performance, and the cases *Lindsay* v. *Lynch* (1), *Legal* v. *Miller* (2) and *Marshall* v. *Berridge* (3) are relied upon.

The lower Appellate Court has found that after the parties entered into the agreement to sell, a mortgage, (Exhibit A), of the properties agreed to be sold was granted to the plaintiff as an intermediate step. It is stated that item No. 15 was mortgaged and that the houses in the occupation of two persons, Rajunath Naik and Kisto Souza, were excluded. F and G are the houses in Naik's occupation and No. 18 is the house in Souza's occupation. There was really no dispute between the parties as to the scope of the agreement so far as the properties were concerned. They were the properties in Exhibit A. The only question was, what were the properties in Exhibit A. The correspondence that passed between the parties does not show that the defendant took any exception to the plaintiff's claim on the ground that he has claimed more properties than he was entitled to. On the other hand, he claimed a higher purchase amount which has been disallowed. He also claimed that the agreement was to be

(1) 9 R. R. 54; 2 Sch & Lef. 1.

(2) 2 Ves. Sen. 299; 28 Eng. Rep. 193.

(3) 19 Ch. D. 233 at p. 241; 51 L. J. Ch. 329; 45 L. T. 599.

carried out within a certain time. On this point also the finding is against him. So far as the plaintiff's claim is concerned, it is found that Survey No. 16 is really included in Exhibit A. But as Survey No. 15 is mentioned by name, the plaintiff gave up his claim to it in appeal and the Judge states that both the parties were under a mistake as to that item. As regards No. 18, and the houses or house-sites, and the trees, the Judge finds that the differences between the plaint claim and what was proved at the trial are very insignificant considering the value of the property. It is not shown that the plaintiff wilfully and with knowledge put forward a claim which he knew to be false; he has not obtained a decree for any property not claimed by him or not included in the agreement set up by him. No objection was advanced by the defendant before suit for specific performance on this ground, and the difference is not material. In these circumstances we are of opinion that the Judge was right in decreeing specific performance when the plaintiff consented to accept a decree for the same. He is, however, bound to pay the balance of the purchase-money, Rs. 500. We will modify the decree of the Court below by directing the plaintiff to deposit in Court the amount of Rs. 500 within three months from this date. In default his suit will stand dismissed. With this modification we confirm the decree of the lower Appellate Court and dismiss the second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 454 OF 1913.

March 17, 1914.

Present:—Mr. Justice Ayling.

S. CHIDAMBARAM PILLAI—PLAINTIFF—PETITIONER

versus

MUTHAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 111, 115, 189, 213 (3)—*Sale—Declaratory suit to set aside sale—Jurisdiction of Civil Courts—Bengal Tenancy Act (VIII of 1885), s.* 119.

A suit for declaration to have a sale, under section 111 of the Estates Land Act, declared void is triable by a Civil Court and not by a Revenue Court.

Doraisamy Pillai v. *Mothusamy Moopan*, 27 M. 94; 13 M. L. J. 479; *Zamindar of Ettyapuram* v. *Sankarappa Reddi*, 27 M. 483, *Gouse Mohideen Sahib* v. *Muthialu Chattier*, 21 Ind. Cas. 762; 14 M. L. T. 523; 26 M. L. J. 36; (1914) M. W. N. 55, followed.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order, dated 19th February 1913, of the District Court of Tinnevelly, in Civil Miscellaneous Appeal No. 2 of 1913, preferred against the order, dated the 26th October 1912, of the District Munsif of Ambasamudram, in Original Suit No. 5 of 1911.

Mr. *S. Ramaswami Aiyar*, for the Petitioner.

Mr. *L. A. Govindaraghava Aiyer*, (with him Mr. *L. S. Veeraraghava Aiyer*), for the Respondents.

JUDGMENT.—Petitioner sued for a declaration that a sale of his holding held under sections 111 *et seq* of the Madras Estates Land Act was legally void and liable to be set aside in consequence of the land-holder's failure to apply to the Collector for sale within the period of forty-five days prescribed by section 115.

The Munsif held that he had no jurisdiction to try the suit and dismissed it. The District Judge on appeal took the same view.

It seems clear that a suit of this nature is maintainable in Civil Court, in the absence of any statutory bar [Vide *Dorasamy Pillai* v. *Muthusamy Moopan* (1) and *Zamindar of Ettyapuram* v. *Sankarappa Reddiar*(2)].

Respondent relies on section 189 of the Estates Land Act. This makes it clear that a suit for damages sustained in consequence of the alleged illegality would lie in a Revenue and not in a Civil Court: which is also specifically laid down in section 213 (3). But a suit for declaration like the present one is not one of those set forth in the Schedule to the Act. It may seem anomalous to give the jurisdiction to award damages for the illegality to the Revenue Court which ordered the sale and the jurisdiction of setting it aside to the Civil

(1) 27 M. 94; 13 M. L. J. 479.
(2) 27 M. 483 (F. B.).

tribunal. But if the view taken by the lower Courts is correct, then in spite of the mandatory directions of section 115, an order of a Collector for sale, which was passed without jurisdiction, must stand, and cannot be questioned: for, admittedly, no suit to set aside the sale will lie in a Revenue Court.

The only doubt that occurs to my mind arises out of the curious wording of section 189. The Civil Court is forbidden to take cognizance, not of any suit or applications of the nature specified in the Schedule, but "of any dispute or matter in respect of which such suit or application might be brought or made". Section 109 of the Bengal Tenancy Act may be referred to for comparison. It is arguable that the words of section 189 bear a more extended meaning and exclude from the cognizance of a Civil Court not only the suits described in the Schedule, but all suits arising out of a dispute or matter in respect of which such suits might be brought. I should be loth to place such an interpretation on the sections, which might have wide and possibly undesirable consequences, without some authority or very strong grounds for holding that this was the meaning intended to be conveyed thereby. No authority has been quoted (or indeed the point was not taken by respondent's Vakil until after I had suggested it) and in a recent case of a similar nature *ouse Moideen Sahib* v. *Muthialu Chettiar* (3), the learned Judges appear to have felt no difficulty in the matter. I, therefore, though not without some hesitation, prefer to follow the more restricted interpretation of the section, which was (by implication) applied in that case. On this view I must hold that the jurisdiction of the Civil Court in the matter of the present suit was not ousted.

The decrees of the lower Courts are set aside. The Munsif will restore the suit to his file and dispose of it according to law. The costs will be the costs in the cause.

Appeal allowed.

(3) 21 Ind. Cas. 762; 14 M. L. T. 523; 26 M. L. J. 36; (1914) M. W. N. 55.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1211 OF 1911.

February 4, 1914.

Present:—Mr. Justice Chevis.

SHERA—PLAINTIFF—APPELLANT

versus

HAYAT MUHAMMAD AND OTHERS—DEFENDANTS—HASSAN AND OTHERS—PLANTIFFS—RESPONDENTS.

Estoppel—Reversioner accepting mortgage of land sold by widow, whether estopped.

A reversioner who unknowingly accepts mortgage of a land sold by a widow is not estopped from contesting the sale, if he understood the vendee to be mortgaging not what he had purchased from the widow, but his own share.

Second appeal from the decree of the Additional Divisional Judge, Jhelum Division, at Rawalpindi, dated the 29th May 1911, varying that of the Subordinate Judge, 1st grade, Pind Dadan Khan, dated the 10th December 1910, decreeing plaintiffs' claim.

Lala *Hukam Chand Mehra* for Mr. *Nihal Chand Mehra*, for the Appellant.

JUDGMENT.—The genealogical tree will be found on a separate page appended to this judgment.

Musammat Hatam succeeded as widow to her husband's share of the estate. Karm Bakhsh left 709 *kanals* 9 *marlas* of land, of which $\frac{1}{4}$th descended to Khuda Bakhsh. After the death of Khuda Bakhsh the widow, *Musammat* Hatam, sold his share of the land to Kadir Bakhsh; this was in 1896. The widow died in 1899, and in 1910 the plaintiffs have sued for possession of their shares, alleging that the sale was neither for necessity nor for consideration. Both the lower Courts are agreed that the sale was not for necessity nor for consideration, and I see no reason to differ. The sale seems to have been a fiction, made to favour the vendee, who was not only a reversioner but was also married to a sister of the vendor.

The plaintiff's shares it will be seen come to 5/6ths of $\frac{1}{4}$th of the whole estate, *i.e.*, of Khuda Bakhsh's $\frac{1}{4}$th share, the sons of Ghulam Muhammad should get $\frac{1}{3}$rd, the sons of Surkhru should get $\frac{1}{3}$rd, while Ala Bakhsh represented by his daughter and Samand, two of the four sons of Raja, should get 1/6th. So the first Court decreed 5/24ths of the whole *khata*.

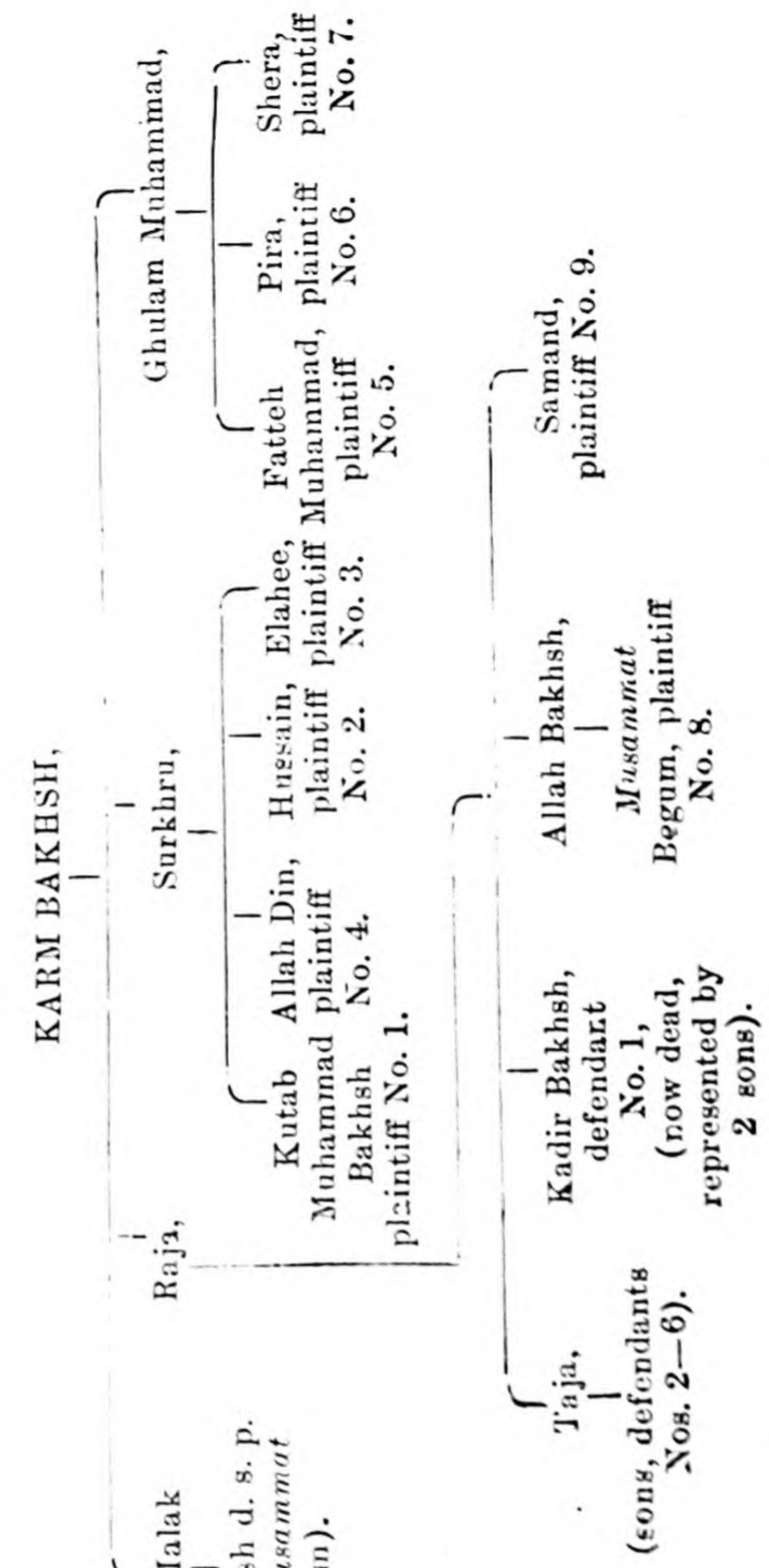
SHERA *v.* HAYAT MUHAMMED.

But on appeal the learned Divisional Judge has reduced the amount, holding that Shera is estopped and cannot claim his share having taken a mortgage from the vendee in 1913 of part of the land sold by the widow. So Shera appeals to this Court. Now the area taken in mortgage by Shera was 63 *kanals* 9 *marlas*. Kadir Bakhsh's share of Karam Bakhsh's estate, was as the Divisional Judge points out, only 1/16th *i.e.*, 44 *kanals* 7 *marlas*, and so the Divisional Judge thinks that Shera cannot possibly be deemed to have thought that Kadir Bakhsh was mortgaging only that share which he had inherited direct from his father. But, if we include the share which Kadir Bakhsh would inherit when Khan Malak's line died out, Kadir Bakhsh's share is increased to 1/12th *i.e.*, about 58 *kanals*. So it is by no means clear to me that Shera could not possibly have thought that Kadir Bakhsh was merely mortgaging his own share. Moreover, I see that in the mutation entry Kadir Bakhsh is shown as mortgaging *bataur hissedar*, and the entry winds up by saying *sirf hak kasht rehn hua hai*. What the parties really meant I cannot say, the transaction seems to have been a lease to last till the mortgage money was re-paid, but it appears to me by no means clear that Shera understood that Kadir Bakhsh was mortgaging what he had got by purchase from *Musammat* Hatam, and so I hold that there is no estoppel.

I, therefore, accept this appeal and reversing the decree of the Divisional Judge, I restore that of the first Court. The costs of the plaintiffs in all Courts will be paid by the sons of the late Kadir Bakhsh.

Appeal accepted.

Appendix to the judgment in Civil Appeal No. 1211 of 1911.



JOT RAM *v.* HARDAWARI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 568 OF 1909.

October 31, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Beadon.

JOT RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARDAWARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Adopted son dying without lineal descendants—Succession to ancestral property and to self-acquired property of adoptor.

According to general agricultural custom, the collaterals of an adoptor succeed to the ancestral property of the adoptor on the death of the adopted son without lineal descendants, but in the case of self-acquired property of the adoptor, the succession devolves not upon the collaterals of the adoptor but upon the heirs of the adopted son.

Special custom must, therefore, be established if the collaterals of the adoptive father claim the self-acquired property of the latter.

Sita Ram v. *Raja Ram*, 12 P. R. 1892 (F.B.), *Gurditta* v. *Atar Singh*, 117 P. R. 1906; 77 P. L. R. 1907; *Punjab Singh* v. *Khazan Singh*, 88 P. R. 1906; 149 P. L. R. 1907; *Rulia* v. *Wariam Singh*, 20 Ind. Cas. 454; 94 P. R. 913; 287 P. L. R. 1913; 177 P. W. R. 1913 and *Sant Singh* v. *Sadda*, 14 Ind. Cas. 23; 63 P. R. 1912; 222 P. W. R. 1912, followed.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated 15th February 1909, reversing that of the District Judge, Hissar, dated 21st September 1908, decreeing the claim.

Mr. *Badr-ud din Qureshi* and Mr. *Gokal Chand* for Diwan *Lakhshmi Narain*, for the Appellants.

Mr. *Manohar Lal* for Mr. *Lajpat Rai*, for the Respondents.

JUDGMENT.—This is a suit by the collaterals of one Diala for agricultural land left by him. The case for the plaintiffs-appellants is that the land in suit was ancestral; that one Lachman was placed in possession of the land as adopted son by Diala's widow; that Lachman died within 12 years of suit, and that the appellants were entitled, as collaterals of Diala, to the land on the death of Lachman without lineal descendants on the principle that they were Lachman's collaterals *qua* the land in suit.

We agree in the reasons recorded by the learned Divisional Judge for holding on appeal that the land in suit was not ancestral. The oral evidence that the land was ancestral, *i. e.*, that it came from Amru, common ancestor of the appellants and Diala, is worthless and was not seriously relied on at the hearing, and the pedigree-table and specification of shares of the 1843 Settlement satisfy us that Diala did not inherit the land in suit from Amru and that it was acquired by him.

The learned Divisional Judge was not justified on the pleadings in holding that Lachman was not the adopted son of Diala, the defence set up by the respondents having been that Diala adopted Lachman, but the suit fails on the finding that the property in suit was not ancestral in the hands of Diala.

The parties are governed by agricultural custom, and the so-called adoption was the customary appointment of an heir.

The rule, laid down in Article 55 of Rattigan's Digest of Customary Law, that the estate inherited by the appointed heir from the appointer goes to the natural heirs of the appointed, if it consists of property over which the appointer had no absolute power of disposal, is ordinarily followed and is supported by authority. *Sita Ram* v. *Raja Ram* (1), in which it was held that the natural collaterals of the appointed heir did not succeed to property inherited by him from the appointer, dealt with ancestral property—at page 62 of the report this passage occurs: "The general principle which regulates succession to ancestral land in a Punjab village, etc."

Gurditta v. *Atar Singh* (2) obviously dealt with ancestral property, following the Full Bench ruling above cited.

In the Full Bench ruling in *Punjab Singh* v. *Khazan Singh* (3), and at pages 343-4 of the report of 94 P. R. 1913 [*Rulia* v. *Wariam Singh* (4)], a distinction was drawn between the rules of inheritance to the property which an appointed heir inherits or takes from the appointer, and to his own self-acquired property.

In *Sant Singh* v. *Saddu* (5), it was held that an adoption, the validity of which was doubtful, had the same effect as a gift, in respect

(1) 12 P. R. 1892 (F. B.).
(2) 117 P. R. 1906; 77 P. L. R. 1907.
(3) 88 P. R. 1906; 149 P. L. R. 1906.
(4) 20 Ind. Cas. 454; 94 P. R. 1913; 287 P. L. R. 1913; 177 P. W. R. 1913.
(5) 14 Ind. Cas. 23; 63 P. R. 1912; 222 P. W. R. 1912.

of the self-acquired property of the adoptive childless proprietor, whose collaterals were consequently not entitled to possession of that property. There is a wide distinction between succession to ancestral property and succession to self-acquired property, and no authority for applying, to the right of the collaterals of the donor or appointer to property which was not ancestral in his hands, the rules regulating their right to his ancestral property has been cited. The principle of reversion to the heirs of the donor or appointer is limited to property over which he had not unrestricted power of disposition.

Counsel for the appellants was indeed constrained to admit that special custom must be established before the appellants can establish their right to any of the property of Diala which was not held by Amru.

The issues framed gave the appellants ample opportunity of adducing any available evidence of such custom, and we see no reason for a remand for that purpose. Issues were framed on the 9th of June the next hearing was on the 3rd of July, and the appellants closed their case that day without suggesting the desire to adduce further evidence.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1348 OF 1912.

March 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

SUBBA NAIDU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

VENKATARAMA NAIDU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Nucleus of family property—Self-acquisition—Burden of proof—Inheritance—Disqualifications—Congenital defect.

Where there is a substantial nucleus of family property, the onus to prove that the property afterwards acquired by the father was his self-acquisition lies on those who assert it to be such property.

A mere tumour in the nasal cavity and on the nose is not a sufficient disqualification for inheritance as it is not congenital.

Venkata Subba Rao v. *Purushottam*, 26 M. 133; 12 M. L. J. 262; and *Kayarohana Pathan* v. *Subbaraya Thevan*, 19 Ind. Cas. 690; (1913) M. W. N. 642; 25 M. L. J. 251; 13 M. L. T. 460, followed.

Second appeal against the decree of the District Court of Tinnevelly in Appeal Suit No. 174 of 1911, preferred against that of the Court of the District Munsif of Tinnevelly, in Original Suit No. 690 of 1909.

Mr. *M. D. Devadoss*, for the Appellants.

Mr. *C. Narasimhachariar*, for the Respondents.

JUDGMENT.—The only questions in this second appeal are:

1. Whether the learned District Judge fell into any error of law in finding on the evidence that the plaint lands were joint family properties in the hands of the plaintiff's father and not his self-acquired separate property.

2. Whether the plaintiff is disqualified from inheritance under the Hindu Law and whether the District Judge's omission to give a finding on this point necessitates a remand.

As regards the first question, the finding of both Courts is that there was a substantial nucleus of ancestral funds. In such a case (see Mayne, paragraph 291), that is where there is a substantial nucleus of family property of which the father was the manager, the onus would lie on those who assert that any property afterwards acquired in the name of the father was acquired without detriment to that property and was his self-acquisition. The lower Courts have found that the defendants (appellants) failed to discharge that burden and we think they were right.

As regards the question of plaintiffs' alleged disqualification we have very little doubt that the learned District Judge's omission to refer to it in his judgment was because the defendants (appellants before him) did not argue it in the District Court and practically gave up that contention. If it was necessary to go into that question we do not think we shall come to a different conclusion from the District Munsif who held that plaintiffs' disease relied on as a disqualification was not congenital. Even if it was congenital the nature of the disease (a tumour in the

nasal cavity and on the nose) is not one of the diseases which disqualifies a person from inheritance (see Manu, paragraph 596) but only such congenital disqualifications as blindness, dumbness, etc. Whether some of these texts as to disqualifications are in force now a days has been doubted in *Venkata Subba Row* v. *Purushottam* (1) and *Kayarohana Pathan* v. *Subbaraya Thevan* (2).

We dismiss the second appeal with costs.

Appeal dismissed.

(1) 26 M. 133; 12 M. L. J. 262.
(2) 19 Ind. Cas 690; 13 M. L. T. 460 (1913); M. W. N. 642; 25 M. L. J. 251.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 48 OF 1912.
March 4, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

SHEIK AMJAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LACHMI KANT JHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 74—Evidence—Public document—Notice under s. 107, Criminal Procedure Code, whether public document—Proof of identity of persons concerned, if necessary.

A notice under section 107 of the Criminal Procedure Code, is a public document within the meaning of section 74 of the Evidence Act, being the record of the act of a tribunal, and in one sense the act of the tribunal itself. But it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence.

Appeal from the decree of the Subordinate Judge of Darbhanga, dated September 20th, 1911, reversing that of the Munsif of Madhubani, dated February 20th, 1911.

Babu *Manmotha Nath Mukherjee* for Babus *Umakali Mukherjee* and *Suresh Chandra Mukherji*, for the Appellants.

Babu *Lakshmi Narain Singh*, for the Respondents.

JUDGMENT.—The only point which arises in this case is the question upon which the two lower Courts were in disagreement, whether the notice under section 107, Criminal Procedure Code, is a public document within the meaning of section 74 of the Evidence Act, and if it is, whether it can come in without proof of the identity of the parties who are named therein. We may answer the second question first by saying that clearly it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence. But in this case the plaintiff himself in the witness-box said that he had received this notice from the Court and that he had appeared in Court and he had fought this case against the defendant, 4th party, and that the order had been passed in his favour. It is, therefore, clear that this was a notice issued in a criminal case between the plaintiff and defendant No. 4 in the year 1905 and if it is admissible it would, therefore, be evidence that there was a quarrel between Ajaib Jha and Udai Jha about a piece of land in the year 1905.

As regards its being a public document we think that there can be no doubt that it is the record of the act of a tribunal, in one sense it is the act of the tribunal itself. It is the only authority by which the accused person can be brought before the tribunal and it is in its essence the strong arm of the tribunal stretched out to bring the accused person into its presence. It is clearly, therefore, the act of the tribunal. It is also in the case of notice under section 107 the record of another act of the tribunal, inasmuch as it sets out the ground upon which the tribunal is acting and calls from the party summoned to show cause, so that in any case it appears to us to be a public document; and that being so and it being shown that the parties mentioned therein were the plaintiff and defendant No. 4 in this case, the learned Judge in the Court below was right in using it as evidence.

As this is the only point raised in this second appeal the appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL NO. 31 OF 1913.

March 4, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

ABDUL LATIFF SAHIB AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BATHULA BIBI AMMAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cls. (1) and (3)—Decree for delivery of immoveable property and payment of money—Payment out of Court not certified cannot be recognized.

Order XXI, rule (2), clause (1), of the Civil Procedure Code, appliesto decrees of all kinds under which money is payable; where, therefore, the payment of money in satisfaction of such a decree is not certified to Court, it cannot be recognized.

The distinction which existed under the repealed Code, between decrees for mere payment of money and other decrees, has been done away with by the present Code.

Baba Mohamed v. *Webb*, 6 C. 786; 8 C. L. R. 36 and *Sankaran Nambiar* v. *Kanara Karup*, 22 M. 182; 8 M. L. J. 175, referred to.

Appeal against the order of the District Court of North Arcot, dated 25th February 1913, in Appeal Suit No. 493 of 1912, preferred against that of the District Munsif of Ranipet, in Execution Petition No. 322 of 1912, in Original Suit No. 662 of 1909.

Mr. *R. Subramania Aiyer*, for the Appellants.

Mr. *T. Pattabhiram Aiyer*, for the Respondent.

JUDGMENT.—In this case there was a decree for the delivery of certain immoveable property and for the payment of money. In answer to an application for execution, the defendants have set up an alleged payment of Rs. 500 by way of adjustment. Both the lower Courts have overruled their objection under Order XXI, rule 2, clause 3 of the Code of Civil Procedure as the adjustment was not certified. We think they were right, Order XXI, rule 2, clause (1), says that where the decree—which read with the earlier part of the sentence means a decree of any kind under which money is payable—is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such adjustment to the Court. The decree in the present case is only of the kind dealt with in the section, and the section is, therefore, applicable. The appellant relies upon *Sankaran Nambiar* v. *Kanara Karup* (1) to show that the rule does not apply to decrees which provide for the delivery of immoveable property.

The section has now been amended so as to apply to decrees of any kind under which money is payable, and we see no reason for refusing to give full effect to its provisions. We may observe that under the Code of 1859 it was held in *Baba Mohamed* v. *Webb* (2) that the corresponding provisions as to adjustments were not confined to adjustments of money-decrees. In *Sankaran Nambiar* v. *Kanara Kurup* (1) the learned Judges relied upon subsequent changes in the Code, but the effect of these changes has been done away with by the insertion in the present section of words rendering it plainly applicable to the present case.

This appeal is dismissed with costs.

Appeal dismissed

(1) 22 M. 182; 8 M. L. J. 175.
(2) 6 C. 786; 8 C. L. R. 36.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 61 OF 1913.

January 3, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Bannerji, KT.

THAKUR DIN—PLAINTIFF—APPELLANT

versus

SEETLA SAHAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu law—Joint family—Agreement to sell by one brother with consent of other binding as against subsequent sale by both.

An agreement to sell joint property by one of the two brothers, who constitute a joint Hindu family, with the consent of the other, is binding as against a subsequent sale of the same property by both the brothers.

Letters Patent Appeal against the decision of Justice Sir Harry Griffin, reported as 20 Ind. Cas. 247, wherein the full facts of the case are stated.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—We are quite satisfied that the lower Appellate Court intended to find and did find that the sale made to the plaintiff was made with the full consent of

both the brothers. Upon this finding the decree of the lower Appellate Court was correct, and the decree of the learned Judge of this Court was not correct. We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court with costs of both hearings in this Court.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1223 OF 1911.

January 28, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

TUNGALA MALLANNA—DEFENDANT—PETITIONER

versus

GOTTUMUKKALA RAMARAJU (DIED) AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (Mad. Act I of 1908), s. 3, cl. 5, sub-cl. (2)—Inferior proprietor, holding under 'Missal' conditions—Land-holder—Cowledar, *whether tenant—Waste land.*

An inferior proprietor holding an estate under a "Missal" is a land-holder under section (3) clause 5 of the Estates Land Act.

A *Cowledar* under an inferior proprietor, whose *cowle* provides that he is to be placed in possession of the lands, that he is to pay the *kist* due to Government, that he is to bear the charges of establishment etc., that he is to act subject to "Missal" conditions and pay the inferior proprietor a profit, is not a tenant but one merely dealing with the land on behalf of the inferior proprietor.

The provisions of section 3, clause 7, sub-clause (2), apply only to a letting after the passing of the Act.

Petition praying that the High Court will be pleased to direct the Government Agent, Godavari at Coconada, to review his judgment in Appeal Suit No. 4 of 1911, presented against the decree of the Assistant Agent, Badrachalam, in Original Suit No. 11 of 1908.

Mr. *P. Narayanamurthi*, for the Petitioner.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—The question for decision is whether the appellant defendant, is an occupancy tenant.

The plaintiff is the *cowledar* of the Nandigama Estate which is held under a "Missal" by a person who is styled the *inferior proprietor*. The inferior proprietor is clearly a land-holder under the Estates Land Act, section 3, clause 5. Under that clause every person entitled to collect the rents of the whole or any portion of the estate also is a land-holder. The appellant contends that the respondent, plaintiff, falls within this definition. The *cowle* under which the plaintiff claims to recover possession provides that he is to be placed in possession of the lands, that he is to pay the *kist* due to Government, that he is to bear the charges of establishment etc, that he is to act subject to 'Missal' conditions and pay the inferior proprietor "a profit" of Rs. 800 per annum. These are clearly not the terms of a tenancy. The possession which was given to the *cowledar* is such possession as the proprietor had. We have no hesitation in holding that the plaintiff is not a tenant but a person entitled to deal with the land on behalf of the inferior proprietor including the right to collect the rent. If the plaintiff is a land-holder then it is not denied that the defendant is a tenant. Section 6 of the Act confers on him a permanent right of occupancy unless, as is contended before us by the plaintiff's Counsel, the land is 'old waste' under section (3), clause (7), sub-clause (2). It is clear that this provision applies only to any letting after the passing of the Act. If by surrender or otherwise the plaintiff gets possession of this land and lets it after the passing of the Act and the land was not held with any permanent right of occupancy for 10 years prior to such letting, the land is old waste.

We are of opinion that the defendant is a tenant with permanent right of occupancy in his holding. We direct the agent to review his judgment in accordance with the above observations. Costs will abide the result.

Appeal accepted.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPLICATION No. 2 OF 1914.

March 27, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Bannerji, KT.

Kuar M. A. GAFFOOR KHAN—PLAINTIFF—APPLICANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), *s.* 110—*Privy Council Appeal—High Court dismissing appeal on appellant's failure to furnish security for costs—Substantial question of law.*

Where an appellant on being ordered by the High Court to furnish security failed to do so and on his appeal being dismissed on that ground applied for permission to appeal to the Privy Council:

Held, that, as the appeal did not involve a substantial question of law, the permission applied for could not be granted.

Mr. *Ryves*, for the Opposite party.

ORDER.—This is an application for leave to appeal to His Majesty in Council. The facts are these: The plaintiff instituted a suit in the Court of the Subordinate Judge of Cawnpore claiming a declaration of his title to certain property. The suit was dismissed by the Court of first instance upon various grounds. The applicant presented an appeal to this Court which was admitted. Subsequently an application was made on behalf of one of the respondents that the appellant should be ordered to give security for the costs of the appeal and also of the Court below. By an order dated the 28th of June 1913 this Court was pleased to order that the plaintiff should furnish security within one month. Security not having been furnished this Court on the 30th of July 1913 dismissed the appeal on the ground that security had not been furnished in compliance with its order. This order was passed under the provisions of Order XLI, rule 10, sub-rule (2). The applicant now seeks to obtain leave to appeal from this order.

We will assume for the purposes of our order that the order is a final order. We will also assume (although it is not very clear from the plaint or memorandum of appeal) that the suit out of which the proposed appeal arises related to property of the value of Rs. 10,000 or upwards. As the order of this Court had the effect of

affirming the decree of the Court below we have to see whether or not the appeal involves a substantial question of law. The only question involved in the appeal is whether or not this Court was justified under the circumstances of the case in ordering the appellant to give security for costs. If the Court was justified in ordering security for costs to be given it had no option but to reject the appeal when the order for security was not complied with. We find it quite impossible to certify that the proposed appeal involves a substantial question of law. We, therefore, dismiss the application but make no order as to costs.

Application dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1137 OF 1912.

January 28, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

Musammat FATEH NISHAN—PLAINTIFF—APPELLANT

versus

Sayad AHMAD SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), *s.* 12(b)(3), (4), (c) 2—*Widow, right of—Proprietary holding—Occupancy-holding—Heir—Co-sharer.*

A mother or a widow not being 'heirs' within the meaning of Customary Law cannot exercise a right of pre-emption as such under sub-clause '*thirdly*' of clause (*b*) section 12, but can do so as co-sharers, under sub-clause '*fourthly*' of clause (*b*).

Musammat Kauri v. *Jamiat Singh*, 34 P. R. 1893, referred to.

The mother of an occupancy tenant has no right whatever to succeed on the latter's death to occupancy rights held by him and her claim to pre-empt can only fall under clause (*c*) sub-clause '*secondly*'.

Second appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 22nd April 1912, varying that of the Subordinate Judge, Rawalpindi, dated the 10th February 1912, decreeing plaintiff's claim.

Chaudhri *Nabi Bakhsh*, for the Appellant.

Lala *Moti Lal*, for the Respondents.

JUDGMENT.—The learned Divisional Judge has held that respondents have a preferential right of pre-emption, under

section 12 (*b*) (2), to plaintiff (the mother of the vendor) whose rights, he holds, fall under section 12 (*b*) (3) of the Punjab Pre-emption Act. The plaintiff has appealed to this Court, and it has been pointed out to us, that the learned Judge has fallen into error in stating that respondents are co-sharers with the vendor in the land sold. As a matter of fact, they are not co-sharers in the land held by the vendor as proprietor, and with regard to the land held by him as occupancy tenant, they are co-sharers merely in *Khata* No. 54/116 or in other words only in 1 *kanal* 18 *marlas* out of the total area of the land sold. As regards that small plot of land, their claim to pre-empt would, of course, fall under section 12 (*b*) (2), but as regards the rest of the land, they can only claim under sub-clause 3 of clause (*b*). At the same time, this mistake made by the Divisional Judge does not materially help the plaintiff. She is, we find, a co-sharer in the property sold, but as such, she could claim only under sub-clause "fourthly" of clause (*b*). It is contended, that she can also claim under sub-clause "thirdly," as being a person who would be entitled to inherit the property in the event of the vendor dying without an issue. We cannot accede to this contention. In our opinion, neither a mother nor a widow, who obtains possession of property left by her son or husband for enjoyment during her life or any shorter period, can be regarded as an "heir" to that property within the meaning of Customary Law. As observed by Sir Meredyth Plowden in *Musammat Kauri* v. *Jamiat Singh* (1): "The widow's original right to maintenance has developed in many tribes into a right to possession of her husband's land for her maintenance by sufferance of the reversioners." This exactly expresses the position which a mother or a widow holds when she happens to be in temporary possession of landed property.

The above remarks refer to the claim of the plaintiff so far as the proprietary lands are concerned. As regards the lands held in occupancy tenure, it is clear from section 59 of the Punjab Tenancy Act that the plaintiff, as the mother of the vendor, would have no right whatever to succeed on his death. Accordingly plaintiff's right of pre-emption must fall under clause (*c*) sub-clause "secondly," and as such it is obviously far inferior to the right of the respondents.

In arguments before us Mr. Nabi Bakhsh urged, that the land in suit was not ancestral *qua* the respondents. This, however, is a point that was not raised in the Courts below and is not urged in the grounds of appeal filed in this Court. In the circumstances we cannot allow it to be raised now.

The result is that the plaintiff's appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 34 P. R. 1893.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 5 OF 1913.

December 19, 913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

ABDUL KADIR ROWTHER AND ANOTHER —JUDGMENT-DEBTORS—PETITIONERS

versus

KRISHNA MALAMAL NAIR, KARNAVAN AND MANAGER OF THE TARWAD—DECREE-HOLDER—RESPONDENT.

Limitation Act (XV of 1877), *Sch. II, Art* 179—*Property attached—Encumbrance Certificate—Oral application to produce—Step-in-aid of execution—Limitation Act (IX of* 1908), *Sch. I, Art.* 182 (5).

An application by a decree-holder for an adjournment to enable him *to produce an encumbrance certificate* in respect of attached property is made to further the execution proceedings with effect and is a step-in-aid of execution within the meaning of Article 179 (5) [Article 182 (5) of the present Act] of Schedule II of the Limitation Act, 1877.

Narsingh Dayal Singh v. *Kali Charan Singh*, 5 Ind. Cas. 147; 14 C. W. N. 486; *Amar Singh* v. *Tika*, 3 A. 139; 5 Ind. Jur. 430; *Maneklal Jagjivan* v. *Nasia Raddha*, 15 B. 405, followed.

Kartick Nath Pandey v. *Juggernath Ram Marwari*, 27 C. 285, dissented from.

Appeal against the order of the District Court of South Malabar, in Appeal Suit No 904 of 1911, preferred against that of the Subordinate Judge of South Malabar at Palghat, in Execution Petition No. 751 of 1911, (Original Suit No. 40 of 1903).

ABDUL KADIR ROWTHER v. KRISHNA MALAMAL NAIR.

Mr. *K. Narain Rao*, for the Appellant.

Mr. *T. R. Ramachandra Aiyer* (with him Mr. *N. A. Krishna Aiyer*), for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—Unless the oral application for an adjournment of the hearing of a previous execution petition made by the decree-holder on the 7th August 1908 is held to be an application to take a step-in-aid of execution, the present execution application of 3rd July 1911 is clearly barred by limitation.

The question is not free from difficulty. In *Kartick Nath Pandey* v. *Juggernath Ram Marwari* (1) there is an *obiter dictum* showing that an application for adjournment to enable the decree-holder to conduct his petition further with effect, is not an application to take a step-in-aid of execution.

A different view was taken in *Narsingh Dayal Singh* v. *Kali Charan Singh* (2) where the point directly arose.

The learned Vakil for the judgment-debtors (appellants before us) sought to distinguish *Narsingh Dayal Singh* v. *Kali Charan Singh* (2) from the present case on two grounds:—

(*a*) That the application for adjournment relied on in *Narsingh Dayal Singh* v. *Kali Charan Singh* (2) was in writing and not oral;

(*b*) that the application in that case was an application for an adjournment to enable the decree-holder to produce an affidavit as evidence to carry on those execution proceedings further whereas it was not so in the present case.

I think that neither of these contentions is sound. There is nothing in Article 179 of the Limitation Act which requires the application to take some step-in-aid of execution to be in writing. *Amar Singh* v. *Tika* (3) and *Maneklal Jagjivan* v. *Nasia Raddha* (4) are direct authorities to the contrary and I am prepared to follow them.

Then as regards the other distinction sought to be made I am unable to see that the application for an adjournment to enable the decree-holder to produce affidavit evidence in aid of further proceedings [which was the application in *Narsingh Dayal Singh* v. *Kali Charan Singh* (2)] stands on a better footing than an application for an adjournment to enable the decree-holder to produce an encumbrance certificate in respect of the attached property in aid of further proceedings in execution.

Then reliance is placed by the appellant's Vakil on the reason given in the *obiter dictum* in *Kartick Nath Pandey* v. *Juggernath Ram Marwari* (1). That reason is that an application for adjournment is in retardation of the execution proceedings and not in the aid of the execution proceedings. I think that there is a fallacy in this reasoning. When an application for an adjournment is made by the judgment-debtor it is almost invariably to retard the execution proceedings. As regards an application by the decree-holder it may be one of three things:

(*a*) it may be to get an order in aid;

or (*b*) it may be to get an order in retardation;

or (*c*) it may be to get an order which is neither.

An application by the decree-holder to give time to the judgment-debtor merely as a matter of grace is a step in retardation. An application for an adjournment to enable the decree holder to produce records or evidence necessary to effectively conduct the execution proceedings further will be an application to get an order in aid. *Sheshdasacharya* v *Bhimacharya* (5), *Haridas Nanabhai* v. *Vithaldas Kisandas* (6), *Pitam Singh* v. *Tota Singh* (7) and *Kunhi* v. *Seshagiri Bhakthan* (8).

An application by the decree-holder to draw money deposited in Court or to obtain copies of sale lists (without anything to indicate that they were necessary to aid further execution) will be application neither in aid nor in retardation.

In the present case, I think that the application for an adjournment was for an order in aid.

I think that the Legislature is a little harsh on decree-holders in fixing the *date*

(1) 27 C. 285.
(2) 5 Ind. Cas. 147; 14 C. W. N. 486.
(3) 3 A. 139; 5 Ind. Jur. 430.
(4) 15 B. 405 at p. 407.
(5) 17 Ind. Cas. 969; 14 Bom. L. R. 1204; 37 B. 317.
(6) 17 Ind. Cas. 30; 36 B. 638; 14 Bom. L. R. 765.
(7) 29 A. 301 at p. 302; 4 A. L. J. 184; A. W. N. (1907) 74.
(8) 5 M. 141.

of applying for execution as one of the starting points for limitation for calculating the three years' period for the next subsequent application in execution, instead of the date on which the proceedings in the previous application for execution *terminated*, and I should be glad if the Limitation Act is amended so as to fix the latter date. But the harshness is mitigated to some extent by allowing the date of applying to take a step-in-aid to be also a starting point and I think that if even an oral application is really for an order which will be a step-in-aid (and not merely for an order which will be indifferent or retarding) a liberal interpretation should be put on Article 179 so as to enable a decree-holder to obtain the fruits of his decree.

In the result I would dismiss the appeal with costs.

SPENCER, J.—I concur.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 938 OF 1908.

November 24, 1909.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

SULTAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALI MUHAMMAD—PLAINTIFF,

GULLAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Succession—Daughter—Collaterals—Female descendants—Muhammadan Jats *of Sanawan* Tahsil, *Muzaffargarh district—Self-acquired property—Ancestral property.*

In the Muzaffargarh District the rights of females are very generally recognized especially among Muhammadan Jats and Pathans.

Savan v. *Sahib Khatun*, 2 Ind. Cas. 71; 44 P. R. 1909; 69 P. W. R. 1909, 67 P. L. R. 1909, referred to.

The word *aulad*, when used with regard to succession in a tribe which recognizes females as heirs, must be taken to include female as well as male heirs.

Chiragh Bibi v. *Hassan*, 19 P. R. 1906; 70 P. L. R. 1906, referred to.

Second appeal from the decree of the Divisional Judge, Multan Division, dated 25th February 1908, modifying the order of the District Judge, Muzaffargarh, dated 31st October 1906.

Mr. *Rajindar Parshad*, for the Appellants.

Mr. *Muhammad Hussain*, for the Respondents.

JUDGMENT.—The facts of the case are fully set forth in the judgments of the Courts below. The pedigree-table given at page 11 of the printed paper-book is correct so far as it goes, but it is so far defective that it does not state that Gaman had a daughter, *Musammat* Sardaro, who married Barkhurdar, the father of the plaintiffs. In the present appeal we are concerned merely with two wells, Hamzawala and Berwala, and the lands thereto attached. It is admitted that this part of the estate of the late Kalu (who died childless) was acquired by Gaman and was not ancestral *qua* the defendants-respondents who are the descendants of Allah Bakhsh and Hassan. The parties are Muhammadan *Jats* of Tahsil Sanawan, in the Muzaffargarh District, and the question is whether plaintiffs who are the sons of *Musammat* Sardaro (the daughter of Gaman) have a preferential right to succeed to this part of estate as against defendants who are collaterals related in the 3rd or 4th degree to the deceased. Plaintiffs are also equally related in the male line, but they contend that by the custom of their tribe they, as the descendants of *Musammat* Sardaro, are entitled to the whole of this part of the property. Their claim has been decreed *qua* that property by the Divisional Judge and after hearing Mr. Rajindar Parshad's arguments to the contrary, we have no hesitation in affirming the decree of the lower Appellate Court.

It is obvious from the provisions of the *Riwaj-i-am* of the district and also from the decision of this Court in *Savan* v. *Sahib Khatun* (1) that in the Muzaffargarh District the rights of females are very generally recognized, especially among Muhammadan *Jats* and *Pathans*. According to the *Riwaj-i-am* when a man dies leaving no male lineal descendants, widow, daughter or daughter's son, the property devolves successively on (1) his father (2) his brother or their descendants; (3) his sisters or their descendants; (4) his mother; (5); his grandfather or his grandfather's descendants, and (6) so on to the other male agnates. The last provision we take to mean that if their is no grandfather, or descendants of a grandfather, the source of descent must be looked

(1) 2 Ind. Cas. 71; 44 P. R. 1909; 67 P. L. R. 1909; 69 P. W. R. 1909.

for among the other agnatic ancestors of the deceased and their descendants, *i.e.*, the great-grandfather on the paternal side and his descendants and so on. The word used for descendants is "*aulad*" and as pointed out in *Chiragh Bibi* v. *Hassan* (2), this expression when used with regard to succession in a tribe which fully recognises females as heirs must be taken to include female as well as male heirs. We see no reason to discredit the *Riwaj-i-am* as a correct exposition of the rules obtaining with regard to succession and in *Savan* v. *Sahib Khatun* (1) its provisions were found to be fully established as regards the right of a sister to inherit in preference to agnates related to the deceased in the 5th degree. In face of this decision it is absurd to contend that the provisions of the *Riwaj-i-am* are not supported by instances and that it is, therefore, of no value. Accepting, therefore, the *Riwaj-i-am* as our guide, we find that in the present case the contest is between collaterals, on the one hand, and the descendants of a great-grandfather, on the other hand. The property was actually acquired by that great-grandfather and though plaintiffs are his descendants through a female *Musammat* Sardaro, (his daughter and their mother), they are nevertheless his descendants within the meaning of the rule and as such entitled to succeed in preference to the defendants.

Mr. Rajindar Parshad laid great stress upon the ruling of the Full Bench in *Hamira* v. *Ram Singh* (3) and argued that this cannot be regarded as a case in which a daughter's sons are competing with collaterals. We fully admit this contention and we decide in favour of plaintiffs, not on the ground that they must be regarded as the sons of Gaman's daughter, but on the ground that they are the descendants of Gaman and as such entitled under the provisions of the *Riwaj-i-am* to succeed to this part of the estate in preference to defendants. We are not here concerned with the succession to the ancestral part of the estate, but we may add that it might well be open to question whether plaintiffs would not be the rightful heirs to that also. This point, however, has been decided against them and as they have not appealed from that finding we have nothing further to say with regard to it. But we accept unreservedly the decree of the lower Appellate Court as regards that part of the property under appeal and we accordingly dismiss this appeal with costs.

Appeal dismissed.

(2) 19 P. R. 1906; 70 P. L. R. 1906

(3) 134 P. R. 1907; 74 P. L. R. 1908; 85 P. W. R. 1907.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1677 OF 1912.

January 30, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

BISHEN DAS—DEFENDANT—APPELLANT

versus

Musammat MANSA DEVI—PLAINTIFF—RAM PARTAP—DEFENDANT—RESPONDENTS.

Hindu Law—Maintenance—Step-mother, right of—Partition among sons—Status of step-mother.

Under Hindu Law, *Dayabhaga* as well as *Mitakshara*, a step-son is not bound to contribute to the maintenance of his step-mother after a partition of the joint property has been effected between him and his step-brother (the son of his step-mother).

Hemangini Dasi v. *Kedarnath Kundu Chowdhry*, 16 C. 758 (P. C.); 16 I. A 115, followed.

Chowdhury Thakur Proshad Shahi v. *Musammat Bhagabati Koer*, 1 C. L. J. 142; *Damoodur Misser* v. *Senabutty Misrain*, 8 C. 537 at pp. 542, 543; 6 Ind. Jur. 584; 10 C. L. R. 401, *Tahaldai Kumri* v. *Gaya Prosad Sahu*, 5 Ind. Cas. 135; 37 C. 214; 14 C. W. N. 443; 11 C. L. J. 588; *Kumaravelu* v. *Virana Goundan*, 5 M. 29; *Muttammal* v. *Vengalakshmiammal*, 5 M. 32, *Mari* v. *Chinnammal*, 8 M. 107; *Kesserbai* v. *Valab Raoji*, 4 B. 188; *Savitribai* v. *Luxmibai*, 2 B. 614; *Lala Joti Lal* v. *Durani Kower*, B. L. R. Supp. Vol. Part 1, p. 67 (F.B.); *Rama Nand* v. *Surgiani*, 16 A. 221; A. W. N. (1894) 47, *Musammat Kirpi* v. *Ramjas*, 153 P. R. 1889, referred to.

Second appeal from the decree of the Divisional Judge, Jullundur, dated 1st July 1912, modifying that of the District Judge, Jullundur, dated 27th February 1912, decreeing plaintiff's claim.

Mr. *Nanak Chand* for Rai Bahadur Lala *Sukh Dial*, for the Appellant.

Mr. *Duni Chand*, for the Respondent.

JUDGMENT.—The parties are Brahmans of the town of Nur Mahal in the Jullundur District and follow the *Mitakshara* system of Hindu Law. The following table willhelp to explain the questions involved in thisappeal:

BUDHA MAL,

Musammat A.(dead)—Labhu Ram—*Musammat* Mansa Devi (plaintiff),

Bishen Das (defendant).

Ram Partap, (defendant).

BISHEN DAS *v.* MANSA DEVI.

Labhu Ram, plaintiff's husband, predeceased his father, Budha Mal, and died many years ago. After his death, *Musammat* Mansa Devi was maintained by Budha Mal and on the death of the latter received the same amount of maintenance, *viz.*, Rs. 25 per mensem, from guardians of the two minors, Bishen Das and Ram Partap. The two latter came of age a short time ago, and thereafter partitioned *inter se* the joint property which they had inherited from their grandfather, Budha Mal. It appears to be a very valuable property and it is not suggested that the sum of Rs. 25 a month as maintenance for the plaintiff is excessive. In the present suit she claims to receive this maintenance from both her step son, Bishen Das, and her son, Ram Partap. The latter admitted the claim and expressed his willingness to contribute half of the allowance, provided his step-brother agreed to pay the other half.

The District Judge, Rai Chuni Lal, decreed the claim against defendants in equal shares, and in his judgment held that, inasmuch as a mother on a partition among her sons to which she was made no party is entitled to have a share equal to that of a son set apart for her maintenance, it was clear that her maintenance was a charge on the whole estate of Budha Mal as it stood before partition between defendants, and that consequently she was entitled to claim it from both of them and to make it a charge on the estate of the deceased in the hands of each of them. He further found that about 100 *ghumaons* of land in Mauza Gamtala had been retained as their joint property by the defendants and that the plaintiff could, in any event, claim her allowance from that part of the estate which, according to the learned Judge, was well able to cover the maintenance allowance.

Defendant No. 1, Bishen Das, appealed to the Divisional Judge, but his appeal was dismissed on the ground that under the *Mitakshara* system of law, which differs in this respect from that of the *Dayabhaga*, a step-son is bound to contribute to his step-mother's maintenance, even after a partition has been effected between him and his step-brother. The learned Judge was also of opinion that plaintiff's claim was really that of a daughter-in-law who asks to be maintained out of the father-in-law's property, her own husband, Labhu Ram, having died in the life-time of Budha Mal and having presumably been a co-parcener in the property.

Bishen Das has preferred a further appeal to this Court, and the question of Hindu Law involved, *viz.*, whether under the *Mitakshara* system a step-son is bound to contribute to the maintenance of his step-mother after a partition of the joint property has been effected between him and his step-brother (the son of his step-mother), is one that has been argued before us at some considerable length and is of no small difficulty. Their Lordships of the Privy Council in *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (1) have held that "where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is to be distributed in accordance with relationship, the sons of each mother being bound to maintain her. The step sons are not under the same obligation." This decision was given in a case from Bengal and was obviously based on the *Dayabhaga*, system. It is contended before us that upon this point there is a difference between the two systems of law founded on the fact that the step-mother is, according to the *Mitakshara* regarded as the mother (*Mata*) of her step-son, whereas she is not so regarded in the *Dayabhaga*. In support of this argument reference is made to paragraph 479 (2) of Mayne's work on "Hindu Law," where it is said that the writers of the Bengal School differ in this respect from those of other Provinces, since they exclude a step-mother from the operation of the texts which speak of the share of a mother, and also to paragraph 566 of the same work where the author remarks: "The Bengal *Pundits* have, on several occasions, asserted that the word '*Mata*' in the *Mitakshara* includes a step-mother." Furthermore, we were referred to a passage in Golap Chandra Sarkar's "Hindu Law" at page 387, where the author speaks of the decision of the Privy Council as laying down an inequitable rule due to misapprehension of the *Dayabhaga*. In our opinion the ruling of their Lordships of the

(1) 16 C. 758; 16 I. A. 115.

Privy Council is final and authoritative upon the question which was before them for decision, and nonetheless so because it does not happen to meet with the approval of a particular writer upon Hindu Law. Nor do we consider it within our province to defend that decision against the charges brought against it by Mr. Golap Chandra Sarkar. Their Lordships' pronouncement upon a point of Hindu Law is binding upon all Courts in this country and we must, therefore, act upon it in this case, unless it can be established that there is *quoad* the particular point before us an essential difference between the *Dayabhaga* and the *Mitakshara* saystems of Hindu Law.

Mr. Dani Chand, for respondents, was unable to cite any authority directly in point in support of his argument that the step-mother was entitled, under the *Mitakshara*, to claim maintenance from her step-son after the joint property had been partitioned between that step-son and her own son. He argued, however, that the difference did in in fact exist, and must necessarily exist, because under the *Mitakshara* system, the step-mother was treated for all purposes as the *Mata* or mother of her step-son. The learned Counsel relied upon the case of *Chowdhury Thakur Proshad Shahi* v. *Musammat Bhagabati Koer* (2) and the decision of the Calcutta High Court in *Damoodur Misser* v. *Senibutty Misrain* (3). These authorities are certainly in his favour, but *per contra* we have an overwhelming weight of authority in support of the proposition that under the *Mitakshara* a step mother is not regarded as *Mata*, or mother, and that she is not in any case an heir to her step-son, as she would be if her position were that of mother—[See *Tahildai Kumri* v. *Gaya Prosad Sahu* (4) *Rumaraelu* v. *Virana Goundan* (5), *Muttammal* v. *Vengalakshmiammal* (6), *Mari* v. *Chinnammal* (7) and the opinion of Muttusami Aiyar, J., at p. 129, *Kesserbai* v. *Valab Raoji* (8), *Savitribai* v. *Luxmibai* (9), *Lala Joti Lal* v. *Durani Kower* (10), *Rama Nand* v. *Surgiani* (11) and *Musammat Kirpi* v. *Ramjas* (12). To a like effect is the statement of the law given in Trevelyan's "Hindu Law" (1912) at page 374.

There being thus, upon the weight of authority, no difference between the two systems of Hindu Law, the *Dayabhaga* and the *Mitakshara*, as to the position and rights of a step-mother, we must decide this case in accordance with the decision of the Privy Council in the case above cited and hold that the plaintiff has, in the circumstances, no claim to be maintained by her step-son Bishen Das.

It is only necessary in conclusion to add a few words with regard to the Divisional Judge's remark that plaintiff is really claiming as the daughter-in-law of Badha Mal. This is an aspect of the question that apparently never struck the plaintiff herself or her legal advisers. She claims as the mother of the present holders of the estate and rightly so, for whatever her rights may have been against Badha Mal, they can only be those of a "mother" against the defendants. The estate had passed out of the hands of Badha Mal when her suit was instituted and in order to adjudicate upon her claim we have to consider, not what rights she may have had against her father-in-law, but what rights she actually has against the persons from whom she is claiming maintenance. As against them, her claim, can be based only upon the ground that she is in law their mother and as such entitled to be maintained by them. Upon the facts and the authorities we must hold that this claim lies against her own son, Ram Partap, and not against her step-son, Bishen Das.

We accordingly accept the appeal of Bishen Das and dismiss plaintiff's suit as against him, the decree awarding maintenance to the plaintiff at the rate of Rs. 25 per mensem, will, therefore, stand only as against the defendent, Ram Partap.

In view of the close relationship of the parties and of the difficult nature of the law point involved, we leave the parties to bear their own costs throughout.

Appeal accepted.

(2) 1 C. L. J. 142.
(3) 8 C. 537 at pp. 542, 543; 6 Ind. Jur. 584; 10 C. L. R. 401.
(4) 5 Ind. Cas. 135; 37 C. 214; 14 C. W. N. 443; 11 C. L. J. 588.
(5) 5 M. 29.
(6) 5 M. 32.
(7) 8 M. 107.
(8) 4 B. 188.
(9) 2 B. 573.
(10) B. L. R. Supp. Vol., Part 1, p. 67 (F. B.).
(11) 16 A. 221 at p. 224; A. W. N. (1894) 47.
(12) 153 P. R. 1889.

In the goods of GOBINDA CHANDRA.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

June 30, 1913.

Present:—Mr. Justice Fletcher.

In the goods of GOBINDA CHANDRA BABAJEE—DECEASED.*

Probate—Caveat, if may be entered by widow of predeceased son—Maintenance of widow of predeceased son, if may be affected by probate proceedings—Obligation of heir—Sufficient interest.

The widow of a predeceased son of the testator has in fact no interest sufficient to enable her to appear on probate proceedings. Her right to maintenance will not be affected by anything that may take place on the hearing of an application for probate.

Bai Parvati v. *Tarwadi Dolatram*, 25 B. 263; 2 Bom. L. R. 894, dissented from.

Yamunbai v. *Manubai*, 23 B. 608, approved.

Rangammal v. *Echammal*, 22 M. 305; 9 M. L. J. 14, followed.

Seddeshury Dassi v. *Janardan Sarkar*, 29 C. 557; 6 C. W. N. 530, referred to.

FACTS.—Gobinda Chandra Babajee, who was of the age of ninty-five years, died on the 29th of August 1909, leaving him surviving Behary Lall Babajee since deceased, Bepin Behary Babajee and Chuni Lall Babajee, his three sons, Sreemutty Rajamani Dasi, his widow, Sreemutty Brojessuri Dasi, widow of a predeceassed son of his, and Neroda Kumari Dasi, widow of another predeceased son of his, Bonomali Chandra Babajee, and a grandson by his predeceased son, Behary Lall Babajee, after having published his last Will and testament on the 8th of December 1908. Bepin Behary Babajee propounded the Will by proving the execution of it by the affidavit of two of the attesting witnesses to the same, and applied for probate thereof.

The testator is alleged to have provided for a residence for life for his widow and a widowed daughter, the property thereafter to devolve upon his surviving sons, Bepin Behary and Chuni Lall, absolutely.

Caveat was entered by the widow Rajamani Dasi, the grandson Bhola Nath Babajee and Neroda Kumari Dasi, the widow of the predeceased son Bonomali Chandra Babajee. The matter coming on for argument on caveat Neroda Kumari was called on to prove her interest in the estate.

Mr. *H. C. Majumdar*, for the caveatrix, Sm. Neroda Kumari Dasi, contended that she has ample interest in the estate entitling her to appear on probate proceedings. It has been held by this Court and the other High Courts that a daughter-in-law's right to maintenance ripens into a legal obligation after the death of the father-in-law on the heir or executor; *Siddessury Dassee* v. *Janardan Sarkar* (1). The daughter-in-law does not lose her maintenance by declining to live in her father-in-law's house. (*Ibid*). Such being the case Neroda Moni has sufficient interest in the estate. *Nobeen Chunder Sil* v. *Bhobosoondari Dabee* (2). He also relied on *Bai Parvati* v. *Tarwadi Dolatram* (3).

Mr. *N. Sarkar*, for the Petitioner.

Mr. *D. N. Basu*, for the widow, Rajamani Dasi.

JUDGMENT.—This is an argument on caveat. Two caveats have been filed, one by a widow of a predeceased son of the deceassed and the other by the deceased's sole widow. As regards the caveat filed by the deceased's sole widow opposing the probate, no doubt she has sufficient interest to file a caveat, and be heard in opposition to the grant of the probate. As regards the caveat filed by the widow of the predeceased son, the matter stands on a different footing. The way that learned Counsel wishes to show that the widow of the predeceased son has sufficient interest to oppose the probate is as follows:—He says first of all that the deceased was under a moral obligation to maintain the widow of his predeceased son and that that moral obligation upon his death ripened into a legal obligation and would be binding on the heir. Learned Counsel has referred to the case of *Bai Parvati* v. *Tarwadi Dolatram* (3). That is the decision of Mr. Justice Fulton and Mr. Justice Batty: and, no doubt, the decision did decide that the widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property. The learned Judges in the course of their decision distinguished the decision of Mr. Justice Ranade in the case of *Yamunabai* v. *Nanubai* (4). I am not satisfied that the grounds upon which the learned Judges attempted to distinguish the case are correct. Mr. Justice Subramanya Ayyar and Mr. Justice Moore in the case of *Rangammal* v. *Echammal* (5) gave a decision

(1) 29 C. 557; 6 C. W. N. 530.
(2) 6 C. 460 at p. 461.
(3) 25 B. 263; 2 Bom. L. R. 894.
(4) 23 B. 608.
(5) 22 M. 305; 9 M. L. J. 14.

* Taken from 17 C. W. N. 1141 with permission.—*Ed.*

opposed to that of *Bai Parvati* v. *Tarwadi Dolatram* (3). In the course of his judgment Subramanya Ayyar, J., made the following remarks:—"The better conclusion is, perhaps, that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the persons morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator, he could, by his Will, have directed that she should get no maintenance out of his estate." On principle I think that the decision of Mr. Justice Subramanya Ayyar and Mr. Justice Moore is correct, and the decision of Mr. Justice Fulton and Mr. Justice Batty is one that I ought not to follow. Moreover, my attention has been called to a case in this Court, *Siddeshwy Dass* v. *Janardan Sarkar* (1), which was an appeal from the original side. That case was a decision by Sir Francis Maclean, C. J., Mr. Justice Prinsep and Mr. Justice Hill. Mr. Justice Prinsep in the course of his judgment expressed his approval of Mr. Justice Ranade's decision in the case of *Yamunabai* v. *Nanubai* (4) and of the decision of Mr. Justice Subramanya Ayyar and Mr. Justice Moore in *Rangammal* v. *Echammal* (5).

Under these circumstances I think the widow of the predeceased son of the deceased has in fact no interest sufficient to enable her to appear on the proceedings. In my opinion the rights and the interest of the widow of the predeceased son will not be affected by anything that may take place on the hearing of the application for probate. Her caveat must, therefore, be discharged. Costs to be costs in the cause.

Solicitor for the Petitioner: Mr. *H. C. De.*

Solicitors for the caveatrix, Neroda Kumari Dasi: Messrs. *Ghose* and *Bose*.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 622 OF 1912.

February 16, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

ADIRAJA SHETTY—PETITIONER

versus

VITTIL BHATTA AND OTHERS—RESPONDENTS.

Promissory-note—Consideration to induce witness to give evidence—Contract Act (IX of 1872), s. 23—Public Policy.

The consideration for a promissory-note executed by the defendant to the plaintiff was that the former should induce a third person to give evidence in latter's favour in a pending suit:

Held, that the promssiory-note could not be enforced as the consideration for it was opposed to public policy.

Shadwell v. *Shadwell*, 127 R. R 604, 9 C. B. (N. S.) 159; S. C. 30 L. J. C. P. 145; 7 Jur. (N. S.) 311; 3 L. T. (N.S.) 628; 9 W. R. 163; 142 Eng. Rep. 62, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Karkal, in Small Cause Suit No 33 of 1912.

Mr. *B. Sitarama Row*, for the Petitioner.

Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.—Whether the fulfilment of a promise to *A* by *C* to perform a private obligation already incurred by *B* under an agreement between B and *C* will form a good consideration for a promise by *A* to pay something to *B* is a question on which there has been some difference of judicial opinion. [See *Shadwell* v. *Shadwell* (1) and Pollock's Indian Contract Act, 3rd Edition page 155.]

But the promise to perform a public duty (in the present case to give evidence as witness) by *B* cannot form good consideration for the promise by *A* to pay something to *C*. In my opinion, it is not merely an unreal or illusory consideration. (See page 23 of Pollock's Indian Contract Act, 3rd Edition). "In the case of the duty" (on *B*) "being imposed by the general law, an agreement" to give something either to *B* or *to any other person* "as a reward" for *B*. doing it is, in my opinion, also void as opposed to public policy.

The plaintiff is the petitioner in revision, and his suit brought on a promissory-note executed by the defendant in consideration of plaintiff's friend's agreeing to give evidence (I shall take it to be true evidence) for the defendant (who was a litigant in former suit) was rightly dismissed by the lower Courts.

I dismiss the petition with costs.

Petition dismissed.

(1) 127 R. R. 604; 9 C. B. (N. S.) 159; S. C. 30 L. J. C. P. 145; 7 Jur. (N. S.) 311; 3 L. T. (N. S.) 628; 9 W. R. 163; 142 Eng. Rep. 62.

GOSIA BEGAM *v.* UMED ALI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 959 OF 1910

August 2, 1913.

Present:—Sir Alfred Kensington and Mr. Justice Shah Din.

Musammat GOSIA BEGAM—DEFENDANT—APPELLANT

versus

UMED ALI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Usmani Sheikhs *of Gurgaon—Daughter not excluded by collaterals of eighth degree.*

Among the Usmani Sheikhs of the Gurgaon District daughters are not excluded by collaterals eight degrees removed.

Usmani Sheikhs admittedly stand on the same footing as Qureshies, Sadiqis, and Ansaries, in that they all are what are commonly described as true Sheikhs, tracing their origin from Arabia.

Second appeal from the decree of the Additional Divisional Judge of Delhi, dated 5th May 1910, reversing that of the District Judge, Gurgaon, dated 28th January 1910, dismissing the claim.

Mirza *Jalal-ud-Din*, for the Appellant.

JUDGMENT.—The parties to the suit are Usmani Sheikhs of the Gurgaon District. The point to be determined is whether the daughter of the last male owner is excluded from inheritance by collaterals eight degrees removed.

Mutation was here effected in favour of the daughter on the death of her father, Hatim Ali, and of his widow, the latter dying in November 1908. The case has, therefore, come into Court in the form of a suit by the collaterals for possession.

The District Judge dismissed plaintiffs' suit, but the learned Divisional Judge has given them a decree for a $\frac{3}{4}$th of the area of about 29 *bighas* in dispute.

We have naturally great respect for a decision on a question of the kind by an officer of Mr. Clifford's great experience, but we think that he has failed to see how strongly the burden of proof rests upon the plaintiffs and that he has also been misled into attaching undue importance to such instances as have been traced in the family (see pedigree at page 8 of the paper book) as proving that a daughter is excluded by even such very remote collaterals as the plaintiff.

Rather strangely no reference has been made by the lower Appellate Court to the general custom of Mussalman tribes in the Punjab as summarised under exception 2 to Article 23 of Rattigan's Digest of Customary Law. The conclusion from rulings there cited is that a daughter is very rarely excluded by collaterals in the eighth degree, especially among endogamous Muhammadans.

Usmani Sheikhs admittedly stand on the same footing as Qureshis, Sadiqis and Ansaris, in that they all are what are commonly described as true Sheikhs tracing their origin from Arabia. As such they have been rightly classed with Sayads in the *Riwaj-i-am* of 1877, which is quoted in Mr. Clifford's judgment. It was admitted before us by the principal plaintiff, Umed Ali, that his tribe intermarry with Sayads (if Sunnis), and that as a fact the defendant herself is married to a Sayad which goes some way to support the *Riwaj-i-am* and we find it difficult to follow the commentary on the statement of custom given at page 145 of Volume II of Tupper's Customary Law, or Mr. Clifford's argument at page 19 of his judgment.

Then again turning to the instances in the family to prove exclusion of daughters by collaterals we cannot hold that they help plaintiffs much. They are four in number, as follows:—

(1) Hatim Ali's case, where a daughter was excluded by a brother. This really proves nothing.

(2) Umed Ali's cases, where he excluded
- (*a*) a female 2nd cousin, daughter of Karim Bakhsh, and
- (*b*) a female 1st cousin, daughter of his uncle Amin-ud-Din.

Here again the instances prove nothing, as Umed Ali was himself married in each case to the daughter of the last male owner, and the family arrangements made had little or no practical effect.

(3) Gauhar Ali's case, where a daughter was excluded by her first cousin (father's brother's son).

Instances of the kind, where the collaterals are very near relatives or themselves connected by ties of marriage as well as blood, are very far from establishing the conclusion that male collaterals, however remote, will always exclude a daughter from inheritance notwithstanding a positive entry to the

contrary in the *Riwaj-i-am*, and also notwithstanding a whole series of rulings in favour of the daughter quoted under Rattigan's Digest of Customary Law, Article 23. We cannot agree that the plaintiffs have made out any sort of case for ousting the defendant from her father's land in opposition to what is so clearly the general custom among high class Muhammadans, whose views on customary inheritance are notoriously tinctured to a considerable extent by their predilection for Muhammadan law.

We accept the defendant's appeal, set aside the decree of the lower Appellate Court and restore that of the District Judge dismissing plaintiff's suit, with costs throughout to the defendant.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1711 OF 1912.

January 19, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

CHELLAGALI CHINNIGADU AND OTHERS —DEFENDANTS—APPELLANTS

versus

KAPPALA VENKATARAYUDU—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 74—Bond—Condition—25 per cent. more to be paid on default in payment on fixed day—Penalty.

Where a bond provides that principal and interest shall be paid on a particular date, that on default in payment on that date 25 per cent. of the principal and interest shall be added to the total amount, and that interest at 12½ per cent. per annum shall be charged on the consolidated amount till its realization, the provision is penal and, therefore, unenforceable.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry, in Appeal Suit No. 15 of 1912, (Referred Appeal No. 84 of 1910 on the file of the Subordinate Judge of Cocoanada), preferred against the decree of the District Munsif of Peddapur, in Original Suit No. 7 of 1909.

Mr. *B. Narasimha Row*, for the Appellants.

Mr. *V. Ramesam*, for the Respondent.

JUDGMENT.—The Appellate Court ought to have considered and decided the 3rd issue in this case.

That issue relates to the question whether the provision in the bond sued on, namely, that on default of payment by the defendants of the principal sum with 12½ per cent. interest per annum within 10th January 1906, 25 per cent. of the total amount of the principal and interest due till then should be added to the debt and that the defendants should be liable for this consolidated sum with interest at Rs. 12½ per cent till payment, is a penal provision. On that issue, we hold that the term to add 25 per cent. to the debt is of a penal character and we allow (as damages for default) an additional sum of Rs. 31-5-0 instead of the sum of Rs. 104-9-4 claimed by the plaintiff.

In the result, the lower Appellate Court's decree will be modified by awarding to the plaintiff Rs. 449-10-6, interest thereon at Rs. 12½ per cent per annum from 10th January 1906 till date of plaint and further interest at 6 per cent. on the total from date of plaint till realization.

The defendants will pay proportionate costs to the plaintiff throughout on the sum due till date of plaint on the above calculation and (defendants) bear their own costs.

Decree modified.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 264 OF 1913.

March 25, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Bannerji, KT.

QAMAR ALI—OBJECTOR—APPELLANT

versus

THE COLLECTOR OF BAREILLY—RESPONDENT.

Land Acquisition Act (I of 1894), s. 23—Compensation—Market value—Price paid by owner—Evidence.

The mere fact that the owner of the property, acquired under the Land Acquisition Act, had obtained it cheap would not entitle the Government to get it under the fair market-value; but the price which was paid by the owner very shortly before the publication of notification would be a valuable piece of evidence to help the Court in ascertaining the true market-value of the property.

First appeal from the decision of the District Judge of Bareilly, dated 10th April 1913.

Mr. *Muhammad Ishaq* for the Appellant.

Mr. *Ryves*, for the Respondent.

QAMAR ALI v. COLLECTOR OF BAREILLY.

JUDGMENT—This and the connected Appeal No. 250 of 1913 arise out of a reference to the learned District Judge under section 18 of the Land Acquisition Act. The Court below has awarded compensation to the appellant amounting in all to the sum of Rs. 6,408-4 0, including the 15 per cent allowed for compulsory acquisition. The appellant is dissatisfied and claims that he ought to get Rs. 15,000 for the property acquired. The Government also appeal contending that the compensation awarded is much too high. There are other grounds mentioned in the memorandum of the present appeal which go to the very root of the validity of the entire proceedings under the Land Acquisition Act. For example it is contended that the proceedings are null and void by reason of the fact that the notice under section 9 did not comply with the requirements of sub-section (2) of the section. In our opinion for the purposes of the reference to the Court below and also of the appeal to this Court it must be assumed that an award was duly made. Section 18 provides as follows: "Any person interested who has not accepted the award may, by written application to the Collecor, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

If the appellant's contention be correct, there never has been any award nor has his land ever been acquired, and accordingly neither the Court below nor this Court could go into any of the matters mentioned in section 18.

The appellant also contends that there had been a relinquishment of his land under section 48. In our opinion what happened in the present case did not amount to a withdrawal by *the Government*. Even if there was a relinquishment the remarks that we have made about the notice equally apply. If the Government relinquished the land then the land remains the property of the appellant.

The real matter which we have to decide, therefore, is whether the compensation awarded by the learned District Judge was or was not fair and equitable under all the circumstances of the case. We find that the entire property of appellant which has been acquired was purchased by him on the 14th and 15th of September 1909 and the purchase-money which he paid was the sum of Rs. 2,000. The appellant has brought under our notice certain facts which go to show that the vendors of the property were very willing sellers. They resided at some distance away from the plot which had been used as a *bagh* and it had not been very profitable. These and other circumstances to which he has referred go to show that the appellant may have got a very good bargain for the Rs. 2,000. On the other hand, his vendors were residents of Bareilly and the appellant has certainly not shown to our satisfaction that the owners of the property were ready to and did sell him property worth Rs. 15,000 to Rs. 40,000 for the petty sum of Rs. 2,000. The mere fact that he obtained the property cheap would not of course entitle the Government to get the property under the fair market-value, but we think that the price which was paid by the appellant very shortly before the publication of the notification is a valuable piece of evidence to help the Court in ascertaining what is the true market-value of the property in dispute. It is far more valuable as evidence than examples of the properties of different measurement and differently situated. The appellant has drawn our attention to a number of small plots which were acquired apparently voluntarily by the Municipal Board for whom the land was intended. We think that the payment of even somewhat extravagant rates for small plots is of very little value as to the real market-value of a large plot like the present. It may well be that the Municipality were ready to pay a comparatively speaking very high rate for small plots and so avoid the expenses of litigation. A plot quite close to the plot in dispute belonged to a *mali* who kept up a nursery garden and had acquired a substantial business. His plot was about half the size of the plot in dispute. The matter was settled between the *mali* and the Municipal Board at the sum of Rs. 3,700. The appellant contends that he should at least get the rate that was given to this owner. We think that the learned Judge has given

cogent reasons for not adopting this contention. After hearing the appellant at great length we see no reason whatever for increasing the amount of compensation awarded by the learned Judge.

With regard to the appeal by the Government we consider that the learned District Judge treated Qamar Ali with considerable liberality and we doubt very much whether if the case had come before us in the first instance, we would have seen our way to award him the full amount awarded him by the learned Judge. However, we think that he took the evidence into consideration and there is no doubt that there were certain circumstances connected with the case which might induce the learned Judge to treat the claim of Qamar Ali in a generous manner.

The result is that we think that both appeals should be dismissed.

We dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 200 OF 1913.

February 5, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

M. A. SRINIVASA AIYANGAR—PLAINTIFF—APPELLANT

versus

KUNDASAWMY NAICKER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5, 6—Mortgage decree against two defendants - Private sale by one defendant to decree-holder for part of decretal money, whether adjustment of decree—Application for personal decree against both, whether competent.

Where in a mortgage decree against two defendants one of the defendants makes a part adjustment by private sale, a decree under Order XXXIV, rule 6, can be passed against him but no such decree can be passed against the defendant who is not a party to the sale, for no procedure under Order XXXIV, rule 5, is followed against him.

Udit Narain Singh v. *Baqar Sajjad*, 2 A. L. J. 353; A. W. N. (1905) 124, distinguished.

Appeal against the order of the Madras City Civil Court, dated 31st March 1913, on Civil Miscellaneous Petition No. 324 of 1913, in Original Suit No. 20 of 1912.

FACTS.—One M. A. Srinivasa Aiyangar obtained a mortgage-decree against one Kundasawmi Naicker and another for a sum of Rs. 700 and odd for the sale of the mortgaged properties. He subsequently arranged with *one of the judgment-debtors* for a sale to him *privately* of those properties. The sale being effected on 10th February 1913, he applied for a personal decree on 20th February 1913. The City Civil Court dismissed the application on the ground that he cannot pass such a decree when there is no sale through Court. Against that order the present appeal is filed.

Mr. *T. Narasimha Aiyangar*, for the Appellant:—The words "such sale" used in Order XXXIV, rule 6, mean also a private sale. Here the property ordered to be sold is that of the 1st defendant only and not of the other.

In the case of *Udit Narain Singh* v. *Baquar Sajjad* (1) no Court sale is necessary.

In *Gajadhar Lal* v. *Alliance Bank of Simla Ltd.* (2) there was no Court sale.

[SANKARAN NAIR, J.—According to your view then it would lead to fraud. The judgment-debtor and a decree-holder may collide together and get the property sold for small price so as to get a personal decree for a large amount against another judgment-debtor who did not join in the sale. The rules are intended to prevent such fraud].

Mr. *R. N. Aiyangar*, for the Respondent:—In both the Allahabad cases the sale was under the supervision of the Court.

In *Udit Narain Singh* v. *Baquar Sajjad* (1) the sale was by private auction.

In *Gajadhar Lal* v. *Alliance Bank of Simla Ltd* (2) the sale was effected in England.

[AYLING, J.—The Allahabad cases seem to imply that under Order XXXIV, rule 6, a decree may be made even where there is a private sale; and in this view, the view of the City Civil Court is not correct. He has not yet exercised his discretion properly. The 2nd defendant was not aware of the sale].

Mr. *T. Narasimha Aiyangar*, for the Appellant.

Mr. *R. N. Aiyangar* (instructed by Mr. *P. Ramanathan*), for the Respondents.

(1) 2 A. L. J. 353; A. W. N. (1905) 124.
(2) 28 A. 660; 3 A. L. J. 445.

PATOJU SANGAYYA *v.* PATOJU SANYASI.

JUDGMENT.—The City Civil Judge has dismissed the application of the plaintiff for a personal decree against the 1st and 2nd defendants under Order XXXIV, rule 6, of the Code of Civil Procedure, on the ground that the plaintiff failed to bring the mortgaged property to sale in execution of the decree under Order XXXIV, rule 5, of the Code of Civil Procedure, obtained by him. The 1st defendant privately sold the property to the decree-holder for Rs. 500 which in his application for a decree for the balance under Order XXXIV, rule 6, he has credited towards the decree amount.

Order XXXIV, rule 5, directs the sale of the mortgaged properties and the application of the sale-proceeds in the manner indicated therein and it is only where the net proceeds are found to be insufficient to discharge the decree debt that the plaintiff is entitled to ask for a decree under rule 6. These provisions, no doubt, contemplate a judicial sale for the decree amount and a decree for the balance. But it is clear that it is open to a judgment-debtor to stop the sale by payment of the debt or by adjustment duly certified to the Court. Such adjustment may be made by a private sale. Nor is there any reason for not recognizing a payment in part or a partial adjustment as between the parties thereto. The 1st defendant who sold the property does not dispute the plaintiff's claim; so far as he is concerned the sale, in our opinion, should be recognized and it follows that the plaintiff is entitled to a decree against him for the balance.

So far as the 2nd defendant is concerned the sale is not binding on him. He is entitled to insist upon the procedure prescribed by the Code of Civil Procedure being followed. He is not a party to the sale and his right to apply for the execution of the decree under Order XXXIV, rule 5, cannot be taken away by the sale of the property by the 1st defendant. No decree, therefore, can be passed against him under rule 6. In the cases cited, the contesting judgment-debtor was a party to the sale and in the case of *Udit Narain Singh* v. *Baqar Sajjad* (1) after the private sale, there was a Court sale for the *balance*. They have no application to this case so far as the 2nd defendant is concerned.

(1) 2 A. L. J. 353; A. W. N. (1905) 124.

We confirm the order and dismiss the appeal as against the 2nd defendant with costs. We reverse the order so far as the 1st defendant is concerned and direct the City Civil Judge to restore the application to his file and dispose of it according to law.

The costs will be provided for in the final order or decree.

Decree modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 567 OF 1912.

February 16, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

PATOJU SANGAYYA—DEFENDANT—PETITIONER

versus

PATOJU SANYASI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Promissory-note—Endorsement for collection, what constitutes—Negotiable Instruments Act (XXVI of 1881), s. 78.

Where from the terms of an indorsement on a promissory-note, no accountability can be inferred between the indorser and indorsee, it is not an indorsement for collection merely, and the holder alone can bring a suit on the note.

Subba Narayana Vathiyar v. *Ramaswami Aiyar*, 30 M. 88, 1 M. L. T. 377; 16 M. L. J. 508 (F. B.), followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Kistna at Ellore, in Small Cause Suit No. 220 of 1912.

Mr. *T. Prakasam*, for the Petitioner.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—It is argued before me that the indorsement on Exhibit A shows that the plaintiff was an agent for collection and not the real payee. I cannot accede to this contention. The language is perfectly clear, the indorsement gives full rights to the plaintiff to recover the amount and there is no accountability between the plaintiff and the second defendant after the collection. Therefore, I hold that it is not an indorsement for collection and for collection only. That being my view, the plaintiff is a holder as defined in section 8 of the Negotiable Instruments Act; and under section 78, as

interpreted in *Subba Narayana Vathiar* v. *Ramaswami Aiyer* (1), he is the only person entitled to bring a suit to recover the amount. I am inclined to think that what is stated in the affidavit, put in immediately after the suit was decided, correctly represents what took place during the course of the trial. If I thought there was a real defence to the suit I would have given an opportunity to the petitioner to examine his witnesses. As I hold that the defence of payment by the 1st defendant to the 2nd defendant is no answer to the claim of the plaintiff, I do not think it necessary to send down the case for examining the witnesses. I dismiss the petition with costs.

Petition dismissed.

(1) 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 508 (F. B.).

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 4177 OF 1910.

March 18, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Walmsley.

GOUR CHANDRA DAS PODDAR—PLAINTIFF—APPELLANT

versus

Sheikh ASIMUDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Raiyat *executing usufructuary mortgage of holding—Abandonment—Question of fact*—Raiyat *continuing to pay rent—No intention of leaving village—Receipt of rent by landlord after notice of alleged abandonment*—Khas *possession, whether landlord entitled to.*

The mere execution of a usufructuary mortgage may not be sufficient to establish abandonment by a *raiyat* of his holding, which question is principally one of fact.

The observations of Chief Justice in *Monohar Pal* v. *Srimati Ananta Moyee Dasya*, 20 Ind. Cas. 198; 17 C. W. N. 802, relied upon.

Where a *raiyat* executed a usufructuary mortgage of his holding but covenanted to continue to pay the rent thereof, and it was found that though he left the land because he was ill and there was no one to take care of him yet he intended to come back to the village, and that rent was recieved by the landlord after he came to have notice of the *raiyat's* leaving the place:

Held, that there was no abandonment of his holding by the *raiyat* entitling the landlord to *khas* possession.

Appeal from the decree of the Officiating Sub-Judge of Dacca, dated September 16th, 1910, confirming that of the First Munsif of Naraingunge, dated May 3rd, 1910.

Babus *Gonesh Chandra Roy* and *Rajendra Chandra Guha*, for the Appellant.

Babu *Upendra Lal Roy*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—The question argued in this appeal is whether there has been an abandonment or not by the tenant entitling the landlord to *khas* possession. Both the Courts below have held that there has been no such abandonment.

It is not necessary for me to decide here whether a question of abandonment can on any case amount to a question of law or mixed law and fact. But in the present case it appears to me that the question is one of fact. Further I rely upon the observations of the Chief Justice in the case cited to us, *Monohar Pal* v. *Srimati Ananta Moyee Dasya* (1), where he says that "the mere execution of a usufructuary mortgage might not be sufficient to establish abandonment; whether there has been abandonment of a holding or not is principally a question of fact", and in the case of *Bhupendra Nath Bose* v. *Bansi Tanti* (2), to which we have referred, the learned Judges say that "In the case before us there is a clear finding by the lower Appellate Court that there has been no abandonment by the tenant defendants and with that finding we are unable to interfere in second appeal." These words appear to me to express the position in which we find ourselves in the present case. It has been held that there was this usufructuary mortgage and that under it the mortgagor covenanted to continue to pay rent of this holding and as pointed out in *Mahadeo Pershad* v. *Sheikh Pachkari* (3) it is only in the assumption that the tenancy continues in operation that the mortgagee can have any subsisting interest in the land.

Then, it is found that the defendant left the land because he was ill and because there was no one to take care of him and there is a distinct finding that he intended to

(1) 20 Ind. Cas. 198; 17 C. W. N. 802.
(2) 22 Ind. Cas. 416; 40 C. 870.
(3) 13 Ind. Cas. 941; 16 C. W. N. 322.

come back to the village. Then there is a finding to which exception has been taken. It is said that the learned Judge has found that the plaintiff sued for rent even after the date of the alleged abandonment and in such suit described the defendant No. 1 as being in the position of the plaintiff's tenant. It is said that as regards this matter, the learned Judge was in error in overlooking the fact that the allegation of the plaintiff was that notice of this alleged abandonment was only received by him after the date of the institution of the suit. Had this matter been material, it might have been necessary to consider the question further. But it does not appear to me to be material and for two reasons. The question as to what the plaintiff did or did not believe as regards the abandonment is not here material. The question we have to consider is what were the defendant's acts and his intention. Further this action is not relied on for the purpose of estopping the plaintiff. The circumstance referred to in connection with the tenants' alleged abandonment of the land is presumably a part of the history of the case showing that notwithstanding the usufructuary mortgage, arrangements were made by the tenants for the payment of rent and rent was actually paid by them. Moreover, it is not to be overlooked that according to the judgment of the first Court which was affirmed, the evidence shows that rent was paid and received apparently after 1314 when the plaintiff alleges that he came to have notice of the alleged abandonment. In these circumstances the question of abandonment appears to me concluded by the findings of fact.

The only other question is whether or not the plaintiff is entitled to relief by way of declaration that the mortgagee has obtained no title by virtue of the usufructuary mortgage. It is quite true that a prayer for such declaration was made in the plaint, but it is there asked for as a prayer for relief by granting *khas* possession on the ground of abandonment. As *khas* possession was refused on this ground, it is not necessary to go into the question and we do not decide the question whether or not the mortgagee has any title under the usufructuary mortgage. Moreover, we are not in a position to go into that matter, seeing that it is not a question which has been discussed by either of the Courts the judgments of which are now under appeal.

The appeal must be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 178 OF 1910.
December 12, 1913.
Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

ABDUL RAHIMAN NACHIYAL—PLAINTIFF—APPELLANT

versus

MUHAMMAD NURDIN MARACAYER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Pardanashin *lady—Independent advice*—Gosha *not observed*—Marcayers *of Southern India—Gift*—Mushaa—*Transfer of Property Act (IV of 1882), s.* 123—*Registration.*

The doctrine of "*independent advice*" should be applied only where the *pardah* system is rigorous and even voluntary deliberate acts of a *pardanashin* woman should not be lightly set aside.

Alikjan Bibi v. *Rambarani Shah*, 7 Ind. Cas. 167; 12 C. L. J. 357, *Kaminee Dassi* v. *Krishna Chandra Mukherjee*, 16 Ind. Cas. 110; 39 C. 933; 16 C. W. N. 649 referred to.

Under Muhammadan Law a gift by a wife to her husband does not require strict proof of its being of a voluntary nature.

A gift of an undivided share in property capable of division and in possession of the donor is valid if such possession is transferred to the donee, although a mere registered gift deed without transfer of such possession is not valid.

Fakir Nyaer Muhamed Rowther v. *Kandasawmi Kulathu Vandan*, 14 Ind. Cas. 993; 35 M. 120, *Vahazulla Sahib* v. *Boyapati Nagayya*, 30 M. 519; 17 M. L. J. 562, *Kandath Veettil Bava* v. *Musaliam Veettil Pakru Kutti*, 30 M. 305; 2 M. L. T. 180, *Alabi Koya* v. *Mussa Koya*, 24 M. 513; 11 M. L. J. 227, *Mahomed* v. *Bai Cooverbai*, 6 Bom. L. R. 1043, *Ibrahim Goolam Ariff* v. *Saiboo*, 11 C. W. N. 973; 4 A. L. J. 572; 17 M. L. J. 408; 6 C. L. J. 695; 34 I. A. 167 (P. C.); 9 Bom. L. R. 872; 35 C. 1, *Ebrahimbhai* v *Foolbai*, 26 B. 577, 4 Bom. L. R. 180; *Jahed-un-Nessa Bibi* v. *Najib-ul-Islam*, 8 Ind. Cas. 38; 15 C. W. N. 328, *Abdul Aziz* v. *Fateh Mahomed Haji*, 9 Ind. Cas. 635; 38 C. 518; 15 C. W. N. 541; 13 C. L. J. 492, *Enayat Khan* v. *Abdul Rahim*, 11 Ind. Cas. 979; 8 A. L. J. 824, *Rahimjan Bibi* v. *Imanjan Bibi*, 15 Ind. Cas. 698; 17 C. L. J. 173, referred to.

Appeal against the decree of the Subordinate Judge of Negapatam in Original Suit No. 21 of 1909.

ABDUL RAHIMAN v. MUHAMMMAD NURDIN.

Mr. *T. Rangachariar* (with him Mr. *S. Varadachariar*), for the Appellant.

Mr. *T. R. Ramachandra Aiyar* (with him Messrs. *K. N. Aiyar* and *T. R. Venkatarama Sastri*), for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—This case is in a manner connected with the four appeals in which judgment was just now pronounced by me. The plaintiff in the suit out of which this appeal has arisen is the first defendant in the Suit No. 15 of 1908, out of which those four appeals arose. The two defendants in this suit are the 13th defendant and 3rd defendant respectively in that other suit. I shall call the plaintiff and the defendants in these suits as 1st defendant, 13th defendant and 3rd defendant. I shall also call Sultan Mohideen Nachiyal, the 13th defendant's wife, as the 2nd defendant in this judgment. The 2nd defendant died during the pendency of that other Suit No. 15 of 1908 on 23rd March 1909. The present Suit No. 21 of 1909 has been brought by 1st defendant as one of the heirs of the said deceased 2nd defendant for her 3/7th share of the properties left by 2nd defendant, (the 2nd defendant's properties including the 2nd defendant's share of the immoveable properties in dispute in Original Suit No. 15 of 1908). The 1st defendant also claims from the 13th defendant a share of the value of certain jewels alleged to have been left by the 2nd defendant and of a sum of 14,333 dollars and 33 cents which 1st defendant alleges that her sister (the 2nd defendant Sultan Mohideen Nachiyal) realised by the sale of her (2nd defendant's) properties in Penang and which amount is alleged by 1st defendant to be in the possession of the 13th defendant (2nd defendant's husband).

The learned Subordinate Judge held (*a*) that 2nd defendant had gifted away all her immoveable properties to her husband (the 13th defendant) by the registered sale-deed of gift, Exhibit I, dated 23rd April 1906 and hence the 1st defendant could not claim any share in those properties as if they had been left by her sister (the 2nd defendant) at the latter's death in 1909; (*b*) that 2nd defendant did not realise 14,333 dollars and 33 cents by the sale of her properties in Penang, that those properties in Penang still exist in Penang as assets left by the 2nd defendant, that a suit for 1st defendant's share in those properties can only be brought in the Penang Courts and that 1st defendant is not entitled to recover a share in the value of those properties from 13th defendant as 13th defendant, did not receive and is not in possession of the price of those properties as alleged in the 1st defendant's plaint in this suit. On these and other subsidiary findings, the 1st defendant was given a decree (*a*) for her share as 2nd defendant's heir in the house item 13, schedule A, part 4, in a connected Suit No. 31 of 1909 and (*b*) for her share in the value of jewels and gold left by 2nd defendant. As regards the other immoveable properties 1st defendant was given her share as her father's heir *as well as her share in 2nd defendant's share of her father's properties* by the decree in Original Suit No. 15 of 1908 itself and hence the latter relief was not repeated in the decree in this suit.

The contentions of 1st defendant in this Appeal No. 178 of 1910 may be thus summarised:—

(1) the gift deed, Exhibit I, executed by 2nd defendant to her husband, the 13th defendant, in 1906 conveyed no title as it was not intended to be operative and was merely colourable;

(2) it is invalid as it was brought about by the influence of the husband over his wife;

(3) the gift was invalid under the doctrine of *Mushaa*;

(4) it was inoperative under the Muhammadan Law as 13th defendant did not get possession from the donor;

(5) the Subordinate Judge ought to have held that the sale price of the Penang properties was held by the 13th defendant on behalf of his wife, the 2nd defendant, and that the plaintiff was entitled to claim a share therein as one of the heirs of the 2nd defendant.

The evidence (oral and documentary) was fully discussed before us on both sides. I see no reason to differ from the conclusions of the learned Subordinate Judge on the evidence that the gift deed, Exhibit I, was executed by the 2nd defendant to her husband of her own free will and after having understood the nature of the transaction. The evidence of the respectable witnesses No. 3 and 4 examined by the 13th defendant and the evidence of the 13th defendant himself and of his sister's husband clearly support the above conclusion. Though the 2nd defendant was a

ABDUL RAHIMAN *v.* MUHAMMAD NURDIN.

gosha woman, she did not observe *gosha* to these witnesses. The *pardah* system is not so very strict among the Maracayers of Southern India as among the Musalmans of the North, and the doctrine of "independent advice" should not be pushed to the same extent here as in Northern India. It is only where the *pardah* system is so rigorous as to dwarf the intellectual capacity and the worldly knowledge of its observers that stress should be laid on the doctrine of "independent advice" and in other cases, the only question is whether the executant had full knowledge of the contents of the document, that is, appreciated the meaning and effect of the deed and then deliberately executed it. [See *Alikian Bibi* v. *Rambaran Shah* (1).] Voluntary deliberate acts of even a *pardanashin* woman should not be lightly set aside. Of course in cases like those reported, *Kamini Dassee* v. *Krishna Chandra Mukerjee* (2) where a highly improvident gift is made to a priest by a *pardanashin* woman, strict proof of the voluntary and deliberate nature of the act would be required. But in the case of a gift by a wife to her husband which is favoured by the Muhammadan Law, strictness should not be carried too far. The evidence in this case further establishes that in the beginning of 1908, (more than a year before 2nd defendant's death), her husband, the 13th defendant, took possession of the properties gifted to him by the gift deed, Exhibit I, by his wife and has been in possession since then. The doctrine of *Mushaa* is not looked upon with favour by the Privy Council and by the Indian Courts and is, therefore, brought within as narrow limits as possible. The latest case in Madras seems to be a case reported as *Fakir Nynar Muhamed Rowther* v. *Kandasawmi Kulathu Vandan* (3). In that case Mr. Justice Abdur Rahim says at page 128: "It is now settled that under the Muhammadan Law as applied in India, a gift of an undivided share in property capable of division is not invalid." There has been some conflict of opinion as to whether, in the case of undivided property, possession by receipt of a share of the profits by the donee is sufficient and also on the question whether where the donor herself is not in possession, a registered deed of gift by itself will convey title to the donee, but it seems to be now settled that if the donor was herself in possession of the undivided share and transfers such possession to the donee, the gift is valid, though a mere registered gift deed without transfer of such possession is not valid. [See *Vahazulla Sahib* v. *Boayapati Nagayya* (4), *Kandath Veettil Bana* v. *Mussaliam Veettil Pakru Kutti* (5), *Alabi Koya* v. *Mussa Koya* (6), *Mahomed* v. *Bai Cooverbai* (7), the Privy Council case of *Ibrahim Goolam Ariff* v. *Saiboo* (8) and *Ebrahimbhai* v. *Fulbai* (9), *Jahed-un-nessa Bibi* v. *Nijib-ul-Islam* (10), *Abdul Aziz* v. *Fateh Mahomed Hai* (11), *Enayat Khan* v. *Abdul Rahim* (12) and *Rahimjan Bibi* v. *Imanjan Bibi* (13)]. In the present case such possession as the donor had, was transferred to the donee before her death and the gift is, therefore, valid.

Coming to the question of the properties in Penang, we agree with the lower Court that Exhibit IX clearly shows that the 2nd defendant's share in the immoveable properties in Penang has not been really sold for any price realised by 2nd defendant or for any price received by 13th defendant for her and that the nine sale-deeds, which a Penang Solicitor made the three husbands of the three sisters (defendants Nos. 1, 2, and 3) execute among themselves, were not intended as transactions by which the three sisters became individually entitled to or got possession of the value in cash of their respective shares. In the result the appeal is dismissed with the costs of the 13th defendant (that is, the 1st defendant in the Suit No. 21 of 1909).

MILLER, J.—I agree with my learned brother's conclusion and have nothing to add to his judgment.

Appeal dismissed.

(1) 7 Ind. Cas. 166; 12 C. L. J. 357.
(2) 16 Ind. Cas. 110; 16 C. W. N. 649; 30 C. 933.
(3) 14 Ind. Cas. 993; 35 M. 120.
(4) 30 M. 519; 17 M. L. J. 562.
(5) 30 M. 305; 2 M. L. T. 180.
(6) 24 M. 513; 11 M. L. J. 227.
(7) 6 Bom. L. R. 1043.
(8) 35 C. 1; 11 C. W. N. 973; 4 A. L. J. 572; 9 Bom. L. R. 872; 17 M. L. J. 408; 6 C. L. J. 695; 34 I. A. 167 (P. C.).
(9) 26 B. 577; 4 Bom. L. R. 180.
(10) 8 Ind. Cas. 38; 15 C. W. N. 328.
(11) 9 Ind. Cas. 635; 38 C. 518; 15 C. W. N. 541; 13 C. L. J. 492.
(12) 11 Ind. Cas. 979; 8 A. L. J. 824.
(13) 15 Ind. Cas. 698; 17 C. L. J. 173.

RAM SINGH *v.* DAULAT SINGH.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1262 OF 1911.

March 26, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

RAM SINGH—PLAINTIFF—APPELLANT

versus

DAULAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Entries in books of Hardwar priests, their importance, if made ante litem motam—*Joint ownership of an open plot of land, remote bearing on relationship of such owners—Oral evidence of persons as to relationship having no means of knowledge.*

Entries in the books of Hardwar priests, if proved to have been made *ante litem motam*, would be of great value in establishing a pedigree-table.

The fact that an open plot of land is the joint property of a large number of persons residing in the same locality has a very remote, if any, bearing upon the relationship *inter se* of the joint owners.

Oral evidence of persons who have no means of knowing the alleged relationship and are interested in the success of the case supported by them cannot be of much value for the purpose of proving an issue upon the decision of which the title to property of a large value depends.

First appeal from the decree of the District Judge, Gujranwala, dated the 30th June 1911, dismissing the plaintiff's claim.

Mr. *Fazal-i-Hussain* and Lala *Balwant Rai*, for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant for possession of property which belonged to the deceased, Mul Singh, a *Bambi Khatri* of Wazirabad. Plaintiff claims to be a collateral of the deceased in the sixth degree, and the learned District Judge has found against him on the point of relationship, and, therefore, dismissed his suit. He has preferred an appeal to this Court, and the sole question for decision before us is whether he has succeeded in establishing his relationship with Mul Singh.

The pedigree table which the plaintiff propounded is given at length at pages 92 and 93 in the judgment of the District Judge and an abbreviated one showing the alleged relationship between him and Mul Singh is as follows:—

GULAB SINGH.

Ghota Singh,	Surat Singh,
Mehar Singh,	Rattan Singh,
Gurmukh Singh,	Budha Singh,
Sahib Singh,	Ran Singh.
Mul Singh.	

It must be noted here that in the pedigree-table filed by the plaintiff with his plaint Mehar Singh is shown as the son of Budha Singh, another son of Gulab Singh, and this is a material difference between the two pedigree-tables. It is not disputed by the respondent that Mul Singh was the descendant of Mehar Singh and that Ran Singh is descended from Rattan Singh. But the important question on which the decision of the appeal must turn is whether Rattan Singh and Mehar Singh were the grandsons of Gulab Singh. We have examined all the relevant evidence on this point and concur with the District Judge in his finding that the plaintiff has failed to establish his contention.

It may be stated at the outset that, excepting the book of the Hardwar priests which will be noticed *infra*, the case of the plaintiff depends entirely upon oral testimony. Mr. Fazl-i-Hussain has divided the witnesses for the plaintiff under the following heads:—

(1) Witnesses who give direct evidence as to the alleged relationship of the plaintiff with the deceased;

(2) witnesses who depose as to the admission by the deceased of his relationship with the plaintiff;

(3) those who state that Ran Singh has a share in a courtyard which is the joint property of all the *Bambi Khatris* living in the *Bambiwala Mohalla*; and

(4) the three priests of Hardwar.

In connection with the first set of witnesses, reliance was placed upon the evidence of Ganpat (page 50), Sant Singh (page 53), Tara Singh (page 55), and Mul Singh (page 59). We have read this evidence and considered the criticism to which it was subjected by the learned Counsel for the respondents. A perusal of their statements in cross-examinations is

sufficient to show that these witnesses had no means of knowing of the alleged relationship and that some of them are interested in the success of the plaintiff's case. Oral evidence of this character cannot be of much value for the purpose of proving an issue upon the decision of which the title to property of a large value depends. We are, therefore, not inclined to attach any importance to the evidence of these witnesses.

The vague allegations of the second batch of witnesses as to the alleged admissions by the deceased are met by the counter-evidence of the witnesses for the defendants who state that the deceased said that he had no male collaterals. Statements of this kind can be easily made and must be received with a great deal of caution. It must be shown that the witnesses who make them are of unimpeachable veracity and that their word can be relied upon. We cannot say that any one of the witnesses can be said to be a man of that type.

The evidence of the third group of witnesses is of the weakest possible character to prove the factum of relationship. In the first place we note that Bulaqi Ram, one of the plaintiff's witnesses (page 37), refutes the contention urged on behalf of the appellant that the latter's house adjoins that of the deceased Mul Singh. In the second place, it is clear that several persons who are not *Bambi Khatris* own houses in *Mohalla Bambiwala* and as such have a right in the joint open space called "courtyard" by the appellant's Counsel. The fact that an open plot of land is the joint property of a large number of persons residing in the same locality has a very remote, if any, bearing upon the relationship *inter se* of the joint owners.

The success or failure of the appellant's case depends upon the value to be attached to the entries in the book of the Hardwar priests. These entries, if proved to have been made *ante litem motam*, would be of great value. But after hearing the Counsel for the parties we are satisfied that they are not genuine and must, therefore, be rejected altogether. Three witnesses, Partab Chand, Kishen Chand and Ram Chand, who are brothers, have been examined to prove them and it appears from the statements of Kishen Chand (*vide*, page 65 lines 8-9) and Ram Chand (page 69, lines 9-10) that all the brothers relied upon one *bahi* which was produced in the first instance by Partab Chand. Now, Partab Chand in his examination-in-chief stated that the entries in the *bahi* bore the signatures of Mul Singh and this fact, if established, would have been a strong piece of evidence to prove their genuineness. But the witness in his cross-examination (*vide* page 47, lines 45 to 52) admits in the clearest possible terms that the *bahi* which he produced in Court did not contain the signatures of the deceased. He added that the said signatures were in another *bahi* which he did not produce. In the face of this statement, we are unable to accept the contention of the appellant that it is proved that the entries bear the signatures of Mul Singh and must take it that the evidence of the two remaining brothers to the contrary is incorrect.

Partab Chand also admits that new leaves have been added in the *bahi* and that the names of the persons mentioned in the pedigree-table relied upon by the plaintiff are to be found on the leaves which have been so added. These two defects are sufficient to condemn the documentary evidence and it is unnecessary for us to notice the other points mentioned by the District Judge in his judgment to show the unreliablility of the entries. We, therefore, find that the plaintiffs have entirely failed to prove that the entries were made at the time when they purport to have been made or that they were signed by Mul Singh. We consider they have no probative force with reference to the matter at issue between the parties.

Our conclusion, therefore, is that there is no reliable evidence to prove the alleged relationship and that the finding of the District Judge on this point must be upheld. We, therefore, maintain the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

FATEH ALI CHOWDHURY *v.* PARSHA NATH DAS.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1359 AND 1806 OF 1911.

March 24, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

FATEH ALI CHOWDHURY—PLAINTIFF—APPELLANT

versus

PARSHA NATH DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Dispossession of tenant by landlord or person claiming under him, effect of—Dispossession from certain lands of tenure—Suspension of rent of other lands during dispossession.

When a landlord or a person claiming under him has dispossessed a tenant from certain land of the tenure, he is not entitled to recover rent for the remaining lands in the possession of the tenant, inasmuch as it could not be said in that case that each *bigha* of land is separately assessed and separately chargeable with rent.

Harro Kumari Chowdhrani v. *Purna Chandra Sarbogya*, 28 C. 188 and *Morrison* v. *Chadwick*, (1849) 7 C. B. 266; 6 D. & L. 567; 18 L. J. C. P. 189; 13 Jur. 638; 137 Eng. Rep. 107; 78 R. R. 627, relied upon.

Kali Prasanna Khashnabish v. *Mathura Nath Sen*, 34 C. 191, distinguished.

Where an intermediate tenure has been created by the landlord between himself and his tenants, and that intermediate tenure-holder has dispossessed the tenants of a portion of their land, he cannot recover rent from them. If the landlord tries to step into the shoes of the intermediate tenure-holder and to do that which the intermediate tenure-holder is not entitled to do, he cannot do so.

Appeal from the decree of the Sub-Judge of Chittagong, dated February 23rd, 1911, reversing that of the Munsif of Cox's Bazar, dated January 3rd, 1910.

Babu *Dwarka Nath Chakravarti*, Moulvi *Nuruddin Ahmed* and Babu *Kumar Sankar Roy*, for the Appellant.

Babu *Manmotha Nath Ray* for Babu *Mohendra Nath Ray* and Babu *Sarat Kumar Mitra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent. The rent was claimed from defendants Nos. 1 and 2 on account of certain lands alleged to be held by them under *kabuliats* dated 1867 and 1874. It appears that two persons named Ram Sundar Sen and Asad Ali Khan were proprietors of an 11 annas share of a certain estate. These two persons accepted the *kabuliats* referred to from the predecessor of defendants Nos. 1 and 2. The land purported to be in the 11 annas share. The 11-annas share held by Babu Ram Sundar and Asad Ali was subsequently purchased by three persons Gopi Mohon Sen, Raj Chandra Sen and Boidya Nath Sen. Gopinath Sen who held a three-annas and odd share out of the 11-annas granted a *sudder putni* lease of his share to one Peary Mohon Ghose. Thereafter the plaintiff's father purchased the 11-annas share on the 3rd December 1903, and his nephew Karimdad on the 9th January 1904 purchased the rights of Peary Mohon Ghose under the *sudder putni* lease. At the time of the suit the 5 annas share, with which the plaintiff as will above appear had nothing to do, was held by one Badiajama. The defence was that the *kabuliats* upon which the plaintiff relied were not genuine and that the land for which rent was claimed fell within the 5-annas share of Badiajama with which the plaintiff had nothing to do. The defence further was that the defendants had been dispossessed of a large portion of the land by the plaintiff's nephew, Karimdad, acting on behalf of the plaintiff. The learned Subordinate Judge in appeal dismissed the suit on the ground that Karimdad, who it will be remembered had purchased this *sudder putni* lease of 3-annas odd share in the property, should have been joined as a plaintiff, his finding being that Karimdad's lease was still subsisting and that Karimdad had fraudulently described his title in the written statement. The plaintiff appeals.

The learned Subordinate Judge has found that certain of the lands for which rent is claimed from defendants Nos. 1 and 2 lie within the *sudder putni* held by the plaintiff's nephew Karimdad, that *sudder putni* having been granted to Karimdad's predecessor from one of the predecessors of the plaintiff, and that Karimdad had dispossessed the defendants-tenants of a portion of the land. It was a case, therefore, of dispossession of a portion of the property leased to the defendants-tenants by a person claiming under the landlord. We hold that the principle which was laid down in the case of *Harro Kumari Chowdhrani* v. *Purna Chundra Sarbogya* (1), would apply. It was there held that when a landlord has dispossessed a tenant from certain land of the tenure he is not

(1) 28 C. 188.

entitled to recover rent for the remaining lands in the possession of the tenant, inasmuch as it could not be said in that case that each *bigha* of land is separately assessed and separately chargeable with rent The rule in England includes in this principle the case of dispossession by a person claiming under a landlord. In such a case the liability of the tenant of the payment of rent is suspended during the period of such dispossession [*Morrison* v. *Chadwick* (2).] We are of opinion that this rule is applicable also to India. We have been referred to the case of *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (3) and it has been contended on behalf of the appellant that what was held in that case is contrary to the view which we have indicated. That case, however, is distinguishable. It was a case in which three leases had been granted of different parcels of land by a landlord. Two of the lessees encroached upon the parcel of the lessee to whom the intervening land had been leased; it was held that the principle of law above referred to did not apply to the circumstances of that case. The present is not, however, a case of encroachment by a neighbouring lessee. It is a case in which an intermediate tenure has been created by the landlord between himself and his tenants. That intermediate tenure-holder has dispossessed the tenants of a portion of their land. It is clear that the intermediate tenure-holder himself after having dispossessed the tenants could not recover rent from them. The landlord tries to step into the shoes of the intermediate tenure-holder and to do that which the intermediate tenure-holder is not entitled to do. Clearly he cannot do so. The case on which the appellant relies was of an entirely different character.

We are fortified in applying this principle to this case by the circumstances which clearly indicate that Karimdad who is the plaintiff's nephew has been party to a fraudulent device; although his *sudder putni* lease still subsists in respect of this land he has denied any right to the property, as the learned Subordinate Judge says, in order to serve the interest of the plaintiff who is his joint uncle and so indirectly to serve the interest of himself. He has leased out a portion of the land to other persons from whom he presumably claims rent and simultaneously stands by and enables the plaintiff to recover rent for the same land from the tenants-defendants. We have no doubt that the two, uncle and nephew, were acting in collusion. The nephew dispossessed the defendants-tenants from the land on behalf of his uncle. This is not expressly the ground upon which the Subordinate Judge dismissed the suit. But we are of opinion that on these facts the suit could not have succeeded.

The learned Subordinate Judge has not come to any express finding on the question whether the land lay within the 5-annas share claimed by the defendant respondent Badiajama. This question will be left open. It is enough to say that in the circumstances which we have above set forth the plaintiff's suit for rent could not succeed.

The appeal is dismissed with costs to the defendants-respondents Nos. 1 and 2.

Badiajama defendant No. 7 who appears as respondent is absolved from the suit and is entitled to separate costs.

This judgment will govern Second Appeal No. 1806 of 1911.

Appeals dismissed.

(2) (1849) 7 C. B. 266; 6 D. & L. 567; 18 L. J. C. P. 189; 13 Jur. 638; 137 Eng. Rep. 107; 78 R. R. 627.

(3) 34 C. 191.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 941 OF 1912.

February 19, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

VOGOTI CHENGIAH—PLAINTIFF—PETITIONER

versus

PUTTA RAMUDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (Mad. Act I of 1908*), s.* 3 *cl.* (2) (*a —Grant of waste land as* inam—*Both* warams *granted—Presumption—Suit for ejectment and for rent —Jurisdiction of Civil Court—Burden of proof on tenant to oust—Jurisdiction to show that the grant was of land revenue only.*

In a suit brought by an *inamdar* in a Civil Court to eject tenants from land which was an

VOGOTI CHENGIAH *v.* PUTTA RAMUDU.

"eternal waste" on the date of the grant, the burden of proof, in order to oust the jurisdiction of Civil Courts, is on the tenants to show that the grant was *only of land revenue*, and the *inamdar* is only an "estate-holder" within the meaning of section 3 clause (2) (*a*) of the Madras Estates Land Act. The presumption, in cases of such grant, is of a grant of both *warams*.

Tadikonda Buchi Virabhadrayya Iyyavaru v. *Sonti Venkanna*, 20 Ind. Cas. 769; (1913) M. W. N. 782; 24 M. L. J. 659, followed.

Indety China Nagadu v. *Potu Konchi Venkatasubbaya*, 8 Ind. Cas. 365; 8 M. L. T. 376; (1910) M. W. N. 639; *Arunachalla Sastry* v. *Krishna Sastri*, 9 Ind. Cas. 272; 9 M. L. T. 360, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of North Arcot, in Miscellaneous Appeal No. 42 of 1911, preferred against that of the District Munsif of Tirupati, in Original Suit No. 65 of 1909.

JUDGMENT.—In this case the question is, which Court has jurisdiction to entertain the suit, the Revenue Court or Civil Court? That again depends upon whether the estate in reference to which the suit is brought to eject and to recover the rent comes within the definition of "estate" in section 3, clause (2) (*a*) of the Estates Land Act. The District Judge on appeal has come to the conclusion that this is a case in which it has not been shown that the plaintiff is entitled to both the Melvaram and the Kudivaram rights. He refers to the evidence and says that it is established that for thirty years the defendants have been on the land and that the *inamdars* have never charged their tenants; and he says that the plaintiff's evidence is vague and meagre and he, therefore, holds that the plaintiff is the grantee of the land revenue only and the suit should be instituted in the Revenue Court. I may say at once that it has been admitted before me—and there can be no doubt upon that matter—that this estate was not granted within the last thirty years. It must also be borne in mind that in the written statement filed by the defendants in this case in paragraph 3, they distinctly state that the land has been 'eternal waste,' therefore, unless the defendants can show that at the time of the grant the plaintiff was given only the land revenue, the presumption will be as pointed out in *Tadikonda Buchi Virabhadrayya Iyyavaru* v. *Sonti Venkanna* (1), that it was a grant of both the Warams. A distinction has been drawn on the question of burden of proof between cases which deal with the question of jurisdiction and the cases which deal with the recovery of the property from the tenants. In the former class of cases, before the Civil Courts can be said to have no jurisdiction it is incumbent upon the defendant who pleads want of jurisdiction to show that the property in dispute comes within the definition of "estates" in the Estates Land Act, that is to say, the defendant will have to prove that the plaintiff has not got the right to both the Warams. In this case the evidence which has been let in will not suffice to prove that. This principle has been laid down in *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya* (2) and *Arunchalla Sastry* v. *Krishna Sastry* (3). This is in no way inconsistent with the course of decisions which hold that, ordinarily where an *inamdar* or *zemindar* seeks to eject a tenant, he ought to show that he has got the right to both the Warams and that the tenant has no right in the soil. Following the decisions in *Arunachala Sastry* v. *Krishna Sastry* (3) and *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya* (2) I must hold that the evidence let in by the defendants is not enough to establish that the plaintiff is an estate-holder as defined in section 3, clause (2) (*a*), of the Estates Land Act. It is further in evidence that, when the plaintiff brought a suit before the Revenue Court that Court came to the conclusion that the plaintiff was entitled to both the Warams and that it would not entertain the suit. The defendant did not prefer an appeal against this decision. I must set aside the decision of the District Judge and direct the case to be taken on the file and to be disposed of according to law. The case will have to go before the Munsif for trial on the merits The costs will abide the result.

Case remanded.

(1) 20 Ind. Cas. 769; 24 M. L. J. 659 at p. 662; (1913) M. W.N. 782.

(2) 8 Ind. Cas. 365; (1910) M.W. N. 639; 8 M. L. T. 376.

(3) 9 Ind. Cas. 272; 9 M. L. T. 360.

ISHWARI SINGH *v.* NARAIN DAT.

ALLAHABAD HIGH COURT.
MISCELLANEOUS CIVIL No. 556 OF 1913.
March 9, 1914.
Present:—Mr. Justice Rafique and Mr. Justice Piggott.
ISHWARI SINGH AND OTHERS—PETITIONERS
versus
NARAIN DAT AND OTHERS—OPPOSITE PARTY.

Specific Relief Act (I of 1877), s. 42, proviso—Suit for declaration—Plaintiff not in possession—Possession not claimed—Suit, whether maintainable.

A declaratory suit is barred by the proviso to section 42 of the Specific Relief Act where the plaintiff is out of possession and still does not sue for recovery of possession of the property in suit.

Ramanuja v. *Devanayka*, 8 M. 361; 9 Ind. Jur. 264, referred to.

Reference made by the Local Government under the Kumaon Regulation, as per letter No. 1240 of 1913 VIII—332, dated 8th September 1913.

Mr. *M. L. Agarwala*, for the Petitioners.

Mr. *Braj Narain Gurtu*, for the Respondents.

OPINION.—This is a reference under rule 17 of the Rules and Orders relating to the Kumaon Division, 1804, asking us to give our opinion on two points mentioned in the letter of reference. It appears that the plaintiffs-respondents in the case sued for declaration of their title in respect of certain land of which they were admittedly not in possession, and in fact it was admitted by them that they had not been in possession of the land in suit for at least seven years prior to the institution of the suit. The claim for the declaration sought was based on Mr. Beckett's Settlement. It was resisted on the ground among others that section 42 of the Specific Relief Act barred it. The Court of first instance dismissed the plaintiff's claim, both on the mertis and on the ground that it was barred by section 42 of the Specific Relief Act. On appeal by the plaintiffs the learned Deputy Commissioner accepted the appeal and decreed the claim on the ground of title, ignoring the plea taken under section 42 of the Specific Relief Act. The defendants preferred a second appeal to the Court of the Commissioner of Kumaon and the learned Commissioner upheld the judgment of the first Appellate Court without any reference to the objection taken by the defendants-appellants under the Specific Relief Act. On an application by the defendants-appellants to the Local Government the present reference has been made to us for opinion on three questions, *viz.*, (1) whether the plea of the defendants that the suit is barred by section 42 of the Specific Relief Act is a valid one, (2) whether the first and second Appellate Courts were justified in ignoring that plea, and (3) what order should be passed as to costs.

On reference to the pleadings in the case there is no doubt that the objection under section 42 was taken by the defendants-respondents throughout. There is an admission by the plaintiffs, apart from any other evidence on the record, that the plaintiffs were out of possession for more than seven years prior to the institution of the suit. They, therefore, could claim a further relief than that of a mere declaration. It is contended on their behalf that the land in suit was at the time of the institution of the suit lying waste and neither party was in possession of it and, therefore, the plaintiffs need not have asked for possession. The only thing that stood in their way was an entry in the Settlement of 1906, by which owing to some mistake the names of the defendants-respondents had been entered in respect of the land in suit. The learned Counsel in the course of his argument referred to the case of *Ramanuja* v. *Devanayka* (1) in support of his contention. We do not think that the Madras case helps the plaintiffs at all. It is laid down there that under section 42 of the Specific Relief Act the Court should not make a declaration of title when the plaintiffs are able to seek further relief than a mere declaration and omit to do so. But it is said that if the plaintiffs had been in possession of the entire property and the defendants denied their title and required the plaintiffs to deliver possession to them, then the plaintiffs may claim a declaration of right to hold the property. In the present case the plaintiffs were admittedly out of possession and the defendants are obviously keeping them out of it. The plaintiffs, therefore, could have sued and ought to have sued for recovery of possession of the land in suit.

Our answer to the first question, therefore, is in the affirmative and to the second in the negative. As to costs we see no adequate reason why they should not follow the event.

Reference answered accordingly.

(1) 8 M. 361; 9 Ind. Jur. 264.

ANNAPURNA DASYA v. NALINI MOHAN DAS.

CALCUTTA HIGH COURT.

MISCELLANEOUS APPEAL No. 328 OF 1913.

April 8, 1914.

Present:—Mr. Justice Woodroffe and Justice Sir Herbert Carnduff, KT.,

ANNAPURNA DASYA—PETITIONER—APPELLANT

versus

NALINI MOHAN DAS AND ANOTHER—OBJECTORS—RESPONDENTS.

Succession Certificate—Certificate for portion of debt, if may be granted—Appeal—Final order—Order declining to grant application.

A person may apply for a certificate under the Succession Certificate Act to enable him to recover a portion of a debt due to the deceased.

The *principle* in *Mohamed Abdul Hassan* v. *Musammat Sharifan*, 12 Ind. Cas. 593; 16 C. W. N. 231; 15 C. L. J. 384, applied.

Muhammad Ali Khan v. *Pattan Bibi*, 19 A. 129; A. W. N. (1896) 198; *Bismilla Begam* v. *Tawassul Husain* 5 Ind. Cas. 424; 7 A. L. J. 255; 32 A. 335 and *Ghafoor Khan* v. *Kalandari Begum*, 9 Ind. Cas. 127; 8 A. L. J. 79; 33 A. 327, dissented from.

Bibee Boodhun v. *Jan Khan*, 13 W. R. 265, referred to.

In an application, under the Succession Certificate Act, the District Judge declined to make the grant prayed for but ordered that if another application was made in a different form he would consider it:

Held, that the order was a final order and appealable.

Appeal from the order of the District Judge of Dacca, dated June 23rd, 1913.

Mr. *S. P. Sinha*, Dr. *Rash Behary Ghosh* and Babu *Upendra Lal Roy*, for the Appellant.

Mr. *B. C. Mitra* and Babu *Bipin Chandra Mallik*, Mr. *B. Chakravarti* and Babu *Umesh Chandra Das*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—This appeal arises in connection with an application which has been made for a Succession Certificate.

The deceased Sanatan Das died leaving Government Promissory Notes and Bank of Bengal shares on which Rs. 4,000 odd were due for interest at the time of his death, and since his death over Rs. 75,000 as further interest has fallen due. The application is by his widow for a certificate which will enable her to realise interest and dividends due up to the date of her husband's death, but not the interest and dividends falling due after his death or the principal. The object of the application apparently is that the applicant may thereby be exempted from finding a large security which she would have to find if a certificate were applied for in order to recover the principal, interest and dividends accruing both before and after the death of her husband.

The learned Judge was of opinion that the certificate, as asked for, could not be granted. He says: "The law intends that in fit cases security should be taken to protect such claims. The present peculiar limitation is intended to evade the giving of any such security. I am not prepared to make the limited grant prayed for. In the absence of any valid objection by the objector whom I have not yet heard, I am prepared to make a grant in the ordinary way of power to realise dividends and interest, not limited to a particular date, but generally, such as fall due on proper security being given. I find nothing to indicate that it was intended that power should be given to realise dividends for a very short period only; the provisions are for granting power to realise dividends. And practically apart from question of law there is no good reason for so limiting a grant. I decline to make the limited grant prayed for, in all the circumstances. Subject to what I may hear from the other side, I will make a grant in the ordinary way, on proper security being given, and not one to enable the applicant to draw Rs 4,000 odd with security, and Rs. 75,000 odd at present, and more in the future without security".

A preliminary objection has been taken by the respondent that no appeal lies on the ground that the order which I have just read was not a final order from which an appeal would lie. In my opinion, however, there is no force in this contention. There was a final order, namely, that portion of the order in which the Judge says that he declines to make the grant prayed for. It is true that he went further and said that he would be prepared to make another grant different from that which he had refused, but that was an expression of opinion as to what he was prepared to do under different circumstances and did not affect the finality of the order which was passed. He refused

to grant the application prayed for merely adding as a rider, which in effect was unnecessary, that if another application was made in a different form, he would consider it. In my opinion, therefore, the preliminary objection fails and an appeal lies.

The question we have to consider is as to the merits of this application. There is a ground which has been taken in appeal that the learned District Judge should have held that Act VII of 1889 had no application to the interest and dividends falling due after the death of the appellant's husband, it being contended in such grounds that such interest and dividends were a debt not due to the deceased but due to his widow, the present applicant, and that, therefore, the petitioner was not bound to include the interest and dividends in the present application. On the other hand, it has been contended that the principal sum was a debt due to the deceased even though it may have been payable after his death and that the rule governing the grant of a certificate to recover such principal applies not only in respect of the interest earned by such principal before the death of the deceased but also after his death. It is, however, unnecessary in the present case to consider this point because I think that the appeal may be dealt with upon the other grounds to which I am now about to refer.

The question which we have to decide is whether a certificate can be granted for the recovery of a part of a debt. It appears to be well established that a separate certificate may be granted in respect of separate debts and that there is nothing in law which compels the applicant for such a certificate to apply for a certificate in respect of all the debts due to a deceased. But the question which is now before us is this, whether assuming that to be so, we can go further and hold that as regards one single debt, a certificate can or cannot be granted for the purpose of enabling the applicant to recover a portion of that debt. The word 'debt' is a comprehensive term which, I think, should receive a liberal construction. The object of the act is to protect the debtors of a deceased person, but there is nothing in law which prevents a debtor from making payment of his debt without the production of a certificate if he so chooses. Now the first point from which the matter may be looked at is that of authority, it being contended by both sides in this appeal that the case-law supports the respective contentions which they have placed before us and there are decisions which may be cited in support of either of these contentions.

The earliest decision to which we have been referred is *Musammat Bibi Boodhun* v. *Jan Khan* (1). In that case the *Musammat* appealed against an order granting Jan Ali a certificate to collect five sixths of the debts due to the estate of Zahur Ali and the learned Judges say: "Now, we observe at the outset of the case that this order is irregular. Act XXVII of 1860, that is the old Succession Certificate Act, does not contemplate a division of the certificate or a power to collect fractional shares of debts". This passage favours the respondent's contention and indeed goes the whole way which he desires us to go; but the statement there made was a mere expression of opinion. It does not appear to have been the subject of discussion or argument and was unnecessary, seeing that the suit in which it was given was not heard but was compromised.

In the case of *Muhammad Ali Khan* v. *Pattan Bibi* (2) it was held by Sir John Edge, C. J., and Burkitt, J., that a certificate for collection of debts under Act VII of 1889 may be given for the collection of any one or more separate debts of the deceased, but not for the collection of part only of a debt. The ground upon which the learned Judges appear to have based their decision was that a contrary view might lead to a multiplicity of suits and the harassment of debtors.

This case was followed by that of *Bismilla Begam* v. *Tawassul Husain* (3) in which it was held that no certificate could be granted to one of the heirs of a Muhammadan lady, who had died leaving a dower-debt unrealised, for collection merely of a part of the dower-debt of the deceased. It was also followed by the decision in *Ghafoor Khan* v. *Kalandari Begam* (4) in which it was held

(1) 13 W. R. 265.
(2) 19 A. 129; A. W. N. (1896) 198.
(3) 5 Ind. Cas. 424; 32 A. 335; 7 A. L. J. 255.
(4) 9 Ind. Cas. 127; 33 A. 327; 8 A. L. J. 79.

that no certificate could be granted to one of the heirs of a Muhammadan lady who had died leaving her dower-debt unrealised for collection merely of a part of the dower-debt of the deceased. There again the decision was based on the ground that a debtor ought not to be harassed more than once for one debt and a multiplicity of suits in respect of one cause of action should be discouraged and on the ground that the word 'debt' must be taken to mean the whole of the debt due to the deceased and not a portion or share of such debt. It was considered that the latter view was opposed to the scheme of the Act which had been enacted to afford protection to debtors and had nothing to do with the convenience of the applicant or his right to, or share in, the debt.

Previous, however, to this, there appears to have been a conflict even in the Allahabad High Court on this point; for, in the case of *Akbar Khan* v. *Bilkisan Begam* (5) Chamier, J., doubted the correctness of the decision in *Muhammad Ali Khan* v. *Pattan Bibi* (2), and was of opinion that the word debts in section 6 (*f*) of the Succession Certificate Act means debts due *i. e*, alleged to be due from debtors to the person applying for the certificate.

Further *in the matter of the petition of Ghansham Das* (6), Blair, J., gave a decision which directly supports the contention of the appellant before us holding that there was nothing in the Succession Certificate Act of 1889 to preclude a Judge from granting a certificate for partial collection of the debts of a deceased person, security being furnished by the applicant of proportionate amount. He, therefore, says: "There seems to be no practical objection to the issue of a certificate for partial collection, inasmuch as the Act itself contemplates the addition to a certificate of debts to which it did not originally apply".

Further, the latest case, and it is one in our Court, supports the view which we have been asked to accept by the appellant. That case is *Mohamed Abdul Hassan* v. *Musammat Sharifan* (7), and was decided by Mookerjee and Carnduff, JJ. There the Court dissented from the decision in *Ghafoor Khan* v. *Kalandari Begam* (4), and held that section 4 of the Succession Certificate Act does not require that the certificate should cover the whole of the debt, if the heirs do not seek to realise the whole. This was a case in which one of several heirs of a deceased Muhammadan lady sued her husband for a portion of the share of the deferred dower due by the defendant to the deceased, relinquishing the balance. It was held that in respect of the deferred dower, each of the heirs of the deceased had a distinct right enforceable by himself though all might jointly sue, and that it was open to each to relinquish a portion of the claim. It was also held that an application by the plaintiff for a Succession Certificate in respect of the amount claimed by her in the suit was properly granted. No doubt, the circumstances of that case were not exactly the same as those before us; but the principle upon which the decision proceeds seems applicable to the present circumstances, for the debt due to the deceased was one debt and yet it was held that a partial certificate might be granted to one of several of the heirs to recover the portion of that debt which he claimed and if this may be done, I do not see in principle why a person may not as in this case apply for a certificate to enable him to recover a portion of a debt due to the deceased. The matter appears to be one which rather affects the question of revenue than anything else. But there does not appear to me to be, as Mr. Justice Blair points out, any practical objection to the grant of such a certificate which may be, as in the present case, a distinct convenience to the applicant.

As regards the objection which has been taken that such a procedure may lead to a multiplicity of suits, the answer appears to me to be two-fold. In the first place, if the debt be due and the debtor be honest and solvent, he will pay on the production of the certificate, for the grantee of the certificate can give him a valid discharge to the extent indicated by the instrument. There will then be no necessity for a suit and the question of multiplicity, upon which the learned Judges of the Allahabad High Court proceed, will not arise at all. Nextly, if there is such a suit it by no means follows that, because a certificate may be given to recover a fractional

(5) A. W. N. 125 (1901).
(6) (1893) A. W. N. 84.
(7) 12 Ind. Cas. 593; 16 C. W. N. 231; 15 C. L. J. 384.

share of a debt, the principle of law which prohibits multiplicity of suits is in any way affected. We must distinguish between two separate things, one is the grant of a certificate and the other is the institution of the suit. We are not here concerned with the frame of a suit but whether a certificate should be granted, and it may well be that though a certificate may be granted to recover a fractional share of a debt, yet if the person to whom the certificate was granted were to sue for a portion of a debt which he might have sued for in a previous suit, his claim would be barred under the provisions of the Civil Procedure Code.

I am of opinion, therefore, that both on the ground of principle and of the authorities to which I have referred and which support the contention of the appellant, this appeal should succeed. I, therefore, would reverse the order of the District Judge rejecting the application for a certificate in the terms prayed for by the appellant and remand the case to him for a re-hearing.

The respondents will pay the appellant's costs of this appeal which we assess at ten gold *mohurs*.

CARNDUFF, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 225 OF 1913.

April 6, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

MUNNA LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUNNU LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), *Sch. I, Art.* 134—*Foreclosure decree*—Puisne *mortgagee not party—Suit for sale by* pusine *mortgagee—Transferee from mortgagee—Transferee of property cannot plead Article* 134.

A prior conditional mortgagee brought a suit on the basis of his mortgage without impleading the puisne mortgagee as a party to the suit and after foreclosing the property sold it to the defendant. The puisne mortgagee then brought the suit for sale of the property on the basis of his mortgage:

Held, that the defendant could not plead Article 134 of the Limitation Act, as his position was not of a transferee from a mortgagee but that of a transferee of property which was sold as free of incumbrances, although it was subject to a mortgage charge.

Second appeal from the decision of the District Judge of Cawnpore, dated 18th November 1912.

Dr. *S. C. Banerji*, for the Appellants.

JUDGMENT.—This was a suit for sale upon a mortgage. It is now being contested by three persons who were defendants Nos. 9, 10 and 11 in the original array of parties. In order to make clear the simple point raised by this appeal it is sufficient to state the following facts: There was upon a part of the property now in suit a mortgage by conditional sale anterior in date to that of the plaintiffs. The prior mortgagee under this mortgage brought a suit for foreclosure, without impleading the plaintiffs, the puisne mortgagees. He obtained a decree for foreclosure and thus acquired the right, title and interest of the original mortgagor in the property covered by the mortgage by conditional sale. He then transferred the property by an out-and-out sale to these defendants Nos. 9, 10 and 11, who are now the appellants before us. The mortgage-deed on which the present suit is brought is one of July the 19th, 1890, and the plaintiffs in order to maintain the suit are compelled to avail themselves of the special period of limitition allowed by section 31 of the Indian Limitation Act IX of 1908. The case for the appellants now before us is that they are entitled to hold up the original prior mortgage by conditional sale as a shield against the plaintiffs' claim, so that the plaintiffs cannot bring the property to sale without first reducing this prior mortgage. They further contend that, as transferees from the original prior mortgagee, they are entitled to plead limitation under Article 134 of the Schedule I to the Limitation Act, and that consequently the present suit should be dismissed as time-barred in so far as it affects that partition of the property in suit which was covered by the prior mortgage. In our opinion Article 134 of Schedule I to the Indian Limitation Act has no application to the present suit. In the first place the suit is one for sale and is brought under the special provisions of section 31 of Act IX of 1908. In the second place the position of these defendants appellants is not that of transferees from a mortgagee in the sense of Article 134, aforesaid. At the time of the transfer in their favour the property mort-

gaged had been foreclosed and their transferor had acquired all the rights of original mortgagor in the property which he purported to transfer. He was, therefore, what he represented himself as being, the owner of the property. We fail to see that the case of these defendants differs in any essential respect from that of transferees of property which has been sold as free of incumbrances, when, as a matter of fact, it is subject to a mortgage charge. For these reasons we hold that this appeal fails and it is hereby dismissed. It has been heard *ex parte* so we make no order as to costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 599 OF 1911.

March 2, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

CHAMARTI SURYAPRAKASARAYADU —PLAINTIFF—APPELLANT

versus

ARARDHI LAKSHMINARASIMHACHARYULU AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 22—Specific performance of contract to sell—Failure of vendor to perform his part—Laches or delay in instituting suit—No ground for refusing specific performance—Discretion.

Where under the terms of an agreement to sell, the vendor is bound to execute and register a proper conveyance before he can call upon the vendee to pay the balance of the purchase-money, he commits a breach of contract if he demands such payment without executing a conveyance.

As mere laches or delay short of the period of limitation is not always evidence of waiver or abandonment of claim; even where it is up to the hilt of the limitation period, that is no ground for refusing specific performance.

Nawab Begam v. *A. H. Creet*, 27 A. 678; A. W. N. (1905) 147; 2 A. L. J 405, distinguished.

AthikarathNanu Menon v. *Erathinikat Komu Nair*, 21 M. 42, *Kissen Gopal Sadaney Co.* v. *Kally Prosonno Sett*, 33 C. 633; *Lindsay Petroleum* v. *Hurd*, (1873) L. R. 5 P. C. 221; 22 W. R. 492, *Peer Mohammad* v. *Mahomed Ebrahim*, 29 B. 234; 7 Bom. L.R. 200, followed.

A decree for specific performance of an agreement to sell should direct the person in whom the property vests, on the date of the decree, to execute a conveyance.

Second appeal against the decree of the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 38 of 1910, preferred against that of the Principal District Munsif of Tanuku, in Original Suit No. 32 of 1908.

Mr. *V. Ramesam*, for the Appellant.

Mr. *Patanjali Sastry*, for Mr. *P. Narayanamurthy*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—Plaintiff is the appellant in this second appeal. He brought the suit for specific performance of the agreement, dated 4th November 1904, Exhibit A, executed in his favour by the 1st defendant.

Under Exhibit A, the first defendant agreed to execute a sale-deed for Rs. 400 in favour of the plaintiff within a month and to receive Rs. 360 out of the Rs. 400 (purchase-money) after so executing the sale-deed, the remaining Rs. 40 having been received by the 1st defendant in advance.

The suit was brought on 2nd December 1907, just within three years from the expiry of the one month's time fixed by the agreement for the execution of the sale-deed by the 1st defendant. The learned District Munsif gave a decree in plaintiff's favour. The learned Subordinate Judge, on appeal, reversed the Munsif's decision and dismissed the plaintiff's suit with costs on the following findings and reasonings:

(*a*) Though the plaintiff made more than one statement that he was always ready to pay the balance of Rs. 360 as soon as the 1st defendant executed the sale-deed, the probabilities are that the plaintiff never had Rs. 360 ready in his hands to make such a payment.

(*b*) As the plaintiff delayed for nearly three years in bringing this suit for specific performance, he has been guilty of laches and hence the Court in its discretion ought to refuse the relief of specific performance prayed for by the plaintiff.

(*c*) Not only has the plaintiff been guilty of laches but the said negligence of the plaintiff itself amounts to a waiver or abandonment of his right under the contract on the part of the plaintiff and hence also the plaintiff's suit ought to be dismissed.

I think that the Subordinate Judge's finding of fact that the plaintiff had not got Rs. 360 ready with him to be paid whenever the 1st defendant was ready with a properly executed document is based upon no legal evidence. The Subordinate Judge may be entitled to find on the evidence on the record that the plaintiff has not proved that he would have been ready with the money if the sale-deed had been executed and tendered to him, but he was not entitled to go further and say that the plaintiff was not ready with the money, as there is no evidence on the record to show that the plaintiff had not enough money with him on any of the occasions when the 1st defendant or the prior mortgagee, P. W. No. 4, applied to the plaintiff for payment of money to the plaintiff's 4th witness. The plaintiff cannot be said to have broken his part of the contract evidenced by Exhibit A until the first defendant had performed 1st defendant's own part of the contract, namely, the execution of a proper sale-deed. Then as regards the alleged laches on the part of the plaintiff, he cannot be legally charged with any laches in the performance of his part of the contract till the 1st defendant had performed his own part of the contract. As the 1st defendant did not execute the sale deed within the one month's period which he himself fixed in Exhibit A for the execution by him of the sale-deed and had not executed it even till the date of the suit, there could have been no laches on the plaintiff's part in the performance of his part of the contract

As regards the delay in bringing this suit for specific performance, the learned Subordinate Judge relies upon the case of *Nawab Begum* v. *A. H. Creet* (1) for the position that such delay in bringing the suit would itself justify the Court in the exercise of its discretion to refuse relief in a suit for specific performance. In that case, however, the defendant *had definitely refused* to perform his part of the contract nearly three years before the suit was brought. In this case, the 1st defendant is not proved to have definitely refused to execute the sale-deed to plaintiff. In his registered notice, Exhibit C, he merely asked the plaintiff to give effect to all the terms of the agreement, Exhibit A, within a week from the date of that notice (which was dated 6th January 1905). It is only if the plaintiff did not give effect to all the terms of Exhibit A within one week that the first defendant said in that notice that he will treat the agreement as at an end. The plaintiff replied to this notice by Exhibit C and he pointed out in that reply that he was always ready to perform all the terms of the agreement, Exhibit A, but that the 1st defendant had first to perform his part of the agreement, namely, the execution of the sale-deed and that, then, the plaintiff was ready and willing to perform his own part of the contract. As I said, the 1st defendant merely threatened to break the agreement if the plaintiff did not conform to the terms of the agreement. When the plaintiff sent his reply that he was ready to perform his part of the agreement, it cannot be said that under the terms of the notice, Exhibit C, the 1st defendant must be deemed to have definitely broken the contract as soon as he received the plaintiff's reply. Further, having regard to the cases in *Athikarath Nanu Menon* v. *Erothanikat Komu Nayar* (2), *Kissen Gopal Sadaney* v. *Kally Prosonno Sett* (3), I am not satisfied that the decision in *Nawab Begum* v. *A. H. Creet* (1) has not been expressed in rather too wide and general a language. The decision in that particular case might be justified on the facts of that case, as the defendant in that case seems to have spent a considerable sum of money in improving the property after he had definitely broken the contract which breach had taken place nearly three years before the suit, and the refusal of specific performance might be justified under clause 2 of section 22 of the Specific Relief Act. The plaintiff brought his suit within two months of the sale made to the second defendant of the property contracted to be sold to the plaintiff. I am, therefore, of opinion that there has been no such laches on the part of the plaintiff either in performing his part of the contract or in bringing the suit which could justify the Court in the exercise of its judicial discretion in dismissing the suit for specific performance.

Then as regards the finding of the Sub-

(1) 27 A. 678; A. W. N. (1905) 147; 2 A. L. J. 405.

(2) 21 M. 42.

(3) 33 C. 633.

ordinate Judge that the laches itself amounts to a waiver or abandonment, I think it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on the plaintiff's part. In this case there are no such circumstances proved. In the result, I would reverse the decision of the Subordinate Judge and restore that of the Munsif. But I would make a slight modification in the decree of the District Munsif (as it is not in strict accordance with law). The object of adding the 2nd defendant's subsequent purchaser with notice of the plaintiff's contract as a party was to enforce specific performance of the plaintiff's contract as against him, he having become the legal owner of the property, since the date of the contract to sell that property made with the plaintiff. The conveyance in favour of the plaintiff as regards the plaint land ought, therefore, to be executed by him in order to convey the title to the plaintiff, and the Munsif's decree which directs defendants Nos 1, 3 and 4 to execute the sale-deed to plaintiff will be modified by substituting the direction that the 2nd defendant do execute the conveyance in the plaintiff's favour, within one month from the re-opening of the Munsif's Court after the summer vacation. The Munsif's decree will stand in other respects. The defendants must pay the costs of the plaintiff in all Courts.

SESHAGIRI AIYAR, J.—I agree with my learned brother's conclusion that the plaintiff was not at fault in performing his part of the agreement, and that the defendant ought to have executed the sale-deed before claiming the money. There is no allegation or proof in this case that the defendant had executed the document and called upon the plaintiff to pay the money nor any suggestion that the defendant was willing to execute the document and that the plaintiff did not perform his part of the contract. Therefore, I cannot accept the finding of the Subordinate Judge given under a misapprehension regarding the nature of the contract between the parties. The Subordinate Judge also comes to the conclusion that the delay in bringing the suit is fatal to specific performance being granted. Ever since the decision of *Lindsay Petroleum Co.* v. *Hurd* (4) it has been settled law that mere laches on the part of the person in bringing a suit for specific performance will be no defence in law, and that has been followed in this Presidency in *Athikarath Nanu Menon* v. *Erathanikath Komu Nayar* (2). *Kissen Gopal Sadaney* v. *Kally Prosonno Sett* (3) accepts that principle. The same has been affirmed in *Peer Mahomed Dewji* v. *Mahomed Ebrahim* (5).

There is nothing in the Specific Relief Act which says that laches in bringing a suit will by itself be a ground for refusing specific performance. The only section dealing with the discretion of the Court is section 22 and under that section the discretion must be judicially exercised. A few illustrations are given which are intended to guide the Courts in either granting or refusing relief. Laches is not one of the grounds mentioned as disentitling a party to a contract to specific performance. Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, I think the Legislature has not intended that mere laches should be one of the grounds for refusing specific performance. On these grounds I concur with my learned brother in his conclusion and in the decree which he has proposed.

Appeal allowed.

(4) (1873) L. R. 5 P. C. 221; 22 W. R. 492.
(5) 29 B. 234; 7 Bom. L. R. 200.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1597 OF 1911.
April 2, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

JAJNESWAR SAHA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SATISH CHANDRA SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-owner—Possession—Presumption that co-owner's possession is on behalf of all owners—Possession by biggest adult share-holder, character of—Trustee for minor co-owners—Reason for rule.

In a case in which the question arises as to whether the possession of one co-owner has been adverse to that of another, the fundamental rule is that the entry of possession of land under the common title

of one co-owner will not be presumed to be adverse to the others, but would presumably be held to be for the benefit of all.

Jogendra Nath Rai v. *Baldeb Das*, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735, relied upon.

The reason for this rule is that the possession of one co-owner is in itself rightful and does not imply hostility as would be the possession of a mere stranger. The law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful the commencement and continuance of which is not proved to be wrongful and this is upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears.

There is a presumption that the biggest adult share-holder of a property is the trustee for the others, if, as a fact, he holds entire possession of the property during their minority.

Appeal from the decree of the District Judge of Pabna and Bogra, dated April 15th 1911, reversing that of the Second Munsif of Patna and Bogra, dated September 30th, 1910.

Babu *Mohendra Nath Roy* and *Dr. Naresh Chandra Sen Gupta*, for the Appellants.

Babus *Dwarka Nath Chakravarti*, *Rajendra Chandra Guha* and *Purna Chandra Roy* for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for *khas* possession on declaration of the plaintiffs' title to three plots of land described in the plaint. It appears that the same property originally belonged to one Nemai Chandra Saha 8-annas share and 4-annas share to Subal Chandra Saha, his first cousin, and 4-annas to Prahlad Chandra Saha, a distant relation, who served as a family servant. As far as Nemai and Subal are concerned, we are not in this case concerned with Prahlad in any way—it is admitted that one the plots in suit, namely, plot 3 did at one time form part of the joint property of Nemai and Subal. The plaintiff came to Court on the allegation that the garden in claim that is all the three plots and another plot of *khol* dwelling house was recorded as *kaimi maurusi jote* from the time of Nemai and Subal at a fixed annual rent. This was clearly traversed by the defendants in their written statement, and we find that in neither of the judgments in the lower Court has this point been dealt with in any way, and that the question whether all or any of these plots originally formed part of a joint family property has been practically ignored. If these three plots or any of them did originally form a part of the joint property in the hands of Nemai and his cousin Subal, it is clear that no devolution by succession in the family, whether through female or otherwise, can terminate the joint possession. The doctrine appears to be too obvious to require any authority. It has been held in a long series of decisions of which we need only refer to that in *Jogendra Nath Rai* v. *Baladeo Das* (1) that in a case in which the question arises as to whether the possession of one co-owner has been adverse to that of another, the fundamental rule is that the entry of possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but would presumably be held to be for the benefit of all. If it be a fact, as was held and has not been traversed in either of the judgments of the lower Courts, that the original entry upon this property was joint then it does not appear from the judgment of the Court below that anything has since occurred to oust the plaintiff from his title.

The Munsif found that the defendant No. 1 who was the biggest share-holder of the properties had been acting as trustee for the plaintiff and the other defendants during the plaintiffs' minority. The learned Judge says that "there is no reliable evidence showing that the defendant held the plaintiff's share in trust for the said plaintiff. The depositions of the witnesses examined by the parties in this case were read over to me, and having carefully considered the same I am of opinion that the plaintiffs have failed to prove that the defendants held their share of the disputed properties in trust for them and that the plaintiffs have further failed to prove that they were in possession of the said share within 12 years of the institution of the suit". But it is not a question of the deposition of witnesses or of any onus upon the plaintiff if he once establishes that the origin of the property was joint. The obvious reason, their Lordships of the Judicial Committee say, for this rule is that the possession of one co-owner is in itself rightful and does not imply hostility as would be the possession of a mere stranger. The law will never construe a possession tortious unless from necessity. On the other hand it will consider every possession lawful the commence-

(1) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.

ment and continuance of which is not proved to be wrongful, and this is upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears. There is, therefore, a presumption that the defendant No. 1 being the biggest adult share-holder of the property was the trustee for the others, if as a fact he held entire possession of the property during their minority.

The case has been extremely inadequately dealt with in both the Courts below. The defendants sought to deal with plots 1 and 2 on a totally different footing to plot 3 and they undertook to show that plots 1 and 2 never constituted any part of the joint property. This is dealt with by the learned Judge on the footing that the onus is on the plaintiff to show that they did form part of the joint property, and the defendant's account books are the evidence upon which the Munsif partly relied in finding that the disputed gardens were the *ijmali* properties of the plaintiffs and the defendants. The Judge found that the defendants' account books do not go clearly to show that the disputed gardens were the *ijmali* properties of the plaintiffs and the defendants. But he says nothing about the oral evidence to which the Munsif refers on this point, nor, as we have already indicated, about the important document, namely, the record of the plots as *kaimi maurusi* for a long period from the time of the two co-sharers Nemai and Subal. No issue was raised to enable the Munsif to deal effectively with the defendant's allegation that the rights in plots 1 and 2 were wholly distinct from the right in plot 3. The sixth issue was, have the plaintiffs any right, title and interest in the disputed land, and if so, what is their share?

The question of limitation appears to have been decided upon the date of the release executed by Drabamoyee, the widow of Subal's son Madhub, in favour of Pulin and the plaintiff who are the sons of the two sisters of Madhub. But it is conceded that whether this deed of release had been executed or not these two persons would have been reversioners. So it has been argued with much force before us that the deed of release is immaterial. It is also said that Pulin's share whatever it was passed into the hands of the plaintiffs in some way but there is no finding how it did so.

It, therefore, seems to us that the whole case is still open to decision and must be remanded for re-trial on the issues already framed by the Munsif and on the further issue whether the plaintiffs have any right, title and interest in plots 1 and 2 as distinct from plot 3, and whether there is anything to show that the origin of the holding in plots 1 and 2 was in any way different from that in plot 3 and whether the whole of the three plots or any of them were originally *kaimi maurusi jote* jointly held by Nemai and Subal. If this issue is carefully decided upon the evidence we think that justice can be done between the parties. As the case at present stands we are unable to form any idea as to what the rights of the parties are either in fact or in law. It is, therefore, clear that the case must go back.

The judgment and decree of the lower Appellate Court are set aside and the case will be remanded to that Court for decision according to the directions in this judgment.

The costs will abide the result.

Decree set aside; Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 889 OF 1913.

February 9, 1914.

Present:—Mr. Justice Spencer.

SAMBASIVA AIYAR AND ANOTHER—PETITIONERS

versus

GANAPATHY AIYAR AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Interlocutory order—Appeal allowed—Revision—Partnership suit—Amendment.

Where the legality of an interlocutory order can be questioned by way of appeal, it is not a fit case for interference by the High Court under section 115 of the Code of Civil Procedure unless there has been an improper exercise of jurisdiction by the lower Court or an improper refusal to exercise the jurisdiction vested in it.

Somasundaram Chettiar v. *Manick Vasaka Desika Gnana Sammanda Pandara Sannaidi*, 31 M. 62; 3 M. L. T. 246, *Mankolam Vasudevan Nambudri* v. *Manakolam Sankaran Nambudri*, 12 Ind. Cas. 719; 22 M. L. J. 60; (1912) M. W. N. 546; 10 M. L. T. 451; *Sree Krishna Dass* v. *Chandook Chand*, 4 Ind. Cas. 509, 32 M. 334; 5 M. L. T. 125; *Kamal Kutty* v. *Udayavarma Raja Valia Rajah of Chirakal*, 17 Ind. Cas. 65; 23 M. L. J. 499; 12

M. L. T. 439; 13 Cr. L. J. 753; 36 M. 275; (1912) M. W. N. 1154; *Pennumarthy Vasantharayadu* v. *Reddy Subbanna*, 22 Ind. Cas. 39; 14 M. L. T. 588, (1914) M. W. N. 98, followed.

In a partnership suit a Court should take into account all the transactions between the partners to avoid multiplication of proceedings and all such amendments should be allowed as may be necessary to determine the real questions in controversy.

Savugan Chetty v. *Krishna Aiyangar*, 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139, followed.

Petition, under section 115 of Act V of 1908 and section 15 of the Charter Act, praying the High Court to revise the order of the Subordinate Judge of Kumbakonam, in I. A. No. 809 of 1913 (Original Suit No. 47 of 1913), dated 25th October 1913.

Mr. *C. V. Ananthakrishna Aiyar* (with him Mr. *A. S. Venku Aiyar*), for the Petitioners.

Mr. *T. Rangachariar* (with him Mr. *T. Arumanatham Pillai*), for the Respondents.

JUDGMENT.—I cannot agree with the Subordinate Judge that the effect of allowing the amendment would have been to settle the affairs of two mills instead of one and that the amendment prayed for was substantially such as to extend the scope of the suit.

Paragraph 17 (*e*) of the plaint contained a prayer for taking the accounts of the Nammeli Mill as well as the accounts of the Mannargudi Mill and the taking of accounts is a form of relief.

Therefore the words in paragraph 16 of the plaint saying that no relief was prayed for in respect of the Nammeli Mill were clearly erroneous and contradictory to what appeared later. Probably the explanation for this statement lies in the fact that, as stated elsewhere in the plaint, the Nammeli business had ended in a loss up to the date when the plaintiffs parted with their rights in it to the 2nd defendant. They were, however, liable for the debts of this business and they claimed a right to outstandings prior to November 25th; and it was right and proper in a partnership suit that a Court should take into account all the transactions between the partners with a view to avoid multiplication of proceedings and to finally determine all the matters regarding which the partners were at issue. It is also just that all such amendments should be made as may be necessary for the purpose of determining the real questions in controversy between the parties. [*Savugan Chetty* v. *Krishna Aiyangar* (1)].

Recently, however, this Court has decided not to interfere under section 115 of the Civil Procedure Code in revision with orders, however incorrect, refusing to allow amendment of plaints. [*Penumarthi Vasantarayadu* v. *Reddy Subbamma* (2)] and although the learned Judge who admitted this petition permitted the party to add section 15 of the Charter Act, under which this Court has exercised powers in respect of interlocutory orders passed by Subordinate Courts in many instances, the principle on which interference has been justified in such cases has always been that there has been an improper exercise of jurisdiction by the Subordinate Court or an improper refusal to exercise the jurisdiction vested in it. See *Somasundaram Chettiar* v. *Manick Vasaka Desika Gnana Sammanda Pandara Sannaidi* (3) *Mankolam Vasudevan Nambudri* v. *Manakolam Sankaran Nambudri* (4) *Sree Krishna Dass* v. *Chandook Chand* (5) and *Kamal Kutty* v. *Udayavarma Raja Valia Rajah of Chirakal* (6). In my opinion no question of jurisdiction arises in this case and the aggrieved party has another remedy by way of appeal against the final decree that may be passed in the suit. I must, therefore, decline to interfere and I dismiss the petition but under the circumstances without costs.

Petiiton dismissed.

(1) 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

(2) 22 Ind. Cas. 39; (1914) M. W. N. 98; 14 M. L. T. 588.

(3) 31 M. 60; 3 M. L. T. 246.

(4) 12 Ind. Cas. 719; 10 M. L. T. 451; 22 M. L. J. 60; (1912) M. W. N. 546.

(5) 4 Ind. Cas. 509; 32 M. 334; 5 M. L. T. 125.

(6) 17 Ind. Cas. 65; 23 M. L. J. 499; 12 M.L.T. 439; 13 Cr. L. J. 753; 36 M. 275; (1912) M. W. N. 1154.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 240 OF 1913.

February 3, 1914.

Present:—Mr. Justice Macleod.

MANGALDAS N. MOTIVALLA AND ANOTHER—PLAINTIFF

versus

ABDUL RAZAK HAJI SULAIMAN ABDUL WAHED—DEFENDANTS.

Cutchi Memons—Hindu Law of inheritance and

MANGALDAS v. ABDUL RAZAK.

succession—Joint family property—Cutchi son does not acquire interest in father's inherited property.

The invariable and general presumption in the case of Muhammdans is that they are governed by the Muhammadan Law and usage, and it lies on a party setting up a custom in derogation of that law to prove it strictly. In matters of succession and inheritance, however, the Khojas and Memons are governed by the Hindu Law as applied to separate and self-acquired property.

Under the Hindu Law there is no such thing as succession and inheritance to joint family property and as such the law of joint family property is not applicable to Cutchi Memons.

Therefore a son of a Cutchi Memon does not acquire by birth an interest in property inherited by his father by the law of inheritance and succession.

Mr. *Raikes*, (with him Mr. *Strangman*, (Advocate-General), and Mr. *Inverarity*, for the Plaintiffs.

Mr. *Setalvad*, (with him Mr. *Jinnah*), for the Defendants.

JUDGMENT.—The first plaintiff obtained decrees for large amounts in two Suits, Nos. 404 of 1911 and 707 of 1912, filed against one Abdul Razak Haji Sulaiman. The second plaintiff obtained a decree against the same person in Suit No. 719 of 1912. Warrants for the arrest of Abdul Razak were issued in execution of the said decrees, and on the 4th January 1913 he was arrested by the Sheriff's bailiff. It is alleged that Abdul Razak then proposed that he would execute a legal first mortgage of all his share, right, title and interest in the ancestral properties belonging to the joint Cutchi Memon family of which he was a member as a condition for the plaintiffs agreeing to release him from arrest.

Accordingly Abdul Razak signed an agreement undertaking to execute such a legal mortgage. On the 9th January a draft mortgage was sent to Abdul Razak for approval, but Abdul Razak then alleged that he signed the agreement under threats, coercion, undue influence and pressure while he was under the influence of liquor.

The plaintiffs thereupon filed this suit on the 10th March against Abdul Razak praying for specific performance of the agreement of the 4th January.

Thereafter Abdul Razak filed his petition in insolvency and the Official Assignee was added as the 2nd defendant on the 5th July 1913. When the plaint was amended no relief was asked for against him.

The 1st defendant filed his written statement on the 8th September 1913. He denied that he had any share or interest in any ancestral properties which was at present capable of being transferred by way of mortgage, sale, or otherwise. He contended that the two writings signed by him on the 4th January were not binding on him as he was made to execute them by coercion, fraud and undue influence.

The 2nd defendant filed his written statement on the 18th September. He did not admit that the 1st defendant had a share in certain ancestral properties as alleged. In the alternative he contended that if the 1st defendant had a share the agreement signed by him was not binding either on the 1st defendant or on himself. I allowed the plaintiff to amend the plaint so as to claim relief against the 2nd defendant also.

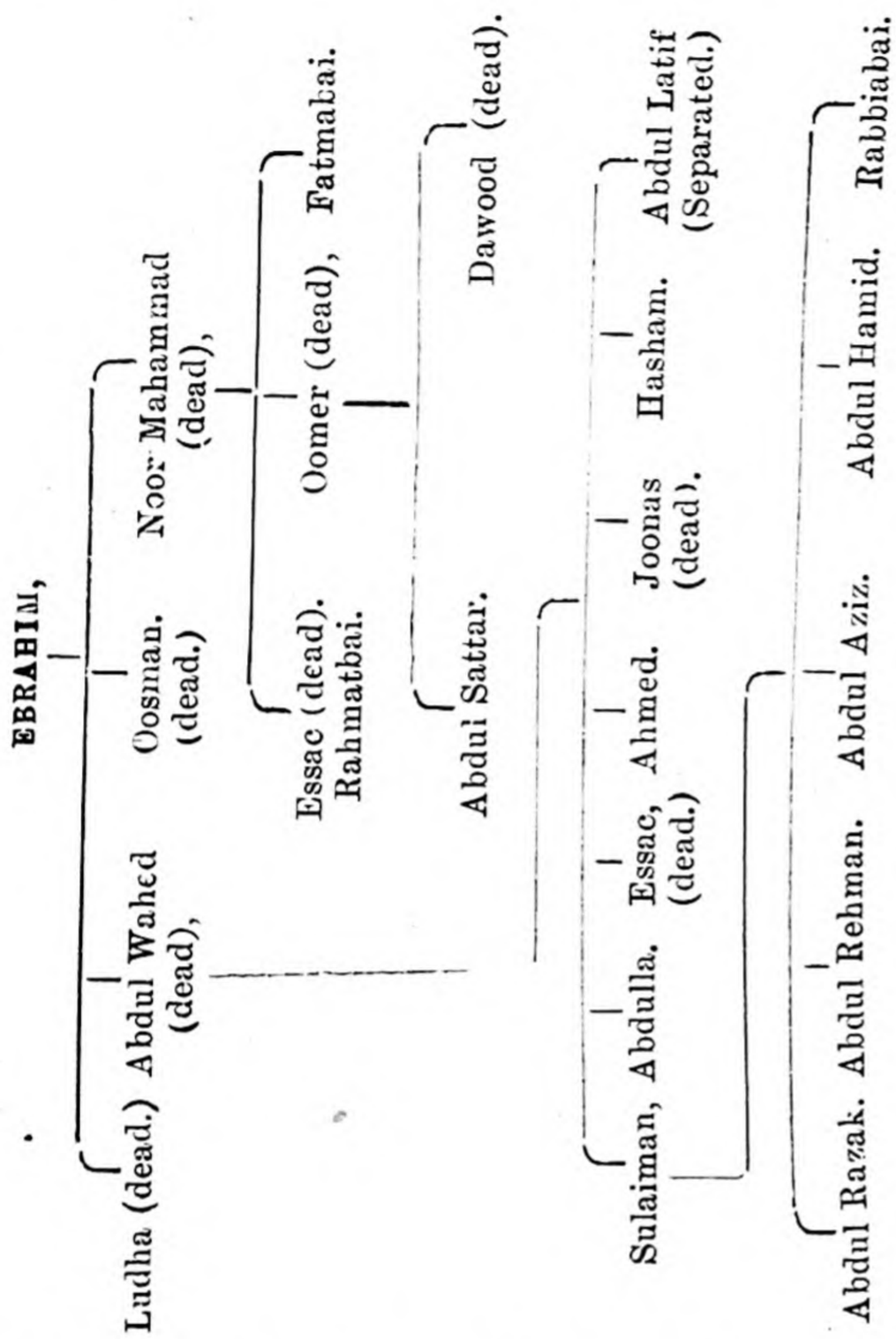
The first issue raised was whether the 1st defendant had any present interest in the properties referred to in paragraph 1 of the plaint capable of being transferred. I determined to take evidence and hear arguments on this issue in order to decide it before going on to the further issue, whether the agreement was binding on the 1st defendant and whether specific performance could be decreed.

One Ebrahim, a Cutchi Memon, died many years ago leaving four sons, Ludha, Abdul Wahed, Osman and Noor Mahomed. They started the business of Ludha Ebrahim & Co. in partnership. Ludha and Osman died without issue. Abdul Wahed had seven sons of whom Sulaiman was the eldest. Noor Mahomed had two sons, Essac and Oomer, and a daughter. Oomer had two sons Abdul Sattar and Dawood.

In 1909 Abdul Sattar, then the only surviving male member of Noor Mahomed's branch, filed a Suit, No 85 of 1909, against the members of the branch of Abdul Wahed seeking for partition of what was called the 'joint family property.' On the 13th April, 1909, a consent decree was passed in that suit whereby it was decreed that the plaintiff should take the properties moveable and immoveable described in Schedule A to the decree in full satisfaction of his share in the joint family property and business, the decree to operate as a partition of the joint family

property and business between the plaintiff and the defendants.

At that time Sulaiman had four sons and one daughter, all minors, the eldest son being Abdul Razak, the present 1st defendant.



The proposition laid down by Mr. Inverarity for the plaintiffs was as follows:—

The son of a Cutchi Memon takes a vested interest by birth in ancestral property in the hands of his father.

He relies for that proposition on decisions of this Court to the effect that Cutchi Memons in all matters of inheritance and succession are governed by Hindu Law.

These decisions have recently been exhaustively reviewed by Beaman, J., in *Jan Mahomed* v. *Datu Jaffar* (1). The parties to that suit were Khojas, but it seems to be generally considered that all decisions on this vexed question relating to Khojas are equally applicable to Cutchi Memons and *vice versa*.

I entirely agree with the conclusions arrived at by Beaman, J., that "Where Mahomedans are concerned, the invariable and general presumption is that they are governed by the Muhammadan Law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly. But in matters of simple succession and inheritance it is to be taken as established that succession and inheritance among Khojas and Memons are governed by the Hindu Law as applied to separate and self-acquired property."

Westropp, C. J., in *In re Haji Ismail Haji Abdulla* (2) said:—

"We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir E. Perry's satisfaction that they observed a Hindu usage which is not in accordance with Muhammadan Law . . . Under these circumstances we must hold them to be Mahomedans to whom Muhammadan Law is to be applied, except when an ancient and invariable special custom to the contrary is established"

That decision was given in 1880 and I think I am right in saying that up to this day no other Hindu custom or usage has been proved by evidence as having been invariably observed by Cutchi Memons from ancient time, and it seems indisputable that, without such proof, it is not within the power of this Court to impose upon any sect of Mahomedans a Hindu usage or a rule of Hindu Law. There is little doubt that the legal profession is firmly convinced that Khojas and Cutchi Memons are to all intents and purposes Hindus, governed by the Hindu Law of the joint family, of will, of inheritance and succession. But the foundation for that conviction rests on a few *obiter dicta* in reported cases which, as Beaman, J., has shown, do not rest on evidence or on any logical basis.

If a Cutchi Memon dies intestate leaving sons and daughters, only his sons take shares in his estate, the daughters being entitled to maintenance instead of to a share as under Muhammadan Law. Starting with

(1) 22 Ind. Cas. 195; 15 Bom. L. R. 1044.

(2) 6 B. 452 at p. 460.

that simple undisputed proposition I am asked to hold that the sons would take as joint tenants as if they were Hindus, that the property in their hands would be ancestral, and that their sons would acquire from birth an interest in such ancestral property.

The argument is as follows:—It has been proved that there is a custom amongst Cutchi Memons that daughters are excluded from inheriting the estate of their father dying intestate. According to Hindu Law daughters do not take a share in their father's estate, therefore, Cutchi Memons are governed by Hindu Law in all questions of inheritance and succession.

Accepting that for the moment as a sound conclusion, which in any event must be confined to intestate succession, the argument proceeds. Hindu brothers inheriting their father's estate take as joint tenants. If they have sons, those sons acquire an interest at the same time, if they are born afterwards they acquire an interest by birth. Therefore whether such an after-born son acquires an interest by birth in the joint family property is a question of inheritance. But Cutchi Memons are governed by Hindu Law in question of inheritance. Therefore a Cutchi Memon acquires by birth an interest in property inherited by his father.

I am only now concerned with sons born after the inheritance has fallen in. It seems obvious that such sons under Hindu Law acquire an interest in the inherited property not by the law of inheritance but by the law of the joint family. For the distinction between co-parcenership and inheritance, see *Francis Ghosal* v. *Gabri Ghosal* (3).

The law of inheritance and succession can only be applied to property which devolves on the death of the persons entitled to succeed under that law. There is no such thing under the *Mitakshara* as inheritance and succession to joint family property. Such property is held by the family as a whole until partition. Members of the family pass away, new members are born, the property remains the property of those members of the family who are alive at any particular moment. It is only when property ceases to be joint that the necessity arises for rules of inheritance and succession.

(3) 31 B. 25; 8 Bom. L. R. 770.

In other words the rules of inheritance and succession under Hindu Law apply only to separate or self-acquired property. The notions of joint family, joint family property, joint family business, are utterly unknown to Muhammadan Law. To conclude, therefore, that because Cutchi Memons have retained the rules of Hindu Law relating to inheritance and succession which can only be applied to separate property they have also retained the law of the joint family with all its far reaching consequences is absolutely illogical. In this case it is not suggested that Ebrahim left any property. His four sons are referred to in the plaint in Suit No. 86 of 1909, as the founders of the business of Ludha Ebrahim & Co. Nothing is said about their having inherited any property from Ebrahim. But if they had it would not make any difference. They were, therefore, partners in that business in equal shares. The shares of the two sons who died without issue devolved on Abdul Wahed and Noor Mahomed or their issue, not by survivorship but by inheritance. To call the assets of the firm joint family property (see paragraph 2 of the plaint in Suit No. 86 of 1909) was begging the question. Strictly speaking the suit should have been a suit for the administration of the estates of Abdul Wahed and Noor Mahomed when the same result would have followed, one-half of the assets going to Abdul Sattar and the other half to the sons of Abdul Wahed subject to the claims of females to maintenance and marriage expenses. Sulaiman and his brothers would then have held as tenants in common and there would have been no question whether their issue acquired an interst in the assets by birth.

In *Mahomed Sidick* v. *Haji Ahmed* (4) it was decided by Scott, J., that a Cutchi Memon had no power to dispose of ancestral family property by Will. If I am correct in thinking that it has never been proved that Cutchi Memons have retained from ancient times the distinction recognized by Hindu Law between ancestral and self-acquired property it must follow that the decision cannot be accepted as an authority. In that case it was argued by Mr. Inverarity, as it has been argued by Mr. Setalvad before me, that the rule of Hindu Law whereby a son acquires an

(4) 10 B. 1.

interest in the joint family property by birth is not a rule of inheritance and succession. I find from the original notes that the learned Judge has underlined his note of the argument which was taken down *in extenso*. I can find no answer to it, though I can sympathise with Mr. Inverarity, who failed to convince the learned Judge that that argument was sound, for finding the Court against him now when trying to support that decision.

I have already declined to follow it in a recent case in which it was contended that Khojas were governed by the Hindu Law of Wills. I held that Khojas were in the matter of Wills governed by Muhammadan Law unless a custom to the contrary had been proved, and I pointed out that in all the cases then cited to me, which have now been so exhaustively analysed by Beaman, J., no trace could be found of the proof of any such custom.

I have been referred to passages in Broom's Legal Maxims (7th Edition) on the judicial rule *stare decisis*. The learned author remarks at page 119:—

"Our common law system, as remarked by a learned Judge, consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."

Those remarks were intended to apply to the decisions of English Judges, which were considered as determining what was the established custom of the realm, though in fact they made law. But at page 121, I find the following passage:—

"The judicial rule—*stare decisis*—does, however, admit of exceptions, where the former determination is most evidently contrary to reason. But, even in such cases, subsequent Judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined."

As there is no common law of India the decisions of Indian Judges do not determine what is the established custom of the country, but letting that pass and applying the above remarks as far as possible to the decisions of this Court on the question before me, which are by no means uniform, certain and consistent, I consider I am entitled to hold that as Mahomedans are governed by Muhammadan Law, unless a custom to the contrary has been proved, if there be any previous decision of this Court that Cutchi Memons are governed by the Hindu Law of the joint family, it is manifestly contrary to reason if it depends, not upon evidence that there is such a custom, but upon the argument that the Hindu Law of inheritance and succession includes the law of the joint family.

I am all the more fortified in coming to this conclusion considering the peculiar facts of this case. It is not the case of a Cutchi Memon setting up an ancient custom that Cutchi Memons on their conversion from Hinduism many centuries ago retained the Hindu Law of inheritance and succession and consequently the Hindu Law of the joint family. Here I have a Hindu and a Parsee who, having obtained decrees against a Cutchi Memon, extract from him as a condition for his release from arrest in execution of those decrees an agreement to mortgage the interest he was supposed to have acquired by birth in properties alleged to be joint family properties in the sense in which that term is used amongst Hindus. He now denies he has any such interest.

It may be that in recent years Cutchi Memons have been forced by the above-mentioned decisions and by the opinions of their legal advisers to believe that they are subject to the Hindu Law of the joint family, but even if they have in consequence come to recognize the distinction according to that law between ancestral and self-acquired property, they are still entitled to ask this Court to hold that they are governed by Muhammadan Law. In this case the plaintiffs rely entirely on the argument that a Cutchi Memon son acquires by birth an interest in property inherited by his father, by the law of inheritance and succession.

This argument, in my opinion, will not bear analysis and is manifestly unsound.

The result is that the suit on this finding must be dismissed with costs.

Suit dismissed.

Attorneys for the Plaintiffs: Messrs. *Matubhai, Jamietram* and *Madan*.

Attorneys for the Defendants: Messrs. *Payne & Co.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 390 OF 1913.

February 24, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

SUBBARAYA REDDIAR—PLAINTIFF—PETITIONER

versus

RAJAGOPALA REDDIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55—Vendor and purchaser—Sale—Title, covenant for—Implied covenant—Vendee obtaining possession under voidable sale—Sale subsequently set aside—Suit to recover consideration money—Cause of action.

In the absence of any express covenant to the contrary, the statutory guarantee for good title is always implied in every contract of sale under section 55 of the Transfer of Property Act, and discovery of defects in title does not take away purchaser's right to be indemnified.

Where a conveyance is *prima facie* unimpeachable, a knowledge of the defects in title should not be imputed to the vendee for the mere circumstance that he had knowledge of a deed of release, which, when legally construed, would throw a cloud on the vendor's title, and the principle of *caveat emptor* would not apply to such a case.

Page v. *Midland Railway Company* (1894) 1. Ch. D 11; 63 L. J. Ch. 126; 7 R. 24; 70 L. T. 14; 42 W. R. 116, referred to.

Where a sale is only voidable at the instance of a third person and possession is taken by the purchaser under such sale, the cause of action for a suit to recover the consideration money arises when the possession of the purchaser is disturbed and not till then.

Ramanatha Aiyar v. *Ozhaloor Pathirisserri Raman Nambudripad*, 21 Ind. Cas. 740; 1 L. W. 110; (1913) M. W. N. 1029, 14 M. L. T. 524, *Hanuman Kamat* v. *Hanuman Mandur*, 19 C. 123; 18 I. A. 158; *Bissu Kumar* v. *Dhum Singh*, 11 A. 47; 15 I. A. 211; Sar. P. C. J. 260; 12 Ind. Jur. 459, *Narsing Shibbakas Marwadi* v. *Pachu Rambakos Marwadi*, 20 Ind. Cas. 254; 15 Bom. L. R. 559; 37 B. 538, followed.

Ardesir v. *Vajesingh*, 25 B. 593; 3 Bom. L. R. 190, *Shiv Ram Govind Desai* v. *Bal Daji Desai*, 26 B. 519; 4 Bom. L. R. 310, *Amrita Lal Bajchi* v. *Jogendra Lal Chowdhury*, 15 Ind. Cas. 707; 40 C. 187, distinguished.

Rajagopalan v. *Thirpanathal Thambiran*, 30 M. 316; 17 M. L. J. 149, *Sriramulu* v. *Chinna Venkatasami*, 25 M. 396; *Venkata Narasimhulu* v. *Peramma*, 18 M. 173, followed.

Obiter.—The same principle applies even where possession is taken under an invalid sale, but where no possession is delivered the cause of action arises on the date of sale.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tinnevelly, in Small Cause Suit No. 1934 of 1912.

Mr. *C. S. Venkatachariar*, for the Petitioner.

Mr. *S. T. Srinivasagopalachariar*, for the Respondents.

JUDGMENT.—The facts of this case are not in dispute. One Subbaraya Reddiar was the original owner of the properties now conveyed to the plaintiff. At his death his widow, Kanthammal, took possession of the properties of her husband; Gnanammal, the mother of Subbaraya Reddiar, executed in 1892 a deed of release of her claims in favour of Kanthammal. On the 23rd August 1900, Kanthammal executed a release of her rights in favour of the father of defendants Nos. 1 and 2 and the 3rd defendant. They are said to be the reversioners to the estate of Subbaraya Reddiar. In this release deed, executed by Kanthammal, reference is made to the release obtained by her from her mother-in-law. The father of defendants Nos. 1 and 2 and the 3rd defendant by his guardian executed on the same day a sale-deed to the plaintiffs. Plaintiffs were put in possession. Kanthammal died in 1904. In 1910 Gnanammal brought a suit to recover possession of the properties from the plaintiffs on the ground that her release of 1892 only related to her right to maintenance and that her right to succeed to her son's estate which accrued to her after the death of Kanthammal was not affected by the release. To that suit the plaintiffs and defendants were all parties. Gnanammal succeeded in her suit and she obtained possession of the property from the plaintiffs in 1911. This suit was brought within a year of the dispossession. The plaintiffs' present suit is to recover the amount paid by them to the father of defendants Nos. 1 and 2 and the mother of the 3rd defendant, on the ground that the consideration for the sale failed when Gnanammal deprived the

plaintiffs of possession of the properties. If Article 62 or 97 of the Limitation Act applied the suit will be in time.

Mr. Srinivasa Gopalachariar contended that no such suit would lie and if the suit were entertainable, the cause of action having arisen on the date of the sale, *viz.*, the 23rd August 1900, the suit was barred by limitation. Upon the first question as to whether the suit will lie, I have come to the conclusion that there is no bar to the suit. The contention for the counter-petitioner is that as there is no express covenant for title and as the plaintiffs took with full knowledge of the infirmities of title, the principle of *caveat emptor* applies and there is no cause of action. In India there is a statutory guarantee for good title unless the same is excluded by the contract of parties. (*vide* section 55, clause 2, of the Transfer of Property Act). The question of the knowledge of the purchaser does not affect the rights to be indemnified under the Indian Statute Law. Even in England, if on the face of the conveyance a *prima facie* title is secured, knowledge of facts which may lead to the discovery of flaws will not affect the claim to compensation. [See *Page* v. *Midland Railway Company* (1)]. In the present case, the conveyance was *prima facie* unimpeachable, and I do not think the construction to which the release of Gnanammal lent itself in the eye of law can be said to be knowledge of the defect of title:

On the second question as to when the cause of action for damages arose, a very large number of cases were quoted before me. These cases can, roughly speaking, be classified under three heads, (*a*) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property: (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (*c*) where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties. In the first class of cases, the starting point of limitation will be the date of the sale. That is Mr. Justice Bakewell's view in *K. A. Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudripad* (2); and I do not think Mr. Justice Miller dissents from that view. That is not the present case. In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will, therefore, arise when his right to continue in possession is disturbed. The decisions of the Judicial Committee of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (3) and in *Bassu Kumar* v. *Dhum Singh* (4) are authorities for this position. In the third class of cases also it is said that the cause of action will arise only on the disturbance of possession. No question of concurrence of third parties either to avoid or perfect the title arises in this case. The most recent authority for this proposition is *Narsing Shivbakars Marwadi* v. *Pachu Rambakas Marwadi* (5). Mr. Justice Miller, in the case reported as *K. A. Ramanatha Aiyar* v. *Azhoor Pathiriserri Raman Nambudripad* (2), gives a qualified assent to the proposition laid down in that case. I do not find Mr. Justice Bakewell expressing his dissent from the view taken in that case. I agree with the view taken by Mr. Justice Miller that it is impossible to see "how the sale can be said to have been without consideration and consequently void *ab initio* where possession has been given under the contract of sale". The case before me, properly speaking, comes under the second class. If the widow, Gnanammal, did not recover possession the plaintiff would never have been disturbed. The sale was not void *ab initio*. It was only voidable if Gnanammal chose to avoid it; even if this view is not correct, I am prepared to hold that this case comes under the third class of cases where under an invalid contract possession had been given; until that possession is interfered with, the purchaser is not bound to ask for the return of his purchase-

(1) (1894) 1 Ch. 11; 63 L. J. Ch. 126; 7 R. 24; 70 L. T. 14; 42 W. R. 116.

(2) 21 Ind. Cas. 740; 14 M. L. T. 524; 1 L. W. 110; (1913) M. W. N. 1029.

(3) 19 C. 123; 18 I. A. 158.

(4) 11 A. 47; 15 I. A. 211; 5 Sar P. C. J. 260; 12 Ind. Jur. 450.

(5) 20 Ind. Cas. 254; 37 B. 538; 15 Bom. L. R. 559

money on the possible ground that at some future time his sale may be impeached. I, therefore, hold that the cause of action for this suit arose only when under the decree obtained by Gnanammal the possession of the plaintiff was disturbed. The decisions of *Ardesir* v. *Vajesing* (6), *Shivram Govind Desai* v. *Bal Daji Desai* (7) and *Amrita Lal Bagchi* v *Jogendra Lal Chowdry* (8), all relate to cases where no possession passed to the vendee and consequently the consideration failed at the date of the sale. They have no bearing on the present case. On the other hand the judgments reported as *Rajagopalan* v. *Thirupinathal Thambrian* (9), *Sriramulu* v. *Chinna Venkatasami* (10) and *Venkatanarasimhulu* v. *Peramma* (11) are cases where possession passed to the vendee and there was subsequent deprivation of possession. The Subordinate Judge is, therefore, wrong in holding that the plaintiff was not entitled to bring the suit to recover the purchase-money, that the cause of action arose on the date of the sale, and that the suit is barred by limitation. I reverse the decree of the Subordinate Judge and direct him to restore the case to his file and dispose of it according to law, costs to abide the result.

Decree reversed.

(6) 25 B. 593; 3 Bom. L. R. 190.
(7) 26 B. 519; 4 Bom. L. R. 310.
(8) 15 Ind. Cas. 707; 40 C. 187.
(9) 17 M. L. J. 149; 30 M. 316.
(10) 25 M. 396.
(11) 18 M. 173.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 354 OF 1913.
February 24, 1914.
Present:—Mr. Justice Seshagiri Aiyar.
P. RAMASAMI NAIDU—DEFENDANT—PETITIONER
versus
VENKATARAMANJULU NAIDU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—High Court's power of revision—Landlord and tenant—Lease for fixed term—Six months' notice given before expiry of term—Jurisdiction—Presidency Small Cause Court, when can pass order under section 41—Presidency Small Cause Courts Act (XV of 1882), s. 41—Presidency Small Cause Courts Act (I of 1895).

A High Court has power under section 115 of the Code of Civil Procedure, to revise the proceedings under section 41 of the Presidency Court of Small Causes Act.

Ismailje Ibrahimji Nagree v. *M. C. Macleod*, 31 B. 138; 8 Bom. L. R. 969; *Haladhar Maiti* v. *Choyatonna Maiti*, 30 C. 588; *Sarat Chandra Singh* v. *Brojo Lal Mukerji*, 30 C. 986; *Ram Dhin Bania* v. *Sew Baksh Singh*, 6 Ind. Cas. 473; 14 C. W. N. 806, 37 C. 714, followed.

Where a lease is for a fixed term and then the tenancy is determinable on notice, the notice cannot be given until after the expiration of the fixed term.

Where in such a case one notice was given before and another after the expiry of the fixed period:

Held, that the first notice was premature and the second insufficient inasmuch as it did not give six months' time as provided in the agreement.

Thompson v. *Maberly*, 2 Camp. 573, distinguished.

Brown v. *Symons*, 8 C. B. (N. S.) 208; 29 L. J. C. P. 251; 6 Jur. (N. S.) 1079; 8 W. R. 460; 125 R. R. 627; 2 L. T. 323; 141 Eng. Rep. 1145 and *Cannon Brewery* v. *Nash*, 77 L. T. 648; 14 T. L. R. 158, followed.

Where discretion is to be exercised by Subordinate Courts, a High Court will ordinarily refuse to interfere if petitioner has other remedies, but where want of jurisdiction of the Subordinate Court has been established, no question of the exercise of discretion arises and a High Court cannot condone this.

Under section 41 of the Presidency Small Cause Courts Act the Court has jurisdiction to deliver possession only when the tenancy has determined and, therefore, where the Court has delivered possession before the determination of the tenancy, its order is wrong and open to revision.

Amritrav Krishna Deshpande v. *Balkrishna Ganesh Amrapurkar*, 11 B. 488, followed.

The provision as to new trials contained in Chapter VI of the Presidency Small Cause Courts Act does not apply to proceedings under section 41 of the Act.

Ramkrishna Sitaram v. *Haji Dawood Ismail*, 31 B. 259, 9 Bom. L. R. 208, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Presidency Court of Small Causes at Madras in Ejectment Suit No. 91 of 1913.

Dewan Bahadur *M. O. Parthasarathy Aiyangar* (with him Mr. *K. V. Krishnaswamy Aiyar*), for the Petitioner.

Mr. *N. Chandra Sekhara Aiyar*, (for Mr. *O. P. Ramaswamy Aiyar*), for the Respondents.

JUDGMENT.—This was a proceeding in ejectment under section 41 of the Presidency Small Cause Courts Act. Defendant executed a rental agreement on the 14th June 1897 agreeing to occupy the site for 15 years by building a house on it. The agreement provides: "In case you require the aforesaid land if you give me six months' previous notice after the aforesaid 15 years, I shall accordingly vacate the land, remove the

superstructure I had built thereon and put you in possession of it." Plaintiff gave two notices, one in October 1911 and another on the 13th December 1912, claiming possession on the 31st of that month. Plaintiff's case is that the tenancy came to an end by efflux of time on the 14th of June 1912 and that as he gave notice in October 1911, defendant was bound to vacate the premises. Defendant contended that the first notice was bad as it was before the 15 years were over, that the 2nd notice did not terminate the tenancy as it did not allow six months' time to vacate, and that the Small Cause Court had no jurisdiction to entertain the application under section 41. The learned third Judge of the Small Cause Court overruled these objections and gave possession to the plaintiff directing that "the defendant should remove the superstructure at his cost and deliver the site on 1st May 1913." Defendant moves the High Court to revise this order. A preliminary objection is taken to the jurisdiction of the High Court to entertain the revision petition. Mr. Chandra Sekhara Aiyar, who appeared for the plaintiff, has argued this point very fully and clearly before me. His contention is that under section 8 of Act V of 1908 only certain sections of the Code of Civil Procedure were made applicable to suits or proceedings of Small Cause Courts, and that section 115 is not one of those sections. He also contended that as section 23 of Act XV of 1882, which related to the provisions of the Code of Civil Procedure applicable to Presidency Small Cause Courts, was repealed by Act I of 1895, and as the said section referred to the Schedule which made section 622 of the old Code corresponding to section 115 of the present Code applicable to Small Cause Courts, by implication the power of the High Court to interfere in revision under section 115 was taken away; and he quoted *Ismailji Ibrahimji Nagree* v. *N. C. Macleod* (1) in support of this position. Section 8 of the Code of Civil Procedure enumerates the sections which are made applicable "to any suit or proceeding in any Court of Small Causes." The petition before me is not a suit or proceeding in a Small Cause Court. Nor does the repeal of section 23 affect the question. It was due to the fact that the Civil Procedure Code contained provisions relating to the revisional powers of the High Court and it was thought unnecessary to provide for it in the Small Cause Courts Act. As regards *Ismailji Ibrahimji Nagree* v. *N. C. Macleod*(1) it is true that Mr. Justice Beaman expressed a doubt whether section 622 of the old Code was applicable to applications to revise suits or proceedings for Small Cause Courts. But the learned Judge gives no reason for his conclusion. There can be no doubt that the language of section 115 is in terms applicable to cases coming from Presidency Small Cause Courts. They are subordinate to the High Court (*Vide* section 3 of Act V of 1908 and section 6 of Act XIV of 1882). Therefore, unless by any express provision the power of the High Court is taken away, it will have jurisdiction to revise the proceedings of Small Cause Courts. The practice in this Presidency has been to entertain these applications. I am fortified in this view by the decision of the Calcutta High Court in *Holadhar Maiti* v. *Choytonna Maiti* (2). In *Ram Dhin Bania* v. *Sewbaksh Singh* (3) and in *Sarat Chandra Singh* v. *Brojo Lal Mukerji* (4) the learned Judges of the Calcutta High Court came to the conclusion that the High Court was competent to exercise revisional jurisdiction, but directed that the petitions should be disposed of by the Judge sitting in the Original Side of the High Court. That is not the practice which has been adopted by the Madras High Court. I must overrule the preliminary objection and hold that the High Court has power to revise the proceeding under section 115 of the Code of Civil Procedure.

On the merits, the question turns upon the construction to be placed on the rental agreement. Mr. Parthasarathy Aiyangar, for the petitioner, contends that the language of the rental agreement imports that the defendant was not to be disturbed under any circumstance within the 15 years of his lease, and that on the expiry of that period, the plaintiff can recover possession only after giving six months' notice. It is contended on the other side that the term as to six months' notice was inserted in order that the defendant

(1) 31 B. 138; 8 Bom. L. R. 969.

(2) 30 C. 588; 7 C. W. N. 547.
(3) 6 Ind. Cas. 473; 37 C. 714; 14 C. W. N. 806.
(4) 30 C. 986.

may know at the end of the 15th year that the landlord intends to eject him and that the notice of October 1911 is sufficient compliance with this condition. I am unable to accept this construction. The language is plain and unambiguous; and the parties apparently contemplated the continuance of the tenancy on the original terms after the fixed period was over, leaving to the landlord the right to claim possession after giving six months' notice. I cannot accept the conclusion of the learned Judge that the six months' notice was to be anterior to the 15 years and not subsequent. There are no Indian authorities on the construction to be placed on similar clauses in rent agreements. Nor are the English authorities uniform. In *Thompson* v. *Maberly* (5) it was held that where a tenancy was "for 12 months certain and six months' notice to quit afterwards," notice given to terminate the tenancy at the end of the first year was good. In *Gardner* v. *Ingram* (6) Lord Coleridge says this with reference to *Thompson* v. *Maberly* (5): "Mr. Cross relied on the case of *Thompson* v. *Maberly* (5) (*ubi sup.*) where Lord Ellenborough, C. J., stated that if premises are taken for 'twelve months certain and six months' notice to quit afterwards,' the tenancy may be determined by a six months' notice to quit expiring at the end of the first year." That case is not, however, quite satisfactory, as it appears to have been decided on the meaning of the word certain, and as Lord Campbell points out in a note, the decision was for the plaintiff on another point, so that Lord Ellenborough's observation was *obiter*. It is true that, in the case of *Brown* v. *Symons* (7) in the Common Pleas, which was an apprenticeship case and turned upon the words "for twelve months certain." *Thompson* v. *Maberly* (5) (*ubi sup*) was cited in the agrument, and was not disapproved of. But I think that in a case of a similar agreement where the word 'certain' does not occur, it would be very doubtful whether *Thompson* v. *Maberly* (5) (*ubi. sup.*) should be treated as an authority." The same view was held by the Court of Appeal in *Cannon Brewery Co.*, v. *Nash* (8). The case, *Brown* v. *Symons* (7), related to the contract of service and does not affect the decision in the above cases. In Halsbury's Laws of England, Volume XVIII, page 444, the proposition is thus stated in the notes: "In general where there is a fixed term and then the tenancy is determinable on notice, the notice cannot, it seems, be given until after the expiration of the fixed term." This view is in consonance with reason and justice. I, therefore, hold that the tenancy was not terminated by the notice of October 1911 and that the notice of the 13th of December 1912 was not sufficient.

The further question now arises, whether the Presidency Small Cause Court had jurisdiction to direct possession to be given under section 41 of the Act. The second paragraph of that section makes the determination of the tenancy a condition precedent to the exercise of jurisdiction. It must be remembered that the power to pass orders relating to immoveable property is an exceptional authority conferred on the Presidency Small Cause Courts. The conditions under which this power can be exercised must, therefore, be strictly complied with. If the conditions fail, the jurisdiction does not exist. It was argued before me that the defendant has other remedies and that he is not entitled to invoke the aid of the High Court's revisional powers. A number of cases were quoted before me. I take the principle of these decisions to be that where there is discretion to be exercised, the High Court will ordinarily refuse to interfere, if the petitioner has other remedies; generally speaking, only cases which are sought to be brought under clause (*c*) of section 115 will be affected by this rule. I am of opinion that where want of jurisdiction has been established, no question of the exercise of discretion arises and that the High Court cannot condone absolute want of jurisdiction. The decision of Mr. Justice West in *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar* (9) is not against this position. In the view that I have taken of the right of revision, it is not necessary to consider whether the remedy by way of re-trial is open to a party against whom an order under section 41 has been passed. I need

(5) 2 Camp. 573.
(6) 61 L. T. 729; 54 J. P. 311.
(7) 8 C. B. (N. S.) 208; 29 L. J. C. P. 251; 6 Jur. (N. S.) 1079; 8 W. R. 460; 2 L. T. 323; 141 Eng. Rep. 145; 125 P. R. 627.
(8) 77 L. T. 648; 14 T. L. R. 158.
(9) 11 B. 488.

only mention that it has been decided in *Ramkrishna Sitaram* v. *Haji Dawood Ismail* (10) that such proceedings should not be dealt with under Chapter VI of the Presidency Small Cause Courts Act.

The decision of the learned Judge must be set aside and the application under section 41 must be dismissed with costs throughout.

Order set aside.

(10) 31 B. 259; 9 Bom. L. R. 208.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 303 OF 1911.

F. C. SUB-COURT SUIT NO. 290 OF 1907.

February 10, 1914.

Present:—Mr. Justice Macleod.

IN NO. 303 OF 1911.

KING, KING & CO.—PLAINTIFFS

IN NO. 290 OF 1907.

AMARCHAND HAZARI MAL & CO.—PLAINTIFFS

versus

MAJOR FRANCIS D. DAVIDSON—DEFENDANT.

Civil Procedure Code (Act V of 1908), *s.* 60—*Attachment—Salary—Officer in Indian Army—Salary realized and distributed cannot be refunded.*

Under section 60 of the Civil Procedure Code the salary of an officer in the Indian Army is exempt from attachment in execution of a decree.

Where the salary of such an officer has been attached, realized and distributed among his creditors without any objection having been preferred he is not entitled to a refund of the same.

Mr. *Nicholson*, for King, King & Co.

Mr. *Inverarity*, for Defendant in Suit No. 303 of 1911.

Mr. *Moos*, for Amarchand.

Mr. *Captain*, for Defendant in Suit No. 290 of 1907.

JUDGMENT.—Messrs. King, King and Co. obtained a decree against Major Davidson, then a Captain in the Indian Army, in Suit No. 303 of 1911 on the 25th of July 1911 for a sum of Rs. 4,454-15-3 and costs and further interest. In execution of the said decree the plaintiffs attached a moiety of defendant's pay, and in pursuance of such attachment the Deputy Controller of Military Accounts remitted to the Sheriff such moiety. Thereafter Amarchand Hajarimal & Co., who had obtained a decree against the same defendant in Suit No. 290 of 1907 in the Court of the first Class Subordinate Judge at Poona, transmitted their decree to this Court for execution, and applied for rateable distribution between themselves and Messrs. King, King & Co., under section 73 of the Civil Procedure Code. Rupees 2,384-2-11 paid to the Sheriff as aforesaid have been rateably distributed between the two execution plaintiffs. There is now in the hands of the Sheriff the further sum of Rs. 2,979-12 7, which in the ordinary course would be distributed in like manner. But on the 20th of January 1914 the defendant took out a summons in the Poona Suit No. 290 of 1907, calling upon the plaintiffs to show cause why the attachment levied by them on the salary of the defendant should not be raised and why the sum of Rs. 2,384-2-11 recovered by the plaintiffs under such attachment should not be refunded. On the 24th of January the defendant took out a similar summons against the plaintiffs in Suit No. 303 of 1911. I adjourned the summonses into Court, and they were argued before me on the 2nd of February.

In the face of the decision of a Bench of this Court in *Velchand Chaganlal* v. *Bourchier* (1), Counsel for the plaintiffs were unable to contend that the attachment on the defendant's pay could be continued. In that case the defendant was an Officer in a British Regiment; but the reasons given by the learned Judges for their decision apply equally to an officer in the Indian Army. In *Calcutta Trades Association* v. *Ryland* (2) and in *Watson* v. *Lloyd* (3), the defendants were officers of the Indian Staff Corps, and in both cases it was held that there was a distinction between an Officer of the Indian Staff Corps and an Officer of the Regular Forces. But no reference was made to section 190, sub-section 8, of the Army Act of 1881, from which it is clear that Officers of the Indian Staff Corps or the Indian Army are also Officers of His Majesty's Regular Forces. Nor in either of those cases was any reference made to sub-section 2, sub-clause (*b*), of section 266 of the Civil Procedure Code of 1882. This has been re-produced in section 60 of the Code of 1908, which was held in *Velchand Ohhaganlal* v. *Bourchier* (1) to be a bar to the Court considering whether an officer in the Army fell within the definition of "public officer" given in the Civil Procedure Code. There-

(1) 17 Ind. Cas. 13; 37 B. 26; 14 Bom. L. R. 777.
(2) 24 C. 102; 1 C. W. N. 138.
(3) 25 M. 402.

fore, there can be no doubt that the defendant is entitled to receive his pay without any deduction, and that the attachment levied by the plaintiffs in Suit No. 303 of 1911 must be raised. The Sheriff must also pay to the defendant the sum of Rs. 2,976-12-7 which he realized under the attachment and which has not yet been distributed between the plaintiffs.

The question whether the plaintiffs can be ordered to refund to the defendant what has already been paid to them by the Sheriff under the attachment depends on whether the money so received by them can be considered as having been paid by the defendant under coercion, or money voluntarily paid under a mistake of fact. It was admitted by the defendant's Counsel that he had had no objection to Messrs. King, King & Co. receiving the moiety of his pay under the attachment levied by them. It was only when he discovered that the plaintiffs in the Poona suit were obtaining a share in that moiety that he decided to question the validity of the attachment. It must be taken, therefore, that the money paid out by the Sheriff was not money paid under coercion. Nor was it money paid under a mistake of fact. It was paid because the defendant did not choose to apply to the Court to raise the attachment. If there was any mistake in the matter it was one of law, that is to say, the defendant must be taken as having under mistake considered that the attachment on his pay was permitted by law, though it is also possible that there was no mistake of any sort, the defendant preferring that Messrs. King, King & Co. should be paid their debt in this manner. Therefore, in my opinion, defendant is not entitled to a refund of what has already been paid out to the execution plaintiffs.

It was suggested in argument that the defendant might be estopped from claiming a refund; and it is quite possible that the plaintiffs may have acted upon the belief arising from the defendant making no attempt to dispute the attachment that he acquiesced in it. But as far as this case is concerned, there is no evidence on which a case of estoppel could be founded.

Attorneys for the Plaintiffs: Messrs. *Captain and Vaidya.*

Attorneys for the Defendant: Messrs. *Craigie, Blunt* and *Caroe.*

MADRAS HIGH COURT.

SECOND APPEALS Nos. 356 TO 365 OF 1913.

March 2, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

VADDADI JAGANNADHA BHUPATHI DEO GARU—DEFENDANT—APPELLANT

versus

PADDALA APPALASAWMY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 5, 52, cl.(3) —Madras Local Boards Act (Mad. Act V of 1884), s. 73 —Pattah when comes into force—Pattah under old Act —Land cess—Tenant, whether liable to pay full cess— Rent, whether charge on produce in hand of purchaser.

Under section 53, clause (3), of the Estates Land Act, a *pattah* tendered for a particular *fasli*, comes into force in that *fasli*, unless a *pattah* previously tendered for more than one revenue year is in force on that date

Where, therefore, the previous *pattah* tendered was under the old Act, and as such did not enure beyond the *fasli* for which it was tendered, the provision of section 53, clause (3), would not apply and the new *pattah* would become effective at once.

Under section 73 of the Madras Boards Act a landlord can claim only half of the land cess from the tenant and, therefore, a provision to pay the full land cess cannot be inserted in the *pattah.*

Section 5, clause (1), of the Estates Land Act provides that rent shall be the first charge upon the holding and the produce thereof, therefore, a provision in the *pattah* to this effect is superfluous. The charge does not extend when the produce has passed into the hands of a purchaser.

Sankarnami mamool is not part of the rent and a provision in the *pattah* to pay it cannot be allowed.

Krishna Chandra Sen v. *Sushila Soondury Dassee*, 26 C. 611; 3 C. W. N. 608, *Subramanian Chetti* v. *Prince of Arcot*, 2 M. 146; 4 Ind. Jur. 624, followed.

Appeals against the decrees of the District Court of Vizagapatam, in Appeals Suits Nos. 942 and 894, 943 and 872, 944 and 875, 945 and 873, 946 and 871 of 1911, preferred against those of the Sub-Collector of Narasapatam, in S. S. Nos. 19, 17, 20, 18 and 26 of 1910.

The Hon'ble Mr *B. N. Sarma*, for the Appellant.

Mr. *B. Narasimha Rao*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant in these ten Second Appeals No. 356 to 365 of 1913. These second appeals have arisen out of five suits brought by five tenants against their common landlord, the defendant. As there were five appeals by the plaintiff and five appeals by the

defendant in the lower Appellate Court presented against the decisions of the Sub-Collector in the five suits, ten second appeals have been preferred to us against the ten decrees passed by the lower Appellate Court.

The suits were brought by the tenants to have the terms of the *pattah* for *fasli* 1319, ascertained and for directing the defendant to tender proper *pattahs* for that *fasli*. The suits have been decreed in favour of the plaintiffs by the lower Appellate Court after making certain modifications in the terms of the *cadapas* tendered to the plaintiffs by the defendants' officials in *fasli* 1319 and which terms the defendant insisted on plaintiffs' accepting without any modification or omission. Coming to the grounds in the memorandum of appeal, that is, those grounds which were argued before us, I think that we cannot interfere with the findings of fact by the lower Appellate Court on the question whether the plaintiffs accepted with full knowledge the *pattahs* tendered to them by the defendant in *fasli* 1319 and on the question whether the plaintiffs did execute *muchalikas* with full knowledge and consent in favour of the defendant for the same *fasli*. The next point argued was that though the plaintiffs brought their suits in order to obtain *pattahs* for *fasli* 1319, the *pattahs*, with the terms decreed by the lower Appellate Court cannot legally come into force for the *fasli* 1319 itself. In support of this argument, clause 3 of section 52 of the Madras Estates Land Act is relied upon, or rather the proviso at the end of that clause. That proviso relates to a case where a *pattah* or *muchalika* has continued to be in force for more revenue years than one, and the proviso enacts that in that case "no fresh *pattah* or *muchalika* for the same holding shall take effect until the commencement of the revenue year next succeeding that in which such fresh *pattah* is decreed." In order, therefore, to attract the terms of this proviso it is necessary for the defendant to show that any *pattah* has continued to be in force for more revenue years than one. It is argued that the *patta* tendered and accepted in *fasli* 1318, or it may be even *fasli* 1317, was such a *pattah*. But so far as the *pattah* for *fasli* 1317 is concerned, it must have been tendered under the old Act, and I am of opinion that that *pattah* tendered for that particular *fasli* did not continue in force beyond that *fasli*, because under the old Act of 1865 a *pattah* tendered for one *fasli* did not continue in force beyond that *fasli*. It is only under the first sentence of clause 3 of section 52 of the new Act that a *pattah* accepted for a single revenue year continues to remain in force till a fresh *pattah* is accepted, or decreed. If, however, reliance is placed on the facts that a *pattah* was accepted for *fasli* 1318 after the new Act came into force, and that, that *pattah* would continue in force till a fresh *pattah* is decreed for a subsequent *fasli*, the reply is that the first sentence in clause 3 to section 52 itself says that a *pattah* for a revenue year shall remain in force only until the commencement of the revenue year for which a fresh *pattah* is decreed. As these suits were brought for fresh *pattahs* to be decreed for *fasli* 1319 and as they were decreed for that *fasli*, the *pattah* for *fasli* 1318 even under the rule enacted in clause 3 remained in force only until the commencement of the revenue year for which the fresh *pattah* was decreed, *i.e.*, until the commencement of *fasli* 1319, and hence it was in force for only one year and *had not continued in force for more revenue years than one*. Accordingly the proviso at the end of clause 3 of section 52 is not applicable to the facts of these cases. Then the other contentions of the appellants related to the terms of certain clauses of the *cadapa* tendered by the defendant for *fasli* 1319, which terms have been disallowed by the decrees of the lower Appellate Court. The first clause of the *cadapa* provided that the tenant shall pay the land cess at Re. 0-1-0 per Rupee to the defendant's officials, though under section 73 of the Local Boards Act the defendant can claim only half of the land cess from the tenant. It was argued that though the clause provides for the payment of the whole land cess *as land cess* by the tenant, we must presume that half of that land cess was really made payable by the tenant *as rent* and that for the convenience of both the landlord and the tenant, that portion of the rent which is equivalent in amount to half the land cess was made payable as if it was half of the land cess itself. No foundation has been laid in the evidence for making such an extraordinary presumption and I must repel this contention.

Then it is said that clause 4 of the *cadapa* was wrongly disallowed by the lower Appellate Court. That clause provides that *kist* on the land shall be the first charge on the produce of the land. If that clause merely intended to give a charge to the landlord to the same extent as is given by section 5, clause 1, of the Madras Estates Land Act, then the clause is superfluous. But if that clause is intended to give the landlord a higher charge, say a charge upon the produce of the land, even after the produce had passed into the possession of a purchaser from the tenant, then it is a charge which is unreasonable and the lower Court acted, in my opinion, rightly in refusing to give such an extended charge to the landlord. The next contention relates to clause 5. That again makes some provision in favour of the landlord which is also provided for by section 42, clause (*a*), of the Estates Land Act. If the landlord (defendant) was intended to obtain the same benefit under this clause 5, as he is given by section 51 of the Estates Land Act, then clause 5 is superfluous. If he wants some more extended benefit, [the extension to be of a vague and undetermined character as I understand clause (5)], then the lower Appellate Court was justified in refusing to give him such a larger privilege. The last contention relates to clause 10 of the *cadapa*. That clause is to the effect that the tenant shall deliver at the house of the landlord *sankarnami mamool*, namely, 3 seers of ghee, one cart-load of fuel, one cart-load of dry hay, jaggery and one cock. It is argued that this is part of the rent. I am unable to accept this contention. It is a clause which comes at the very end, the penultimate 9th clause evidently being intended to be the last clause appropriate to a *muchalika* as such. In the case of *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (1) it was held that where there was a stipulation for payment of Rs. 4 in lieu of certain quantities of jack fruit, bamboos and fish and, where that stipulation was contained in a clause perfectly distinct from that containing the payment of rent which was payable in instalments (in this case also the rent was payable in instalments), that the provision for such a payment was not a provision for payment of rent but for payment of presents. Further, on comparing all the five different *cadapas* in these appeals it will be seen that while the rent varies, this *sankarnami mamool* payable by each tenant is exactly the same. This also indicates that *sankarnami mamool* is not part of the rent as it does not vary with the extent of the holding or the amount of the proper rent payable. It has also been pointed out by the lower Appellate Court that the land cess which is calculated at the rate of one anna in the rupee on the amount of the rent is not calculated upon the value of these *sankarnami mamool* presents. Hence I am clear that that these payments are no part of the rent. But then it is argued that even if it is not part of the rent, it is a sum which has been lawfully payable under the contract between the landlord and the tenant before the new Act came into force; and that such a payment has not been rendered unlawful by any provision contained in the new Act. I am not quite sure that even under the old Act, the promise to make these presents was a lawful contract which could be legally enforced. I think that even as the agreement to make such presents does not come under the definition of a contract which requires consideration to support it (for however long such payment might have been made by the tenant out of respect to the landlord), it was not legally enforcible payment even when the old Act was in force. Even if for aguments sake it be assumed that it was an enforcible agreement under the old Act, it seems to me, that section 143 of the present Act debars the landlord from exacting from his tenants "under any name or any pretence anything in addition to the rent lawfully payable." As I have found that this is not rent, it cannot be recovered by the landlord even if it is something other than the rent which is lawfully payable under the provisions of the new Act.

In the result I would dismiss all these ten second appeals with one set of costs in each of the five pairs of connected appeals.

SESHAGIRI AIYAR, J.—I entirely agree; I wish to add a few words only with reference to two of the points argued before us. Reading clauses 2 and 3 of section 52 of the

(1) 26 C. 611; 3 C. W. N. 608.

Estates Land Act it seems clear to me that the object of the Legislature was, where there has been a consolidated contract for more than a year, that there should be no sudden change in the relationship of the parties, and that there should be a year of grace before the new conditions come into force. In this case, the only year for which *pattah* was tendered, was *fasli* 1318 after the Act came into force. This is not a case where under clause 2 there had been a contract for more than one revenue year and, therefore, the proviso to clause 3 of section 52 has no application; the District Judge was right in his conclusion.

As regards clause 10 in the *pattah* Mr. Sarma has strenuously argued that the items mentioned therein were lawfully recoverable by the Mookasadar under the old Act, and as the Mookasa is in a hilly tract these payments entered in clause 10 must be taken to have been part of the rent which was stipulated between the tenant and the Mookasadar, and as such, it is claimable as rent. Mr. Sarma concedes that unless he can bring these payments under the designation of "rent lawfully payable" mentioned in section 143 his argument must fail. In the first place, the fact that he himself never paid to Government the road-cess calculated upon this amount is against his claiming this amount as rent. Nor does he levy from the tenant local cess under section 73 of the Madras Local Boards Act upon these items. Therefore, it is clear that these items have never been regarded as rent. I think that these payments originated in a *mamool* to grant supplies to the Mookasadar or his officials who come to inspect the holding each year, and they have continued to be paid voluntarily by the tenant to the Mookasadar. As pointed out by the learned Chief Justice and Sir T. Muthusamy Ayyar, J. in *Subramanian Chetti* v. *Prince of Arcot* (2), payments of this nature cannot be regarded as rent. If they are not rent, section 143 is a complete bar and the plaintiff is not entitled to recover them.

I, therefore, concur in holding that the second appeals should be dismissed with costs.

Appeals dismissed.

(2) 2 M. 146; 4 Ind. Jur. 624.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1555 OF 1910.

April 2, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

versus

JINA GAZI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Kabuliat *taken at enhanced rate on promise to grant* pattah *including extra land in tenant's holding—Grant of* pattah *but not including promised land—Promised land in tenant's possession—Suit for recovery*—Pattah *invalid—Oral Settlement before* pattah, *whether effectual—Bengal Tenancy Act (VIII of* 1885), *s.* 29.

The defendant originally held a *jama* of Rs. 24 under the plaintiff which did not include the lands now in dispute. At the Settlement in 1897, the *jama* upon that holding was increased to Rs. 29-8. Subsequently the defendant was found in possession of these disputed lands and he agreed to pay Rs. 38-8 for his holding provided that the disputed land were included in that Settlement. The defendant executed a *kabuliat* and the plaintiff agreed to grant a *pattah* of all the lands, but, as a matter of fact, the *pattah* which he granted did not include the disputed lands. The plaintiff sued for recovery of possession or in the alternative for Rs. 37-2 as rent and cesses:

Held, (1) that the *pattah* was invalid under section 29 of the Bengal Tenancy Act as well as under section 113;

(2) that the *jama* stated in the *kabuliat* was void and not by law recoverable by the plaintiff;

(3) that nothing more could be given to him in any case as there had been already an illegal enhancement;

(4) that a go-by must be given to the *pattah*, and the oral Settlement before it was given effect to;

Durga Prosad Sureka v. *Bhajan Lall Lohea*, 31 C. 614; 14 M. L. J. 196; 5 Bom. L. R. 498; 8 C. W. N. 489; 31 I. A. 122 (P. C.), applied.

(5) that the plaintiff had no claim to recover the land, nor could any more rent as claimed be decreed to him.

Appeal from the decree of the Sub-Judge of Tipperah, dated January 27th, 1910, affirming that of the Sadar Munsif, dated June 21st, 1909.

Babu *Gobinda Chandra Dey Roy*, for the Appellant.

Babu *Dhirendra Lal Kastagir*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of *khas* possession of three plots of land measuring 6 *kanis* 17¾ *gandas* with mesne profits or in the alter-

native for the recovery of Rs. 37-2 as rent and cesses by establishment of the plaintiff's *zemindari* title.

It appears that the defendants originally held a *jama* of Rs. 24 which did not include the lands now in dispute. At the Settlement in 1897 the *jama* upon that holding was increased to Rs. 29-8. Subsequently the defendant was found in possession of these disputed lands and a criminal case was brought, and the defendant No. 2 agreed to pay Rs. 38-8 for his holding, and his allegation is that his own lands and the land of Chuni Gazi which is the disputed land were included in that Settlement, and he executed a *kabuliat* of all the lands and it was agreed on behalf of the plaintiff that he would grant a *pattah* of all the lands. The learned Subordinate Judge found that in fact the *pattah* and *kabuliat* were executed and registered, the plaintiff was ordered to produce the *bundobust* papers upon which both the *pattah* and *kabuliat* were admittedly founded and he declined to do so. This has been held by the Munsif as a fact strongly against him; but the defendant No. 2 has produced the *pattah* and the *pattah* shows that the disputed lands are not included in it, but only the defendant No. 2's old lands, yet the rent has suddenly leapt up five years after the Settlement to a *jama* of Rs. 38-8.

Now this renders the *pattah* invalid under section 29 of the Bengal Tenancy Act as well as under section 113 for the rent settled at the Settlement cannot be enhanced for the period of 15 years except on the ground of landlord's improvement or subsequent alteration in the area of the holding. The landlord has not alleged any improvement and we cannot assume that there has been any alteration in the area of the holding except what is evidenced by what the learned Judge has found on independent evidence. The argument in appeal is that the terms of this document cannot be varied by oral evidence and that oral evidence cannot be accepted. But the *jama* stated in the document is void and is not by law recoverable by the plaintiff. As one of his prayers is for rent to be fixed in addition upon this land now held by the defendant, it is clear that nothing more could be given to him in any case as there has been already an illegal enhancement. But the soundest way to deal with the document seems to be that in which their Lordships of the Judicial Committee dealt with certain bought and sold notes in the case of *Durga Prosad Sureka* v. *Bhajan Lall Lohea* (1), it was there found that there was either by fraud or mistake a wrong figure inserted in the bought and sold note, which had been signed by the parties and which was the contract in the case. Sale, J., gave the plaintiff a decree. On the case coming on appeal before the Appeal Bench of this Court the High Court expressly held themselves bound by the terms of section 91 of the Evidence Act and allowed the appeal and dismissed the plaintiff's suit. Their Lordships of the Judicial Committee say that the plaintiff had treated the falsified notes with more ceremony than they deserved and that his first prayer ought to have made no reference to the date of the documents as the date of the contract and that the second prayer of rectifying the contract in writing was unnecessary. Applying this principle to this case we must give the go by to this *pattah* altogether. It is a document which was executed after the original document evidencing the contract on the findings of the Subordinate Judge. There was a *kabuliat* first and that *kabuliat* was called for and has not been produced. But there was before the *kabuliat* an oral Settlement, and we can have no doubt from the coincidence of the rent, Rs. 9, for this extra land with the enhancement which appears in the *pattah* as illegal enhancement that that was what was agreed between the parties; and the *pattah* being clearly, either by oversight or by something worse, rendered void as far as the amount of rent is concerned on the area demised, we must deal with the case upon the evidence as the learned Judge has done.

The whole case shows that the lower Courts have done justice and that the plaintiff has absolutely no claim to recover this land. It is proved that he got Rs. 180 as *nazar* and his *amla* got Rs. 70 *nazar* from defendant No. 2 and it is proved that he is receiving this enhanced rent, which would be wholly illegal unless he had demised this extra land to the defendant.

(1) 31 C. 614; 14 M. L. J. 196; 5 Bom. L. R. 498; 8 C. W. N. 489; 31 I. A. 122 (P. C.).

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We, therefore, think that the appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 230 OF 1911.

January 16, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

S. SABAPATHI PILLAY (DIED) AND OTHERS —PLAINTIFFS—APPELLANTS

versus

VANMAHALINGA PILLAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise of suit—Some terms of compromise beyond suit, whether to be made part of decree—Consideration for compromise—Decree, effect of—Execution, objection to such decree, whether can be taken in—Contract Act (IX of 1872), ss. 38, 51, 54—Reciprocal promises—Offer—Tender—Compensation.

Where a certain term, which cannot lawfully be made part of a compromise decree, because it goes beyond the subject-matter, has once been made part of the decree, a party to the decree cannot, *in execution*, object to that term as not binding on him. An objection to such a decree ought to be taken by way of appeal and cannot be urged when execution of the decree is sought.

The Manager of Sri Meenakshi Devastanam v. *Abdul Kasim Sahib*, 30 M. 421; 2 M. L. T. 349; 17 M. L. J. 255, relied upon.

Gurdeo Singh v. *Chandrika Singh and Chandrikah Singh* v. *Rash Behary Singh*, 1 Ind. Cas. 913; 36 C. 193 at p. 223; 5 C. L. J. 611, not followed.

The question whether any particular term of a petition of compromise incorporated in a decree relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by a lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being covered by its own facts.

Gobinda Chandra Pal v. *Dwarka Nath Paul*, 35 C. 837; 12 C. W. N. 849; 7 C. L. J. 492, followed.

The terms and conditions, which are the consideration for a compromise of *the subject-matter of a suit*, must be incorporated in the compromise decree and have a binding effect, *although they themselves go beyond* the subject-matter of the suit.

Gupta Narain Dass v. *Bijoya Sundari Debya*, 2 C. W. N. 663, *Purna Chandra Sarkar* v. *Nil Madhub Nandi*, 5 C. W. N. 485, *Jasimuddin Biswas* v. *Bhuban Jelini*, 34 C. 456 and *Joti Kuruvetappa* v. *Izari Sirusappa*, 30 M. 478, rerlied upon.

A mere offer by registered posted letter to deliver something or rather the expression by a letter of a willingness or readiness to deliver is not a proper offer.

A sufficient tender of money is not made if the money is locked up in a box, nor of goods if they are enclosed in a cask which the other party is not allowed to open. Similarly, a mere offer by posted letter that the offeror is ready to execute a release without having a document of release ready to be delivered is not a proper offer.

The plea of tender is incomplete as an answer to an action (and, by analogy, as an answer to a defence) unless accompained by a tender in Court.

Haji Abdul Rahman v. *Haji Noor Mahomed*, 16 B. 141 and *Behari Lal* v. *Ram Ghulam*, 24 A. 461; A. W. N. (1902) 135, relied upon.

If *A* and *B*, the parties to a contract, consisting of reciprocal promises, fail to perform their respective promises, the one (*A*) wilfully and the other (*B*) because he was not bound to fulfil his part unless *A* had fulfilled his preliminary part, the contract comes to an end by the acts of both parties, *A* and *B*, *except for the purpose of enabling the innocent party (B) to claim compensation from A.* *B*, however, cannot claim the performance of the specific obligation undertaken by *A* under the contract after *B* had himself (though lawfully) put an end to it. If *B* wants to hold *A* to the specific performance of *A's* contract, *B* must fulfil his own promise or make an unconditional continuing offer to fulfil his promise.

Appeal against the order of the Court of the Subordinate Judge of Mayavaram, dated 6th day of July 1911 in Execution Petition No. 193 of 1910 in Original Suit No. 29 of 1907.

Mr. *K. Ramachandra Aiyer*, for the Appellants.

Mr. *K. Srinivasa Aiyanger*, for the Respondents.

This appeal coming on for hearing on the 20th February 1913, the Court (Benson and Sundara Aiyar, JJ.) delivered the following

JUDGMENT.—We see no reason to differ from the finding of the Subordinate Judge with regard to the 1st and 2nd conditions to be fulfilled by the 1st defendant before the 2nd and 3rd defendants could claim to take out execution for the amount in question. But the finding with regard to the 3rd condition is unsatisfactory. It is admitted that the plaintiff did not deposit in Court the amount that he was bound to deposit, but the plaintiff alleged in his objection petition that the 3rd defendant had taken an assignment of the decree in Original Suit No. 66 of 1905 and brought to sale the properties

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allotted to the plaintiff contrary to the obligation undertaken by the 1st defendant to obtain a release of those properties from liability for the decree. If this allegation be true, they certainly cannot take out execution for the amount in question. We request the Subordinate Judge to take evidence on the above question and submit his finding thereon; and also on the question whether the defendants were ready to fulfil their obligations under paragraph A (3) of the *razinamah*. We reserve the questions whether clause B of the *razinamah* can be treated as a part of the decree, and, if so whether it is executable or should be regarded as declaratory. The findings will be submitted within two months after the receipt of this order and seven days will be allowed for filing—objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Mayavaram submitted the following

FINDINGS.—1. The following questions have been remitted by the High Court for findings:—

(1) Whether as alleged by the plaintiff, the 3rd defendant has taken an assignment of the decree in Original Suit No. 66 of 1905 and brought to sale the properties allotted to the plaintiff, contrary to the obligation undertaken by the first defendant to obtain a release of those properties from liability for the decree?

(2) Whether the defendants were ready to fulfil their obligations under paragraph A (3) of the *razinamah*?

2. After the remand, the plaintiffs (respondents) have examined one witness and filed Exhibits 1 to 4 and defendants Nos. 2 and 3 (petitioners) have filed Exhibits F and G. There is no doubt that the 3rd defendant has taken an assignment of the decree in Original Suit No. 66 of 1905 of the Kumbakonam Sub-Court and brought to sale the properties charged under that decree which is a moiety of all the properties mortgaged including the properties allotted to the plaintiff. The 3rd defendant has since purchased such properties and obtained symbolical delivery too. Exhibit I is the assignment deed of the decree to the 3rd defendant. Exhibit II is a copy of the sale certificate to the 3rd defendant and Exhibit III is the delivery account. These are all admitted for the petitioners. The only question is whether these have been done contrary to the obligation undertaken by the 1st defendant to obtain release of those properties (the properties allotted to the plaintiff) "from liability for the decree." In considering that matter, it is first of all necessary to exactly understand the 3rd condition in paragraph A of the *razinamah*. It is this: The plaintiff undertakes to deposit Rs. 13,000 and interest as provided in four months of the *razinamah* and the defendants are charged with the obligation to get the release of the plaintiff's share of the properties from liability to the decree in Original Suit No. 66 of 1905 in 16 months from the date of the *razinamah*. That means that even after the deposit of the money into Court by the plaintiff, the defendants had apparently another twelve months' time to get the release.

3. Now it is necessary to note a few dates. The *razinamah* was on the 9th April 1908. So the plaintiff was bound to deposit the Rs. 13,000, and interest—it would have amounted to about Rs. 27,000 then—by the 9th August 1908. The amount was not deposited within that time. The decree-holder in Original Suit No. 66 of 1905 proceeded with the execution of that decree and the sale was fixed for the 3rd March 1909. In order to avert the sale, the 3rd defendant appears to have bargained for taking the assignment of the decree and he is seen to have actually obtained the assignment as per Exhibit I on the 10th July 1909. It may be noted that under the *razinamah* the defendants Nos. 1 to 3 are made liable to get the release to the plaintiff. In less than a month of the assignments we find the 3rd defendant and 1st defendant sending the registered notices, D and E, to the plaintiff on the 7th August 1909. Then the four months' time for the deposit by the plaintiff had long past and even the sixteen months' period within which the defendants were to act their part was to expire in two days more. By these registered notices, the plaintiff was even then called on to pay up the amount payable in a week and even then there

was no response. In fact the plaintiff returned the registered notices refused. These notices, Exhibits D and E, show that the assignment to the 3rd defendant was not to circumvent the plaintiff, and that the defendants gave the plaintiff an opportunity of performing his part even at that late stage. In this state of matters it is futile for the plaintiff to contend that the 1st defendant was without the means to pay the balance of the amount due for the decree in Original Suit No. 66 of 1905 and that he would otherwise have deposited the amount due by him. Even granting that the 1st defendant had no means then, there were the defendants Nos. 2 and 3 who, as I have already said, were also responsible for getting the release and the plaintiff's own witness admits that defendants Nos. 2 and 3 are rich men. Nor was it necessary that all the moneys due under the mortgage decrees should be paid for getting the release of the plaintiff's portion of the properties. In paragraph 5 of the counter-petition, the plaintiff states that he tendered the amount to the original plaintiff in Original Suit No. 66 (Murugappa Chetty) but that he refused to receive it and give a release. That is not the undertaking in the *razinamah* and there is no proof of such tender. Exhibits F and G show that Murugappa Chetti's heirs applied for execution of the decree more than once. The plaintiff's witness admits that plaintiff had notice of such petitions. Still he is not shown to have opposed the execution on any ground. Not even after the petitioners applied for execution in this case does the plaintiff appear to have offered to deposit the amount. Under these circumstances, I cannot say that the assignment to the 3rd defendant was contrary to the obligation laid by the *razinamah* and I must hold that the defendants were ready to fulfil their obligations.

This appeal coming again for hearing on 16th of January 1914, after the return of the findings upon the issues referred by this Court to the Subordinate Judge of Mayavaram, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The judgment-debtor is the appellant in this appeal preferred against the order of the Subordinate Judge's Court of Mayavaram passed on the execution petition filed by the 2nd and 3rd defendants as decree-holders.

The facts are a little complicated, but it is necessary to set out many of them in order to understand the contentions in this appeal.

The plaintiff and the 1st defendant are brothers. They effected a partition of their properties about July 1897. In that partition, about 34 items of landed properties (among other properties) were divided between the plaintiff and the 1st defendant, the plaintiff obtaining for his share certain specific properties out of the 34 properties and the 1st defendant the remaining properties. In June 1889, the 1st defendant and the father of the defendants Nos. 2 and 3, since deceased, executed a simple bond for Rs. 10,000 in favour of the plaintiff. It has here to be mentioned that though the plaintiff got in the partition of 1897 certain specific properties out of the 34 items of land, all the 34 items had been mortgaged by the 1st defendant before the partition in favour of a third person whom I will call the mortgagee. This mortgagee brought Suit No. 66 of 1905 on the file of the Kumbakonam Sub-Court for sale of those 34 items against both the plaintiff and the 1st defendant; the plaintiff (without protest apparently from the 1st defendant) seems to have raised the plea in the mortgagee's suit that one-half share in all the 34 items belonged to him and that the said half share was not liable for the mortgage as the sum advanced by the mortgagee to the 1st defendant was not a debt incurred by the 1st defendant for the benefit of both the plaintiff and the 1st defendant. The plaintiff, if the debt was not a proper debt, might have had those particular items (out of the 34 mortgaged items) which fell to the plaintiff's share released from liability under the mortgage, but, as I said above, he seems to have attempted to get one-half share in every one of the 34 items released from the mortgage. One other complication in the case is that in January 1903, the 1st defendant seems to have sold some of those properties which fell to his share (out of the 34 properties) to the plaintiff for Rs. 13,000 and asked the plaintiff to pay

that Rs. 13,000 to the mortgagee in part satisfaction of the mortgage debt. The plaintiff had failed to pay that Rs. 13,000 to the mortgagee and hence the mortgagee brought his Suit No. 66 of 1905 to recover the entire amount due under his mortgage by sale of all the 34 properties.

That Suit No. 66 of 1905 was decreed only for the sale of one-half share in all the the 34 properties and the Court released the other half share on the footing that the plaintiff was entitled to the said half share in all the 34 properties. The partition under which the plaintiff got certain specific items out of the 34 properties was thus ignored by that decree. It is not clear whether it was ignored because the partition was held invalid or not proved or because the partition was not relied upon and put forward by any of the parties.

The present suit was brought by the plaintiff in 1906 as Original Suit No. 38 of 1906 (in the Kumbakonam Sub-Court) on the simple bond for Rs. 10,000 executed in June 1899 by the 1st defendant and the father of the defendants Nos. 2 and 3 for the recovery of Rs. 18,000 and odd due under that bond. This Suit No. 38 of 1906, of the Kumbakonam Sub-Court, afterwards became Suit No. 29 of 1907 on the file of the Mayavaram Sub-Court. On the 9th April 1908, a *razinamah* petition was filed in this suit by the plaintiff and by the defendants Nos. 1 to 3 compromising all the disputes between the plaintiff and the defendants. The Court on that same date decreed in terms of the *razinamah* "so far as those terms related to the suit as detailed below." It is doubtful (and it is a matter of dispute between the parties) whether by detailing all the terms of the *razinamah* in the decree after stating that the Court decreed in terms of the *razinamah* in "so far as those terms related to the suits" whether all those terms were intended by the Court as relating to the suit and as decreed in the suit or whether all the terms were detailed merely for the purpose of recording the terms of the *razinamah* and only those terms which directly related to the right to recover moneys due under the bond of 1899 were intended to be decreed in that suit.

Now the terms of the *razinamah* are again of a complicated character, but as it is necessary to refer to them for understanding the dispute, I shall set them out briefly. The terms are (A1), that, within the 9th August 1909, the three defendants should fulfil a condition which I will call condition No. 1; (A2), that the three defendants should before that same date (9th August 1909) fulfil another conditon which I will call condition No. 2; (A3), that upon plaintiff depositing Rs. 13,000 and interest thereon from January 1903 into Court for payment to the mortgagee, the decree-holder in No. 66 of 1905, the defendants Nos. 1 to 3 should within the 9th August 1909 get released from liability under that decree the two sets of properties which belonged to the plaintiff out of the 34 mortgaged properties, those two sets being (*firstly*) the properties which fell to the plaintiff's share in the division of 1899 and (*secondly*) the properties which had been included in the sale to the plaintiff by the first defendant in January 1903; (B), that if the three defendants fulfilled the above conditions (A1, A2 and A3) the amount due to the plaintiff under the simple bond of 1899 for Rs. 10,000 and the sum due to the plaintiff of Rs. 3,000 and odd should be set off against the sum of Rs. 16,000 and interest due to the 1st defendant by the plaintiff and that the plaintiff *should pay Rs. 2,200 to the 2nd and 3rd defendants* (which sum would be the balance due to the defendants Nos. 2 and 3 after such set off) with interest from May 1899; (C), that if the defendants failed to fulfil conditions A1, A2 and A3 the plaintiff should recover Rs. 20,000 as due to him under the plaint bond with interest from the date of the *razinamah* by execution against defendants Nos. 1 to 3. (There are certain other minor terms in the *razinamah* which need not be stated here.)

Now, the defendants Nos. 1 to 3 have fulfilled the conditions A1 and A2. They say that they offered and were ready and willing to fulfil the condition A3 and that their such offer, readiness and willingness should be treated as legally of the same effect as if they had actually fulfilled the condition A3 also. Then, they contend that under clause (B) of the *razinamah* decree, the plaintiff ought to pay Rs. 2,200 to them and that the defendants Nos. 2 and 3 are entitled in execution of this same decree to

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recover this Rs. 2,200 and interest from the plaintiff. On these contentions, they filed the Execution Petition No. 193 of 1910 on the 26th November 1910 and prayed for the arrest of the plaintiff for the recovery of the Rs. 2,200 and interest. The plaintiff raised several objections to the grant of the prayer of this execution petition of the defendants Nos. 2 and 3. Two of these objections, namely that the defendants Nos. 1 to 3 did not fulfil conditions A1 or A2, are useless as the Sub-Court and also a Bench of this Court (when this appeal came on first before this Court) have found that the conditions A1 and A2 had been fulfilled by the defendants before this execution petition was put in. Two other objections of the plaintiff remain to be considered. The first objection is that the 3rd condition (A3) had not been fulfilled by the defendants before this execution petition was filed and not only that the third condition had not been fulfilled before the execution petition was filed *but the defendants had precluded themselves from fulfilling that condition by certain acts of the 3rd defendant.* The second objection was that even if the defendants had fulfilled all the three conditions, the term (B) of the *razinamah* petition, namely, that on the defendants fulfilling those conditions, the 2nd and 3rd defendants should recover Rs. 2,200 from the plaintiff, was not a term which related to the dispute in the plaintiffs suit brought on the bond of Rs. 10,000 and that, therefore, there was and could be no decree passed for that amount in the Suit No. 29 of 1907; in other words, the gist of that objection is that the defendants Nos. 2 and 3 should bring a separate suit on the promise recorded as term (B) in the *razinamah* decree and cannot claim that an executable decree for that amount has been passed in this Suit No. 29 of 1907.

I shall shortly deal with the second objection. Having regard to the nature of the pleadings in the Suit No. 29 of 1907, I think that the term (B) *of the razinamah* was intended to be one of the considerations which moved the defendants Nos. 1 to 3 in consenting to the term (C) of the *razinamah* which directly related to the plaintiff's claim. It has also to be noted that the amount of the plaintiff's claim is set off even under the provisions of the term (B) against the plaintiff's claim. I, therefore, hold that the term (B) is a part of the decreed provisions in the Suit No. 29 of 1907 and not merely one of the recorded provisions. In this view, the law laid down in the cases reported as *Joti Kuruwetappa* v. *Izari Siruseppa* (1), and *Purna Chandra Sarkar* v. *Nil Madhub Nandi* (2), applies and the term (B) can be lawfully made part of the decree and the liability created by that term can be enforced in execution proceedings. As on this question, I agree with the observations in *Gobinda Chandra Paul* v. *Dwarka Nath Pal* (3), I shall quote certain passages therefrom:

"The question whether any particular term of a petition of compromise incorporated in a decree, made under the power given by section 375 of the Code of Civil Procedure, relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts." "In *Jasimuddin Biswas* v. *Bhuban Jelini* (4). Brett and Sharfuddin, JJ. recognised the binding effect of the term in a decree which was the consideration for the relief granted in a suit as decreed on agreement of parties. The same view was taken in *Gupta Narain Dass* v. *Bijoya Sundari Debya* (5) and *Purna Chandra Sarkar* v. *Nil Madhub Nandi* (2). In the latter case, Ghose and Pratt, JJ., held that a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions, and that, if those other conditions are the consideration for the compromise of the subject-matter of the suit, they must be incorporated in the decree."

Even if the term (B) could not lawfully be made part of the decree, once it has been so made part of the decree, as I think it has been in this case, the person bound by the

(1) 30 M. 478.
(2) 5 C. W. N. 485.
(3) 35 C. 837; 12 C. W. N. 849; 7 C. L. J. 492.
(4) 34 C. 456.
(5) 2 C. W. N. 663.

decree cannot, *in execution*, object to that term as not binding upon him. The appellant's Vakil relied upon a passage in *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrika Singh* v. *Rash Behary Singh* (6), where Mookerjee, J., says that if a compromise decree "gives effect to the settlement touching properties extraneous to the litigation, the decree is to that extent clearly without jurisdiction and is inoperative." I respectfully dissent from that *dictum* as it is opposed to the decision of this Court in *The Manager of Sri Meenakshi Devastanam* v. *Abdul Kasim Sahib* (7), where Benson and Wallis, JJ., held that any objection to such a decree giving reliefs in respect of such matters not relating to the suit ought to have been taken by way of appeal and could not be urged when execution of the decree is sought.

Now I shall deal with the first and the principal objection of the plaintiff. This objection has again to be divided under two heads. The first head is that defendants have not fulfilled the third condition (A3) and hence cannot take advantage of the provision (B) in their favour. The second heading of the objection is that they have absolutely precluded themselves from fulfilling that third condition. Taking the first head of the objection, the reply of the defendants Nos. 2 and 3 is, as I said before, that they had made an offer to fulfil the third condition and as the plaintiff did not accept that offer, the defendants are in as good a position as if they had fulfilled the third condition. It seems to me that in execution of a decree which gives a particular relief to the defendants Nos. 2 and 3 *only if a condition is fulfilled*, they cannot get that relief unless they fulfil that condition or unless the fulfilment of that condition has been made impossible by the plaintiff. I also think (*a*) that the offer to fulfil that condition should be kept always open and (*b*) that the offer relied upon ought to be an unconditional offer. Again the second head of the objection seems to me to be clearly valid. The defendants not only have not fulfilled the condition of getting the plaintiff the two sets of properties out of the thirty four properties released from the mortgage decree, but the third defendant obtained a transfer of the mortgage decree, bought a half share in those two sets of properties belonging to the plaintiff to act in execution of that decree and purchased them himself. Thus, that mortgage decree has fully operated on and destroyed plaintiff's rights in those properties and the third defendant by his acts has rendered it impossible for the defendants Nos. 1 to 3 to get those properties released from the effects of that decree, effects which were threatened at the time of the compromise and consummated afterwards. Of course, as the plaintiff neglected to perform his part of the agreement forming the third condition in the *razinamah*, namely, the payment of Rs. 13,000 before the 9th August 1908, the defendants Nos. 1 to 3 were not bound to fulfil before the 9th August 1909 their part of that agreement and they could under sections 51 and 54 of the Contract Act refuse to perform their part of the promise and even claim compensation (besides) from the plaintiff for any loss which they have sustained by the plaintiff's non-performance of his preliminary promise to pay Rs. 13,000; but if both the parties to a contract (whom we might call *A* and *B*) fail to perform their reciprocal promises, the one (*A*) wilfully and the other (*B*) because he was not bound to fulfil his part, unless *A* had fulfilled his preliminary part the contract itself clearly comes to an end by the acts of both parties *A* and *B* *except for the purpose of enabling the innocent party* (*B*) *to claim compensation from A*. *B*, however, cannot claim the performance of the specific obligation undertaken by *A* under the contract after *B* had himself (though lawfully) put an end to it. If *B* wants to hold *A* to the specific performance of *A*'s contract, *B* must fulfil his own promise or make an unconditional continuing offer to fulfil his promise. Under section 38 of the Contract Act an offer equivalent to performance in the eye of the law must be unconditional. In the present case, the offer under letter Exhibit D is not unconditional, as it says that the third defendant was ready to release plaintiff's properties under the decree in Suit No. 66 of 1905 only if plaintiff *paid Rs.* 13,000 *and the interest within one week's time*. Further an offer under section 38 (see clause 3 of section 38) must be such that the promisee must have a reasonable opportunity of seeing

(6) 1 Ind. Cas. 912; 36 C. 193 at p. 223; 5 C. L. J. 611.

(7) 30 M. 421; 2 M. L. T. 349; 17 M. L. J. 255.

that the thing offered is the thing which the promisor is bound by his promise to deliver. Now the English and Indian cases have established that a mere offer by registered posted letter to deliver something or rather the expression by a letter of a willingness or readiness to deliver is not a proper offer. As Shephard, J., says in his Contract Act: "A sufficient tender of money is not made if the money is locked up in a box, nor of goods if they are enclosed in a cask which the other party is not allowed to open." Following that analogy, a mere offer by posted letter that the 3rd defendant is ready to execute a release without having a document of release ready to be delivered is not a proper offer. Again as said in *Haji Abdul Rahman* v. *Haji Noor Mahomed* (8) and *Behari Lal* v. *Ram Ghulam* (9), the plea of tender is incomplete as an answer to an action (and, by analogy, as an answer to a defence) unless accompanied by a tender in Court.

In the present case, the third defendant who obtained the transfer of the decree in Suit No. 66 of 1905 did not execute a release deed, did not show it to the plaintiff and did not offer any such deed unconditionally or even make his mere expression of willingness and readiness unconditional. Hence the offer under Exhibit D was not a legal or proper offer. When the plaintiff failed to pay the Rs. 13,000 the defendants had two courses open to them. They might refuse to perform their part of the promise (namely the procuring of the release) and claim compensation for plaintiff's breach of contract (see section 54 of the Contract Act) or they might, notwithstanding the plaintiff's breach, fulfil their (defendants') part of the contract by performing their reciprocal promise and then claim all their rights under the contract as a subsisting contract. The plaintiff in not having paid the money broke the contract wrongfully, and the 3rd defendant in not having got the plaintiff's properties released and in obtaining transfer of the decree and executing it also broke the contract though rightfully and must be deemed under section 54 of the Contract Act as having also himself avoided the contract. In the result, I hold that the defendants Nos. 2 and 3 cannot obtain any relief in pursuance of the term (B) of the *razinamah* decree as they have not fulfilled the condition (A3) which is preliminary to their obtaining that relief, as they have never made an unconditional offer to fulfil that condition, as they have never made an offer which gave a reasonable opportunity to the plaintiff of seeing that the thing offered is the thing which he was entitled to get (section 38, clause 3 of the Contract Act) and lastly as the offer has not been a continuing offer, the defendants having by the third defendant's conduct precluded themselves from fulfilling that condition which involves the release of the plaintiff's properties from a decree which subsists no longer as a decree but has resulted in the fruits which have been gathered by the third defendant. In the result, in reversal of the lower Court's order which allowed the execution of the decree in favour of the 2nd and 3rd defendants, I would direct that their execution petition shall stand dismissed. As the plaintiff relied upon several invalid and even dishonest pleas besides the pleas on which he has succeeded I would make no order as to costs in either Court.

AYLING, J.—I agree.

Order reversed.

(8) 16 B. 141.
(9) 24 A. 461; A. W. N. (1902) 135.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL No. 12 OF 1910.
April 8, 1914.
Present:—Mr. Justice Coxe and Mr. Justice Imam.

BHAIRO PRASHAD—DEFENDANT—APPELLANT

versus

GAJADHAR PRASHAD—PLAINTIFF—RESPONDENT.

Account stated—Stated account found to be forgery—If suit may be altered to one on account stated in previous year—Limitation—Acknowledgment of liability—Letter saying writer will sign after looking into account—Limitation Act (IX of 1908). *s.* 19.

Where a suit was brought on an account stated in a particular year and not on an open account, and it was found that the account stated was a forgery, the suit could not be altered to one on the account stated in the previous year.

Where a letter merely says that the writer after looking into the account will sign it:

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(1) it is not an acknowledgment of liability on an account stated;

Mani Ram Seth v. *Seth Rup Chand*, 33 C. 1047, 8 Bom. L. M. 501; 1 M. L. T. 199; 2 N. L. R. 130; 4 C. L. J. 94; 10 C. W. N. 874; 3 A. L. J. 525; 16 M. L. J. 300; 33 I. A. 165 (P. C.), distinguished;

(2) assuming that it is an acknowledgment of liability to pay whatever may be found due when accounts have been properly taken between the parties, it is not an acknowledgment of liability to pay the amount stated to be due in the *hatchitta* of a particular year.

Appeal from the decree of the Sub-Judge of Mozafferpur, dated December 1st, 1909.

Dr. *Rash Behary Ghose*, Babus *Baldeo Narain Singh* and *Jyotish Chandra Sarkar*, for the Appellant.

Babus *Mohendra Nath Roy*, *Lakshmi Narayan Singh* and *Kulwant Sahay*, for the Respondent.

JUDGMENT.

COXE, J.—This appeal arises out of a suit on a *hatchitta*, instituted on the 10th November 1904. The suit was dismissed on some preliminary point but was remanded by this Court for trial on the merits. The learned Subordinate Judge has disbelieved the *hatchitta* but has given the plaintiffs a decree on the *hatchitta* of the previous year, and holds that the suit is saved from limitation by reason of certain acknowledgments.

The learned Pleader for the respondent has attempted to support the decision of the Court below by contending that the *hatchitta* sued upon, *i.e.*, the *hatchitta* of 1303, ought to be believed. This contention, however, is quite unsustainable. As the plaint originally stood the cause of action was stated to have arisen on the 21st October 1901, the date of the last signature entered in the *hatchitta*. The sentence is very ungrammatical, but that is the meaning that any plain man would attach to the passage. It was till four years later, after the suit had been remanded for re-hearing, that the plaintiffs realised that the suit was barred by limitation, and they then amended the plaint by altering the date of signature to October 1903. Obviously an alteration made more or less under compulsion four years late must excite suspicion and this is enhanced by the fact that Mr. Hindmarsh, who verified the original plaint, gives no explanation why the wrong date was entered. He says indeed that he satisfied himself that the allegations in the plaint were true. He does not depose that the *hatchitta* was signed in 1903. All that he can say is that, as far as he recollects, the amounts were adjusted during his managership, which began in September 1903. But as prior to being manager he had been receiver of the plaintiff's firm, his recollection five years after the institution of the suit may well have been uncertain, and does not outweigh his sworn verification in 1904. Several letters are put in but none of them refer to the *hatchitta* of 1908, and the only evidence that the *hatchitta* was signed about October 1903 is the bare word of the plaintiff's *gomasta*. This is corroborated to some extent by a statement of Mr. Smith that after September 1902, the defendant asked that the account of 1308 might be left open. Copies of two lists are put in, dated the 28th September 1903 and the 9th October 1903. The first shows that the defendant had not then signed the *chitta* for 1303, and the second shows that in the meanwhile he had done so. These lists might have been good evidence but they are not really proved at all. The originals were filed, but were taken back and are then said to have been lost. They are not put to Mr. Hindmarsh at all and certainly in the circumstances of the case no value whatever can be attached to copies.

Another fatal defect in the plaintiff's case is that although the Subordinate Judge has come to a clear finding against them that the *hatchitta* sued upon is a forgery, and although they have tried to support his decree in their favour by contending that this part of the decision is wrong, they do not produce the *hatchitta*, that has been removed by them from the record and although this appeal was instituted in January 1910, it has not been returned. The Subordinate Judge says: "The test of handwriting also shows, in no inconclusive manner, that Ram Manohar Sahu could not have signed the *hatchitta* for 1308 after accounts were adjusted and the balance struck. He admittedly signed the *hatchitta* for 1307 (see Exhibit 3A). If his admitted signature and writing be compared with his so-called signature and writing on the receipt stamp for 1308, it will be abundantly clear that they could not have been written by one and

the same hand." To ask us to reverse this finding, while the *hatchitta* is withheld, seems to me idle.

I, therefore, hold that these materials are quite insufficient to justify any interference with the Subordinate Judge's finding that the *hatchitta* in suit was not genuine.

The learned Subordinate Judge, however, has given the plaintiffs a decree on the *hatchitta* of 1307. This he says was signed admittedly on the 24th *Assin* 1308. I cannot trace the admission, but the witness Radha Kishun deposes that it was signed about a week before the Dasehra day in 1309 and that would be more than three years before suit. The Judge, however, holds that limitation is saved by the letter Exhibit 4 C, which he regards as an acknowledgment under section 19 of the Limitation Act. The letter is dated the 29th September 1902.

I do not think that this decision can be maintained. The suit was brought on an account stated and not on an open account. It was found that the account stated was forgery. I do not think that in these circumstances the suit could be altered to one on the account stated in the previous year. In any case it ought not to have been done with retrospective effect. The plaint ought to have been amended and then there could have been no question that the suit was barred by time. Nor do I think that the letter, Exhibit 4C, is an acknowledgment under section 19 of the Limitation Act. In the first place the letter relates to a *hatchitta* that 'will be barred by limitation on the 12th October 1902'. That cannot possibly be the *hatchitta* of 1307. Next the letter merely says that the writer after looking into the account will sign it. That is not, in my opinion, an acknowledgment of liability on an account stated. The Judge relies on the case of *Mani Ram Seth* v. *Seth Rup Chand* (1). That was not a suit on an account stated, but a suit on an open and unsettled account between the parties. And the letter (Exhibit 4C) assuming that it is an acknowledgment of liability to pay whatever may be found due when accounts have been properly taken between the parties, is certainly not an acknowledgment of liability to pay the amount stated to be due in the *hatchitta* of 1307. In this connection reference has been made to the case of *V. Andiappa Chetty* v. *P. Devarajulu Naidoo* (2) which is clearly in point.

In my opinion the suit ought not to have been altered to one on the *hatchitta* of 1307, and even if so altered it is barred by time. I would decree the appeal and dismiss the suit with costs throughout.

IMAM, J.—I agree.

Appeal decreed.

(1) 33 C. 1047; 8 Bom. L. R. 501; 1 M. L. T. 199; 2 N. L. R 130; 4 C. L. J. 94; 10 C. W. N 874; 3 A. L. J. 525; 16 M. L. J. 300; 33 I. A. 165 (P. C.).

(2) 12 Ind. Cas. 378; 36 M. 68; 10 M. L. T. 251; 21 M. L. J. 1024; (1911) 2 M. W. N. 225

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 198 OF 1912.

March 4, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.,

JAGAN PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

INDERMAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hundi *insufficiently stamped—Original consideration, falling back upon.*

Where a *hundi*, which is the renewal of a prior *hundi*, is not sufficiently stamped, the plaintiff can fall back on the prior *hundi*.

First appeal from the decision of the first Additional Subordinate Judge of Agra, dated 9th March 1912.

FACTS.—The plaintiffs brought a suit on the basis of four *hundis*, two of them dated 4th of July 1910 and two others dated 6th of July 1910, each *hundi* being payable 61 days after date. The *hundis* were executed by Jagan Prasad, defendant No. 1, and father of the other defendants. The suit was filed on the 7th of August 1911 and the allegation was that there had been money dealings between the parties for a long time by means of *hundis*. The defence was that the *hundis* were insufficiently stamped, the suit was barred by limitation and no consideration had been paid on account of the *hundis*. The lower Court found that the transaction in question commenced on *Asarh Badi* 7th, *Sambat* 1965, or about the 6th of July 1908

when the amount of the loan was advanced and since then the *hundis* had only been renewed at intervals, and the last set of *hundis* was insufficiently stamped. It held that though the *hundis* were inadmissible in evidence the plaintiffs could fall back upon the original loan advanced and so decreed the claim. It also held that the payment of *hundiawan* or the discount on each renewal saved the debt from being barred.

The defendants appealed.

Mr. *A. P. Dube*, for the Appellants:—The plaintiffs having based their whole claim on the *hundis*, and the *hundis* having failed, everything fails. There was no alternative or money claim, and the frame of the suit did not warrant the giving of a money-decree. The rulings reported as *Sri Nath Das* v. *Angud Singh* (1) and *Ram Sarup* v. *Jasoda Kunwar* (2), which were relied upon by the lower Court, did not apply. They require that the frame of the suit should admit of such a relief being given.

Besides, the money claim is barred. *Hundiawan* is a mere discount. It is part of the consideration for the renewal of the engagement or obligation contained in the *hundi* and its legal effect is exhausted when the *hundis* were renewed.

It cannot be taken as an unequivocal payment towards a debt when the main object was the renewal of the *hundis* and the *hundis* having been discarded, the *hundiawan* should go with them.

The cases regarding bills may be divided into three classes. When a bill is given for a prior debt, the obligation is pre-existent and if the bill fails, the prior obligation remains intact. *Secondly*, when the loan is advanced simultaneously with the bill, and the bill for some reason is invalid, the plaintiff can recover on the money count and discard the bill on the principle that the plaintiff paid money for a valid bill and the bill for some reason is invalid, so he must get his money back. *Thirdly*, as in this case, where the money is advanced and a valid bill is given, there is only one contract and there is no separate debt apart from the *hundi* itself. In this case, the prior bills were valid. The plaintiff cannot recover on a money count as no separate debt exists. He referred to Bullen and Leake on Pleading, 1863 Edition and Pollock on Contracts

Mr. *M. L. Agarwala* (with him Dr. *Tej Bahadur Sapru*), for the Respondents:—We have advanced Rs. 9,100, and it is hard we should lose the money. The transaction of the renewal must be construed as if the whole money was paid to us and again re-paid at the time of each renewal. In this way the debt would be in time.

[CHIEF JURTICE.—How do you get over the fact that you got a valid bill and not a defective one?]

The fact remains that we paid the money.

Besides, the first *hundis* were re-payable 61 days after date and that would bring us within time and we have proved the terms of those *hundis* by secondary evidence under sections 65 and 66, Evidence Act. Renewal of *hundis* does not bar a suit on the original consideration, and even if it does and the last set of *hundis* were invalid, we can fall back upon the prior set of *hundis*. The suit as framed gives us a right to fall back upon such prior set.

Mr. *A. P. Dube* in reply:—The former *hundis* were never sued upon. We do not know what they were and what were their dates. Besides, which of the prior sets would the plaintiffs select. There was no issue with regard to this. There are at least six sets of *hundis*. To assume that at least some of them were valid is a leap in the dark. The prior *hundis* were contracts which were novated and their obligation was dissolved. The giving of an invalid *hundi* cannot revive a dissolved contract.

JUDGMENT.—This appeal arises out of a suit for money. The plaintiffs allege in their plaint that they had a shop and that the defendants had another shop and that money dealings had taken place for a long time between them. With their plaint they filed a copy of their books, so far as it related to their alleged dealings with the defendants, and from this it would appear that the transactions commenced about the 6th of July 1908 and the 12th of March 1909 when sums of money were advanced, that from these dates *hundis* were from time to time given and renewed. Assuming the entries to be correct, they show that *hundis* were given for the principal sum of Rs. 9,100,

(1) 6 Ind. Cas. 126; 7 A. L. J. 459.
(2) 13 Ind. Cas. 138; 9 A. L. J. 72; 34 A 158.

that when the time came for a renewal discount or interest was paid and the *hundis* were renewed for the same principal amount. Jagan Prasad, defendant, met this by a denial of the plaintiff's right and by a special defence contained in paragraph 12 of his written statement in which he alleged that the *hundis*, which were alleged to be the last renewals by the plaintiffs, were in fact fictitious and that the plaintiffs being short of money had asked them to draw these *hundis* upon them. In the Court below the defence of the other defendants was more or less confined to a denial that Jagan Prasad had any right to take loans on behalf of the joint family. In the Court below the books of the plaintiffs were produced and proved, and we have no doubt that the books are genuine. The last renewal of the *hundis* could not, however, be given in evidence on account of a deficiency in stamps. Notwithstanding this the Court below has granted a decree to the plaintiffs for the amount claimed.

It is now contended on behalf of the defendants-appellants that the plaintiffs must be confined to their claim upon the last renewals of the *hundis*, and since these were insufficiently stamped the suit must necessarily fail. It was proved on behalf of the plaintiffs that the old notes were from time to time handed over to the defendants and were in their possession. We can see no reason why the plaintiff could not fall back upon the *hundis* that were given prior to the last renewals. There was a change in the Stamp Act just about this time, which probably explains the deficiency in the stamp on the last renewals. We do not think that any good purpose would be served by sending back the case to the Court below for more formal proof of the *hundis* before the last. We believe that they were in the possession of the defendants. They could not, having regard to the nature of the defence, have produced them, and the plaintiffs would be entitled to give secondary evidence of them. We think that secondary evidence was in fact given in the Court below by the witnesses for the plaintiffs and by the proof and production of their books. Under all the circumstances of the case we think that the decree of the Court below was correct and ought to be confirmed. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 720 OF 1913.

January 29, 1914.

Present:—Mr. Justice Scott-Smith.

Musammat SOHAMARI BAI—PLAINTIFF—PETITIONER

versus

CHATTA RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, Sch. II, r. 17—Award—Compromise amending award—Decree based thereon—Ten days' time for objection not necessary.

Proceedings under rule 17, Schedule II, of the Code of Civil Procedure, 1908, can be compromised and a decree passed upon the compromise.

Behari Lal v. *Dholan Das*, 5 Ind. Cas. 994; 38 P. W. R. 1910, followed.

It is not necessary to allow ten days for objections where the parties have accepted an award.

Sheo Narain v. *Sheo Ram*, 15 P. R. 1899 and *Ghulam Mustafa* v. *Halima Bibi*, 21 Ind. Cas. 298, 176 P. W. R. 1913, 310 P. L. R. 1913, followed.

Petition, under section 70 of Act XVIII of 1884, and amended by. Act IV of 1912, for revision of the order of the Divisional Judge, Multan, dated 15th January 1913, affirming that of the Additional District Judge, Multan, dated 15th July 1912, decreeing the claim in accordance with the award.

Pandit *Ram Bhaj Datta*, for the Petitioner.

Messrs. *Gullu Ram* and *Khem Chand*, for Respondents.

JUDGMENT.—Plaintiff-petitioner made an application in the first Court under rule 17 of the 2nd Schedule of the Civil Procedure Code for the filing in Court of an agreement. The agreement was duly filed and was followed by an award which was presented in Court on the 15th of July, 1912. The arbitrators were then examined and made a statement modifying the award in certain particulars as set forth in the order of the lower Appellate Court. The parties were then examined and accepted the award as thus modified and in accordance with this the first Court passed a decree. This decree has been upheld on appeal by the Divisional Judge on the ground

that it was passed with the consent of the parties.

The plaintiff has filed a petition for revision in this Court and it is urged on her behalf that the decree of the first Court is not in accordance with the award. Mr. Ram Bhaj Datta says that the proper course for the Court to adopt, when it found that the written award did not express the intention of the arbitrators, was to remit it under rule 14 of the 2nd Schedule. He also objects on the score that the Court did not allow ten days for the filing of objections. *Sheo Narain* v. *Sheo Ram* (1) and *Ghulam Mustafa* v. *Halima Bibi* (2) are authority for holding that there is no necessity to allow ten days for objections when the parties have accepted the award. When the Court found that the written award did not really express the intention of the arbitrators it might, no doubt, have remitted it under rule 14 of the 2nd Schedule, but instead of that it took the statements of the arbitrators, which showed clearly what their award really was, and then took the statements of the parties which showed that they consented to the award as modified by this statement of the arbitrators. It then passed a decree in accordance therewith. The decree was, therefore, really one passed upon a compromise entered into between the parties and was not one in accordance with the original award. The case reported as *Behari Lal* v. *Dholan Das* (3) is an authority for holding that proceedings under rule 20 of the 2nd Schedule can be compromised and following the same principle I see no reason why proceedings under rule 17 should not be compromised.

Mr. Ram Bhaj Datta urges that his client is a lady who probably did not understand the nature of the award as modified, and that she should have been given time to consider her position. No such objections were, however, raised in the grounds of appeal in the lower Appellate Court and I do not consider that there is any force in them. In the first Court she was present and made a clear statement agreeing to the award and the statement of the arbitrators. In accordance therewith a decree was passed and I see no sufficient ground for interference on the revision side.

The petition is, therefore, rejected with costs.

Petition rejected.

(1) 15 P. R. 1899.

(2) 21 Ind. Cas. 298; 176 P. W. R. 1913; 310 P. L.R. 1913.

(3) 5 Ind. Cas. 994; 938 P. W. R. 1910.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1520 OF 1911.

March 14, 1913

Present:—Justice Sir Asutosh Mookerjee, Kt. and Mr Justice Beachcroft.

MUKUNDA LAL CHAKRAVARTI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALI PROSONNA CHATTERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Decree of Revenue Court in rent suit—Subsequent title suit—Acceptance of decretal amount under protest—Non-acceptance of rent subsequent—Creation of relationship of landlord and tenant—Decision of Revenue Court as to extent of holding.*

The present defendants instituted a suit for rent in a Revenue Court against the present plaintiffs in respect of the holding of one *R. G.* which the present plaintiffs had purchased. In the plaint of that suit, the then plaintiffs (the present defendants) did not include the land now in controversy. The then defendants thereupon contended that although they did not dispute the amount of rent payable by them as purchasers of *R G.'s* holding, yet they were entitled to the land now in dispute as included in that holding. The Court found that the disputed land was part of the holding of *R.G.* The suit ended in a decree which was satisfied by the present plaintiffs (the then defendants), and the then plaintiffs (the present defendants) accepted the decretal amount under protest, and since that date they have not accepted rent from the present plaintiffs in respect of the land now in controversy. The plaintiffs have now brought this suit for recovery of possession of the disputed land:

Held that, (1) the decision of the Revenue Court in the suit for rent did not operate as *res judicata* in the subsequent suit for recovery of possession;

Hurri Sunker Mookerjee v. *Muktaram Patro*, 24 W. R. 154; 15 B. L. R. (F. B.) 238 and *Romeshar Koer* v. *Gobardhan Lal*, 7 C. L. J. 202, relied upon.

(2) the relationship of landlord and tenant was not created between the parties, although the defendants accepted rent from the plaintiffs.

Bidhumukhi Dasi v. *Jitendra Nath Roy*, 4 Ind. Cas. 442; 10 C. L. J. 527, referred to.

Appeal from the decree of the Sub Judge of Manbhum, dated March 16th, 1911, reversing that of the Munsif of Raghunathpur, dated May 3rd, 1910.

MUKUNDA LAL CHAKRAVARTI *v.* KALI PROSONNA CHATTERJEE.

Babu *Bepin Behary Ghose* (Junior) and *Bankim Chandra Mukherjee*, for the Appellants.

Babu *Satish Chandra Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration of title to immoveable property and for recovery of possession thereof. The case for the plaintiffs is that the land in dispute formed part of a tenancy held by Raghunath Ghosal under Issur Deghoria, that Issur Deghoria obtained a decree for rent against Raghunath Ghosal in 1900, that at the sale held in execution of that decree, the plaintiffs purchased the property on the 7th September 1903, and, that a few months later, in 1904, they were unlawfully dispossessed by the defendants. The defendants resist the claim on the ground that the land in dispute did not form part of the holding of Raghunath Ghosal and that consequently the plaintiffs have not acquired any title thereto under their purchase. The Subordinate Judge has found against the plaintiffs upon the question of title and has dismissed the suit. On the present appeal, it has been argued on behalf of the plaintiffs that by reason of events subsequent to their purchase at the execution sale, they have acquired a good title as against the defendants. To appreciate this argument, we must remember that Issur Deghoria was a *se-putnidar* for life under an instrument dated the 10th November 1888 and that after the termination of his interest, the defendants came into occupation as the superior landlords. These defendants instituted a suit for rent in a Revenue Court against the plaintiffs in respect of the holding of Raghunath Ghosal. In the plaint of that suit, the defendants did not include the land now in controversy. The plaintiffs thereupon contended that although they did not dispute the amount of rent payable by them as purchasers of the holding of Raghunath Ghosal, yet they were entitled to the land now in dispute as included in that holding. The Court investigated into this matter and came to the conclusion that the disputed land was part of the holding of Raghunath Ghosal. The suit was accordingly decreed on the 23rd May 1903 and subsequently the decree was satisfied by the plaintiffs. It has been argued on these facts that as the defendants have accepted rent from the plaintiffs in respect of the land now in dispute, a tenancy has been created between the parties, and the plaintiffs are consequently entitled to recover possession from the defendants. In our opinion there is no foundation for this contention.

It has not been argued, and in view of the decision of this Court in the case of *Huree Sunkur Mookerjee* v. *Kristo Pattro* (1), which was applied in the case of *Rameshar Koer* alias *Dulpin Saheba* v. *Gobardhan Lal* (2), it cannot be contended that the decision of the Revenue Court in the suit for rent operates as *res judicata*. But it has been argued that the decision has a different effect, namely, that it created the relationship of landlord and tenant between the parties. This view cannot possibly be supported. It is true that the defendants have accepted from the plaintiffs the sum payable under the rent decree. But the amount payable was not in controversy; the only dispute between the parties was as to the extent of the holding. The decision of the Revenue Court upon that question is admittedly not conclusive; and it would have been open to the defendants to assail that finding in a proceeding, properly framed and instituted in the Civil Court, for determination of the area and boundaries of the holding. The defendants did not follow this course for an obvious reason, as, according to the plaintiffs themselves, they lost possession as early as 1904. In 1904, the plaintiffs had no title; it is difficult to appreciate how they can succeed on the strength of what happened in 1908, even if it were assumed that the effect of the satisfaction of the decree of the Revenue Court by the plaintiffs was to constitute the relationship of landlord and tenant between the parties. But it is plain that the relationship of landlord and tenant was not so constituted; for the defendants must be deemed to have accepted the money under protest, and it is not shown that since that date, the defendants have accepted rent from the plaintiffs in respect of the land now in controversy: *Bidhumukhi Dasi* v. *Jitendra Nath Roy* (3).

On behalf of the plaintiffs, the ingenious argument has been finally put forward that the position of the defendants is the same as

(1) 15 B. L. R. (F. B.) 238; 24 W. R. 154.
(2) 7 C. L. J. 202 at p. 210.
(3) 4 Ind. Cas. 442; 10 C. L. J. 527 at p. 532.

if there had been a contract of tenancy between the parties. This contention is manifestly fallacious. There has admittedly been no such contract as we are invited to imagine. No doubt in the suit for rent the plaintiffs successfully asserted that the land now in controversy was included in the holding purchased by them. But the defendants have rebutted that assertion; and it has now been established that notwithstanding the fact that Issur Deghoria in 1903 put up this land to sale as the land of the holding of Raghunath Ghosal, it was never in fact included in that holding.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2397 OF 1912.

March 12, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

BODI MUTTAYYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KAVOORI KODANDARAMAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Gifts to females, construction of—Gift by father-in-law in favour of his widowed daughter-in-law—Presumption as to life-estate—Possession by female without title—Adverse possession - Prescription.

Documents of gift to daughters or other female members of a Hindu family are not to be construed to mean necessarily that no absolute interest could have been intended to be transferred by them.

Therefore, there is no presumption in law that a gift by a father-in-law of his ¼th share in certain properties to his widowed daughter-in-law is only of a life-estate and much more so when he, along with this gift, has made other absolute gifts to others.

A female in possession of property without any legal title for more than twelve years acquires by prescription an absolute title to such property.

Second appeal against the decree of the Court of the District Judge of Guntur, in Appeal Suit No. 40 of 1910, preferred against that of the Temporary Subordinate Judge of Guntur, in Original Suit No. 26 of 1909.

Mr. *S. T. Srinivasa Gopalachariar*, for the Appellants.

Mr. *T. Chenchiah* for Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—The appellants' learned Advocate points out that the District Judge committed an error when he stated in one portion of his judgment that the alienation under Exhibit III, dated 30th June 1883, was by the 1st plaintiff, Bodi Parvathammal, while, as a matter of fact, it was by Ravipati Parvathammal (the widow of another ¼th sharer). This incorrect statement cannot have materially affected the findings of the lower Appellate Court and we do not think that a remand is necessitated by the existence of this error.

One of the findings of the lower Appellate Court is that there was an oral gift by Venkayya to his widowed daughter-in-law, Atchamma, of ¼th of his property about 40 years ago. The District Judge disbelieved the oral evidence on both sides as to the different gifts respectively set up by the two parties. We think that if we rejected the evidence on both sides the logical result was that Atchamma, the daughter-in law, somehow without any right or title got possession of ¼th share of her father-in-law's property. If so, according to the Privy Council rulings, she acquired a full ownership title by adverse possession for twelve years against the next heir entitled to possession as against her and if she was such full owner, the plaintiff's suit admittedly fails and the second appeal by plaintiffs follows.

But we shall take it that though the learned District Judge says that the defence evidence is worthless, he still accepts it, as the probabilities support and corroborate that evidence; then as that evidence is to the effect that an absolute title was conveyed to his daughter-in-law by Venkayya the plaintiff's case fails on this basis also.

What, however, the plaintiffs want us to do is to accept the defendant's case to this extent only that Venkayya made some gifts to his daughter-in-law and then to reject the defendant's case that it was an absolute gift and lastly to apply the rule of law that a gift to a widowed daughter-in-law by a Hindu is presumably only of a life-estate.

We do not see how when plaintiff's case fails, he could elect to fall back upon only that portion of the defendant's case which

suits the plaintiff and then argue that the other portion has not been proved by the defendants. Even if he could do so, we think that there is no presumption of law that a gift by a man to his widowed daughter-in-law is only a gift of a life-estate, as, whatever might have been the tendency of certain earlier decisions, it has been held in more recent cases that documents of gift to daughters or other female members of a Hindu family need not be construed with a bias in favour of the view that an absolute interest could not have been intended to be transferred. Even if there is such a presumption the District Judge has referred to circumstances (such as the gift at the same time of another $\frac{1}{4}$th share to a male who was admittedly entitled to an absolute estate in that $\frac{1}{4}$th share and the fact that the alienation from other females, who obtained their shares under gifts contemporaneous with the gift to the daughters, had not been questioned by plaintiff before this suit was brought indicating that the gift by Venkayya to his daughter-in-law was probably an absolute gift.

We, therefore, dismiss the second appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 213 AND 214 OF 1912.

April 6, 1914.

Present:—Justice Sir Herry Stephen, KT., and Mr. Justice Mullick.

IN NOS. 213 AND 214.

MOULA BAKSH—JUDGMENT-DEBTOR—APPELLANT

versus

IN NO. 213.

STRUGHAN DEB DHABAL, MANAGER OF DHALBHUM ENCUMBERED ESTATE OF CHAIBASSA, VISHENJI VELJI—DECREE-HOLDERS

RAMESHWAR UPADHYA—JUDGMENT-DEBTOR—RESPONDENTS.

IN NO. 214.

1, 2 AND 3 THE SAME AS IN NO. 213—DECREE-HOLDERS

SUBHADRA KUMARI AND *Sheikh* ABDUL GAFFUR—JUDGMENT-DEBTORS—RESPONDENTS.

Damages—Suit for injunction and damages—Execution proceedings—If damages can be ordered to be ascertained in execution.

In a suit for injunction and damages, it is altogether beyond the authority of the Court to leave the ascertainment of damages for determination in execution as if they were mesne profits.

Appeals from the orders of the Special Sub-Judge of Singhbhum, dated January 2nd, 1912.

FACTS.—These suits were brought by the owner of certain lands against the occupiers of the surface, and the cause of action alleged was that the defendants had been excavating stones from the land in a way which they had no right to do. The plaintiff prayed for an injunction to prevent such excavation in future, and for damages for the excavation which had been made in the past. The Court granted an injunction and ordered that the defendants "must pay damages for anything done in contravention of the above, and that the ascertainment of damages be made in execution."

The decree-holders then applied for ascertaining the amount of mesne profits the judgment-debtors are liable to under the decree. Several objections were put forward by the judgment-debtors. The Court overruled them, and ordered as follows:

"Next, as to the amount of mesne profits the decree-holder has asked for time to adduce evidence. In cases like these, it is of little good to rely on the mere oral statements of witnesses examined in Court, but the best course would be to send a Commissioner to the spot to see the locality and determine the amount of mesne profits by taking evidence on the spot."

Accordingly a Commissioner was appointed, but one of the judgment-debtors appealed to the High Court and the execution proceedings were stayed,

The principal ground urged on behalf of the appellant was that the Court below ought to have held that the decree directing damages to be ascertained in execution was passed without jurisdiction and was illegal and inoperative and that consequently the plaintiff was not entitled to recover damages by execution of the decree.

Babus *Jogesh Chandra Rai* and *Suresh Chandra Das*, for the Appellant in both the appeals.

Babu *Baidya Nath Dutt*, for the Decree-holders-Respondents in both the appeals.

Babu *Tarakeshwar Pal Chowdhry*, for the Judgment-debtor Respondent in No. 213.

Babu *Bhupendra Kumar Bose*, for the Judgment-debtors-Respondents in No. 214.

JUDGMENT.—This was a suit brought by the owner of land against the occupier of the surface land, and the cause of action among other things was that the defendant had been excavating stones from the land in a way which he had no right to do. The plaintiff sought for an injunction to prevent such excavation in future, and for damages for the excavation which had taken place in the past. The Judge decided, in a judgment which has not been appealed against, that the defendant, although he had a right to take stones from the surface of the land, had no right to excavate stones and he granted an injunction forbidding him to do so in future. He also said that the defendant must pay damages for anything done in contravention of what he has ordered and that an ascertainment of damages should be made in execution proceedings. Reading this sentence in the plaintiff's favour we may take it to mean that he must pay damages for something already done in contravention of the rule which the Court laid down about the future, and that the damages were to be ascertained in execution. This provision about damages is altogether beyond the authority of the Court and was exercised without any jurisdiction. The judgment was passed under the former Code of Civil Procedure; but that confers no authority on the Court to leave the ascertainment of damages for determination in execution. The case is made all the more plain by the fact that as we read the judgment we find no determination of the question whether or not any stone had actually been excavated. Under these circumstances the plaintiff has proceeded in execution to ascertain the amount of excavation which has taken place. The defendant has objected that this is not a proper procedure and that no such inquiry can be instituted. He made his objection in due form to the lower Court which found against him and confusing damages with mesne profits, ordered that the mesne profits might be ascertained in execution proceedings for the period between the date when the cause of action arose and the date of disposal of the suit. Even if we can read this as an order for ascertainment of damages we find that such ascertainment is not within the jurisdiction of the Court. Consequently the objection made by the defendant was a good one. The original decree is *ultra vires* in so far as it ordered the ascertainment of damages to be made in execution proceedings.

The appeal is accordingly allowed which is against the order of execution dated the 2nd January 1912 and that order is set aside.

The appellant is entitled to his costs in this Court and in the Court below. The second defendant who has apppeared is not entitled to separate costs. The hearing-fee being 2 (two) gold *mohurs* in each case.

This judgment governs Appeal No. 214 of 1912.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1172 OF 1912.

February 4, 1914.

Present:—Mr. Justice Beadon.

Pir GANGA NATH—PLAINTIFF—PETITIONER

versus

TAJA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Document—Material alteration, suit based on.

Where a document has been materially altered so as to cast a definite liability on a party, the suit based thereon should be dismissed.

Petition for revision, under section 70 of Act IV of 1912, of the decree of the District Judge, Shahpur District, dated 24th June 1912, reversing that of the Munsif, 2nd Class, Bhera, dated 12th February 1912, decreeing plaintiff's claim.

Rai Bahadur Pandit *Sheo Narain*, for the Petitioner.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—Under the agreement as originally written the total yield of cotton in a specified area was to be sold at a certain rate, but by the introduction of the words *sau manya* the agreement is one to sell 100 maunds or the total yield of cotton in the specified area.

It is contended that if the addition had been "100 maunds and" that would have been a material alteration but that, as the

word "or" governs the whole sentence, there is no alteration in the meaning of the document. It is urged that 100 maunds was entered as rough estimate of the yield and that the agreement was, that more or less than 100 maunds should be sold according to the total yield.

This is the view taken by the first Court and at first I was inclined to think that the contention had some force, but on consideration I think that the alteration is material.

There was no particular object in entering a rough estimate of the yield and the plaintiff's notice to the defendant and his plaint show the object for which the alteration was made. Plaintiff on the strength of the altered document tries to hold defendant responsible for delivery of 100 maunds, whether the yield amounts to that weight or not, and also of any cotton which the land may have yielded in excess of 100 maunds.

The lower Appellate Court has, I think, rightly held that a material portion of the document has been altered and I am unable to interfere on revision.

The application for revision is dismissed with costs.

Revision dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 573 OF 1912.

February 18, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

GANGALA RAMOKOTAYYA AND ANOTHER —PETITIONERS

versus

BHIMAVARAPA GURUVA REDDY AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 37—Sale before adjudication—Evidence given at insolvency proceedings, whether admissible against purchaser in proceedings under section 37.

Where a sale made by an insolvent is impugned under section 37 of the Provincial Insolvency Act, evidence given at the insolvency proceedings, can be used against the purchaser, though not a party to the insolvency proceedings, to prove that the insolvent was unable to pay his debts at the time of the sale.

Petition, under section 46 (1) of Act III of 1907, praying the High Court to revise the order of the District Court of Kistna at Masulipatam, in Miscellaneous Appeal No. 23 of 1911, dated 20th February 1912, preferred against that of the District Munsif of Bezwada, in Miscellaneous Petition No. 1122 of 1911, in Insolvency Petition No. 5 of 1910.

Mr. *V. Ramadoss*, for the Petitioners.

Mr. *P. Nagabhushanam*, for the Respondents.

JUDGMENT.—I have to satisfy myself in this case that there has been a violation of law by the District Judge in passing the order he has passed. The District Judge upon the evidence given in the insolvency proceedings has come to the conclusion that at the time of the sale the insolvent was not in a position to pay his debts; and he refers to other circumstances which indicate that this is a case in which by collusion between the petitioner and the insolvent the sale has been brought about in order that the other creditors of the insolvent may not be able to get their share of the property. I am asked to say that the evidence given at the insolvency proceedings should not be used against the petitioner and that evidence *de novo* must be taken in order that, under section 37 of the Provincial Insolvency Act, it may be adjudged that the insolvent was not in a position to pay his debts. I have been referred to no authority for this position. The District Judge upon the materials which were available to him in the case has come to the conclusion I have referred to and I can find no ground to disturb his findings. I dismiss the revision petition with costs.

Petition dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No 221 OF 1910.

April 1, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

DURGA PROSAD—PLAINTIFF—APPELLANT

versus

RAGHU NANDAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Will—Bequest—Gift over if minor legatee do not attain full age, whether valid—Failure of prior bequest, not as contemplated—Validity of gift—Succession Act (X of 1865), ss. 111, 116.

A gift over to a person in the event of a minor legatee not having attained full age is valid. The specified uncertain event in this case, under section 111 of the Succession Act, is the failure of the minor to attain his majority.

Section 116 of the Succession Act, which merely incorporates the rule of the English Law, provides that a gift over shall take effect on the failure of a prior bequest, although the failure may not have occurred in the manner contemplated by the testator

DURGA PROSAD *v.* RAGHU NANDAN LAL.

Where a testator contemplated that if his son died a minor and his widow survived him, she would acquire the property before the two daughters:

Held, that this would not deprive the two daughters of the benefit of the legacy if the widow predeceased the son.

Appeal from the decree of the Sub-Judge of Patna, dated April 27th, 1910.

Dr. *Dwarka Nath Mitter* for Babu *Golap Chandra Sarkar* and Babu *Kishindra Nath Sarkar* for Moulvi *Mohamed Mustafa Khan*, for the Appellant.

Babu *Surendra Kumar Bose*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal arises out of a suit brought by the plaintiff for the construction of the Will of one Ram Narain Lal Sahu, a Hindu governed by the *Mitakshara* School of Hindu Law, which is dated the 1st July 1890. The testator died on the 1st March 1901, leaving him surviving his widow *Musammat* Chota Koer, two daughters, *Musammat* Binda Debi and *Musammat* Jaidebi, and an only son Tej Narain. The testator also left a brother and the two sons of his brother, namely, Ganesh Lal and Raghu Nandan Lal, who are the defendants in the suit. The son of the testator, namely, Tej Narain, died sometime in March 1904, having survived his mother *Musammat* Chota Koer by a few days. The eldest sister of Tej Narain, that is, the testator's eldest daughter, died in the life-time of her mother, *Musammat* Chota Koer, namely, on the 15th June 1903. She left a daughter, *Musammat* Janki Koer, who died in 1906. No question arises as to the interest that Janki Koer might take, because it is the common case of both the parties that if Janki Koer took any interest under the Will, the plaintiff would take in the usual course of succession any interest that Janki Koer had taken as she died apparently unmarried and without any children. The two plaintiffs in this case are the two surviving sons of the other daughter of the testator, namely, Jaidebi, the third son having died in February 1904 and, therefore, he could not take any interest under the terms of the Will. The Will of the testator is in these terms:—The testator proceeds, in the first place, to make his son Tej Narain Lal Sahu, who is described therein as his minor son and his legal heir, the *malik* of all his properties and the Will states that he should succeed to and enter upon possession and occupation of the whole of his estate. Then, the testator proceeds to appoint his widow, Chota Koer, as the manager and legal guardian of the infant. Then, the testator deals with the contingency which did not happen, namely, the contingency of any other son born to him. Next he deals with the case of the wife predeceasing the son before he attains the age of majority and he appoints in that case another person to be the guardian of the infant, Tej Narain. It is quite clear that down to there the Will contemplates the case of Tej Narain being an infant and the management of the property. Then comes the gift which the present appeal turns on. The clause runs thus:—"If after my death the said minor son dies, which God forbid, the mother of the said son shall in his stead become the *malik* in possession and occupation when like myself the said *Musammat* shall acquire all the properties moveable and immoveable." Now the learned Judge considered that that gift over in favour of the widow in the event of the son Tej Narain dying without having attained majority was a void gift as being repugnant to the form of the gift that was previously made in favour of Tej Narain. That is wholly an unarguable proposition. The gift over to a person in the event of the minor legatee not having attained full age has been supported in a large number of decisions both in the Courts in India and elsewhere. As a matter of fact, the learned Judge considered that, under section 111 of the Indian Succession Act, there was no specified uncertain event. The specified uncertain event in this case was the failure of Tej Narain to attain his majority. It is quite clear that the provisions of the Indian Succession Act render such a gift perfectly good. Then, after the death of the widow the property was given by the testator in equal shares to his two daughters, Binda Debi and Jaidebi. The learned Judge considered that that gift was void on the ground that it was dependent on the gift in favour of the mother and that, as the mother predeceased the son, the gift over in favour of the daughters did not take effect. Section 116 of the Indian Succession Act, which merely incorporates the rule of the English Law, provides clearly that the gift over

shall take effect on the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator. The mere fact that the testator comtemplated that, if his son died a minor and the widow survived him, she would acquire the property before the two daughters and that that event did not take effect in that order because the widow predeceased the son, does not deprive the two daughters of the benefit of the legacy given to them by the testator. Section 116 is quite clear as to that. In my opinion the learned Judge came to a wrong conclusion on the construction of the Will. The gift in favour of the daughters, in my opinion, was a valid bequest to them and the defendants who claim as being the next heirs of Tej Narain have no interest in the estate of the testator. The present appeal ought, therefore, to be allowed and the decree of the Subordinate Judge reversed and the defendants Nos. 1 and 2 ordered to pay to the plaintiffs their costs both in this Court and in the Court below. We make no order as to the costs of the defendant No. 7 who appears to have been added as a formal party. We assess the hearing fee at five hundred rupees.

RICHARDSON, J.—I agree.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 188 OF 1913.

October 10, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

PURSHOTTAM MUKUND SAMANT—DEFENDANT—APPELLANT

versus

RAKHMABAI MUKUND—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption by widow—Reservation of control over property by widow—Such reservation, whether fair and reasonable.

A Hindu widow while adopting a boy stipulated with the natural father of the boy to have all the rights of management in her husband's estate in herself till her death:

Held, that the agreement was not binding upon the adopted boy inasmuch as it was not fair and reasonable.

Second appeal from the decision of the Additional first Class Subordinate Judge, of Ratnagiri, in Appeal No. 498 of 1911, confirming the decree passed by the Additional Subordinate Judge of Malvan, in Civil Suit No. 33 of 1909.

Mr. *Jayakar*, (with him Mr. *A. G. Desai*), for the Appellant.

Mr. *Coyajee*, (with him Mr. *K. N. Koyajee*), for the Respondent No. 1.

JUDGMENT.

HEATON, J.—This is a case the determination of which depends upon whether a certain agreement, Exhibit 61 in the case, can or cannot be given effect to. The agreement is one of a kind that has often been the occasion of litigation. It was made on the occasion of an adoption and it gives to the adoptive mother, her husband being dead, a certain control over the property which would otherwise immediately pass to the adopted son. This was with the consent of the natural father who gave his son in adoption.

Mr. Jayakar has argued the case from the side which maintains that the agreement cannot be given effect to. He has not asked us to go into the general question, an attempt to do which was very recently made and the result of which appears in the judgment in the case of *Vyasacharya Narayanacharya* v. *Venkubai Rangacharya Upadya* (1). All he asks us to do is to find that the agreement is not fair and reasonable and must, therefore, be set aside.

Now I speak of this document as an agreement, because it has been so termed. Whether technically it is an agreement or not, does not matter in the view which we take of it. It provides, to summarize it, that the widow is to continue in management of the property, that she is to retain all the rights she had of managing as long as she lives, of receiving the income, of recovering money etc., and it further provides that she is to retain all the rights which she had in the absence of a son, and that the adopted boy is to get after her his rights. Now if effect is given to that agreement, it would mean that the widow had not only the management of the property but the unfettered right of disposing of the income. She could turn the boy out of her house and

(1) 17 Ind. Cas. 741; 14 Bom. L. R. 1109; 37 B. 251.

refuse to give him a single pie. I do not for a moment say that she would do this, she certainly has not done it. But if the rights of the parties were to be regulated by this agreement, she could do it and it seems to me to be very clear that a document which would make this possible cannot be regarded as a reasonable provision as between the adoptive mother and the boy whom she has taken in adoption. Therefore, applying the test which we are asked to apply as to whether these provisions are fair and reasonable, I come to the conclusion that they are not, and that consequently this agreement must be regarded as non-existent. That being so, the lady, who is the plaintiff in the case, has no right to succeed in her suit. She has prayed amongst other things for possession from her son and the effect of making a decree in her favour would be to uphold the agreement which, as I say, is neither fair nor reasonable. Consequently the decree of the lower Court must be set aside and the claim must be dismissed.

In the peculiar circumstances of this case, we think that the parties should bear their own costs throughout.

In Appeals Nos. 44 and 137 of 1913, the decision follows from that given above. In each case the appeals are allowed, and the plaintiff's claim is dismissed. The order as to costs is that each party is to bear his own costs throughout.

SHAH, J.—I concur. On a consideration of the terms of the agreement which have been discussed on both sides fully before us, I have come to the conclusion that this agreement cannot be upheld as a reasonable agreement binding upon the adopted boy. The agreement in terms provides that the widow is to have all the rights of management which she had before the adoption was made, and that the rights of the adopted son were to accrue after her death. The result of this agreement, if it were held binding upon the adopted son, would be that during the life-time of the plaintiff he would have no right to the property whatever. The mere circumstance that the plaintiff has allowed certain concessions in favour of the adopted boy does not alter the legal position of the parties. In this view of the agreement it is clear that applying the test which has been accepted by the appellant as applicable to this class of agreements, *viz.*, whether it is fair and reasonable, I am of opinion that the agreement is not fair to the adopted boy.

Though the lower Courts have upheld the agreement as reasonable and binding upon the adopted boy, the terms of the decree show that the agreement by itself was not found by them to be reasonable, and that by way of compromise they allowed certain rights to the adopted boy, which were outside the agreement. This tends to show that without making substantial alterations in the agreement as indicated by the provisions of the decree, the lower Courts were not prepared to enforce the agreement against the adopted boy. The decree appealed from substitutes in effect a new agreement in place of the agreement in dispute. I am of opinion that this could not be done and that the agreement which the adoptive mother seeks to enforce against the adopted boy should not be enforced against him.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1536 OF 1912.

March 11, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ABDUL AZIZ AND OTHERS—DEFENDANTS—APPELLANTS

versus

Saiyed MASUM ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 2 (d)—Consideration—Subscription gratuitously promised, whether recoverable—Treasurer of Subscription Committee—Agent—Negligence.

A suit cannot be maintained to recover a subscription gratuitously promised for the benefit of an institution.

An honorary treasurer of a Committee for subscriptions is not an agent of the Committee and is not liable for gross negligence in not cashing a cheque given to him by one of the donors.

Second appeal against the decree of the District Judge of Agra, dated 7th September 1912.

FACTS.—The plaintiffs as trustees of a Committee invited subscriptions for the repairs

of a mosque and the funds so collected were entrusted to Abdul Karim, the ancestor of the defendants. Abdul Karim himself promised a subscription of Rs. 500, and he received a cheque for Rs. 500 dated 12th September 1907, from one Jan Mohammad. The cheque lapsed before it was presented to the Bank. The defendants contested their liability to pay the money promised as subscription by Abdul Karim as also the money due under the cheque which was not realised. The Court of first instance disallowed the amount due under the lapsed cheque. On appeal, the District Judge decreed the whole claim.

Dr. *Tej Bahadur Sapru* (with him Mr. *Mohammad Ishaq*), for the Appellants, submitted that the defendants were not liable to pay the subscription promised by their ancestor. In the first place as there was no consideration for the promise, the agreement, if any, could not be enforced. If it be taken as a wrongful act, the right to sue ceased after the death of Abdul Karim.

Kedar Nath Bhattacharji v. *Gorie Mahomed* (1), is distinguishable. He relied on Pollock's Law of Contract. If their claim was based on tort they ought to have shown that they had sued within limitation.

Act XII of 1855 was specifically pleaded in *Krishna Behary Sen* v. *The Corporation of Calcutta* (2).

He cited *Sreemutty Chandermonee Dassee* v. *Santo Moonee Dassee* (3).

Dr. *S. M. Sulaiman*, for the Respondents, contended that it was the duty of the treasurer to realise the money and the only presumption possible under the circumstances is that Abdul Karim paid the money which he had promised to pay. It is not a case of mere voluntary promise. The plaintiffs have suffered loss through the negligence of Abdul Karim in not realising the money due under the cheque. His heirs are liable to pay both the amounts. Abdul Karim had constituted himself an agent of the trustees. Section 182 of the Contract Act. Even if there was no agreement he was liable for the tortuous act.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs against the heirs of Munshi Abdul Karim. The plaintiffs are the members of the Islam Local Agency Committee, Agra. It appears that in the year 1907, a movement was set on foot to collect money for repairing and reconstructing a mosque known as *Masjid Hammam* Alawardi Khan. The Local Agency Committee themselves sanctioned a subscription of Rs. 3,000; besides this amount, Rs. 100 were paid in cash at that time by Hakim Shafi Ullah, Rs. 500 were promised by Munshi Abdul Karim and another sum of Rs. 500 was promised by Munshi Jan Mohammad. Munshi Abdul Karim was appointed treasurer. The Local Agency Committee handed over their contribution of Rs. 3,000 to Munshi Abdul Karim and he also received the donation of Rs. 100 from Hakim Shafi Ullah. Munshi Jan Mohammad gave a cheque for Rs. 500 dated the 12th of September 1907. On the 29th of September 1907, the cheque was presented for payment, but it was returned by the Bank with a note that the endorsement was not regular. It was again presented on the 12th of January 1909 when the Bank returned the cheque with a note that it was out of date. Munshi Abdul Karim died on the 20th of April 1909; the present suit was instituted against his heirs on the 14th of April 1910. Munshi Jan Mohammad died in May 1910. The defendants do not dispute the right of the plaintiff to recover the sum of Rs. 3,100, they have admitted this part of the plaintiff's claim all along. It is admitted on both sides that nothing has been done to carry out the repairs and re-construction of a part of the mosque. Defence is, however, taken to the two items *viz.*, the Rs. 500 represented by the cheque of Munshi Jan Mohammad and the subscription of the deceased Munshi Abdul Karim. The Court of first instance granted a decree for the subscription promised by Munshi Abdul Karim but dismissed the suit in so far as it related to the claim for Rs. 500, the subscription of Munshi Jan Mohammad. The lower Appellate Court granted a decree for the entire claim. It appears to us that the suit cannot be maintained in respect of either item. With regard to the subscription of Munshi Abdul Karim this was a mere gratuitous promise on his part. Under the circumstances of the present case it is admitted that if the promise had been made by an outsider it could not have

(1) 14 C. 64.
(2) 31 C. 406; 8 C. W. N. 745.
(3) 1 W. R. 251.

been enforced. We cannot see that it makes any difference that Munshi Abdul Karim was himself the treasurer. There is no evidence that he ever set aide as sum of Rs. 500 to meet his promised subscription. As to the other item *viz.*, the amount of Munshi Jan Mohammad's cheqne, we see great difficulty in holding that a suit could have been brought against Munshi Abdul Karim in respect of this cheque during his life-time. His undertaking of the office of treasurer was purely gratuitous. He might at any time have refused to go on with the work. It is said that he must be regarded as the agent of the Committee, and that if he was the agent he was guilty of gross negligence and accordingly would have been liable for any loss the Committee sustained. In our opinion Munshi Abdul Karim cannot be said to have been an agent of the Committee; even if he was; it is very doubtful that he could have been held guilty of gross negligence. He had presented the cheque for payment; the mistake in the endorsement was a very natural one and the delay in re-presenting the cheque or getting a duplicate from the drawer may well be explained by the delay which took place in carrying out the proposed work. In our opinion, under the circumstances of the present case, Munshi Abdul Karim could not have been sued in his life-time. It is quite clear that if no suit lay against Munshi Abdul Karim in his life-time, no suit could be brought after his death against his heirs. The result is that we allow the appeal to this extent, that we vary the decree of the Court below by dismissing the claim in respect of the two items of Rs. 500 each. The appellants will get their costs of this appeal including in this Court fees on the higher scale. In the Court below the parties will pay and receive costs in proportion to failure and success.

Appeal allowed; Decree varied.

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 42 AND 43 OF 1913.

October 13, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

HARIBHAI HANSJI—PLAINTIFF—APPELLATN

versus

NATHUBHAI RATNAJI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 65—Mortgage—Void—Personal covenant to compensate mortgagee, whether enforceable—Bhagdari Act (Bom. Act. V of 1862)— Valatdan Patta *of unrecognized portion of* Bhag.

A *valatdan patta* (mortgage) of unrecognized portion of a *bhag* was held to be void, but, as there was a personal covenant by the mortgagor to compensate the mortgagee in case his possession was obstructed, the former was not allowed to recover possession of the lands from the latter without payment of proper compensation.

Jijibhai Laldas v. *Nagji Gulab*, 3 Ind. Cas. 761; 11 Bom. L. R. 693, referred to.

Second appeals from the decision of the First Class Subordinate Judge, at Ahmedabad, in Appeals Nos. 73 and 74 of 1910, varying the decrees passed by the Joint Subordinate Judge of Broach in Civil Suits Nos. 334 and 335 of 1910.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.

SHAH J.—In this case the plaintiff sued formally to redeem but substantially to recover possession of the property mentioned in the *valatdan patta* dated the 10th of June 1902. Several defences were raised to this suit on behalf of defendant No. 1. It was held by the trial Court that the document called the *valatdan patta* was a mortgage, that the plaintiff was entitled to recover possession, and that he was liable to give certain compensation to the defendant as claimed by him. The decree of the trial Court was confirmed subject to a slight variation as to interest by the lower Appellate Court.

The plaintiff has now appealed and has urged that the order of the lower Court allowing compensation to the defendant is wrong, *firstly*, because the bond is void under section 257A of the Code of Civil Procedure of 1882, and *secondly*, because the bond is void in virtue of the provisions of the Bhagdari Act. It is contended that no compensation under section 65 of the Indian

HARIBHAI HANSJI *v.* NATHUBHAI RATNAJI.

Contract Act should be allowed, as it must be assumed, in the absence of any evidence to the contrary, that at the time when the agreement was entered into, the parties were aware of the real nature of the transaction.

As to the first point, from the recitals in the document, the amount of the bond does not appear to be in excess of the decretal amount. There is no evidence in the case to show that at the date of the bond the amount due under the decree was less than the amount of the bond. The Appellate Court has observed that in this case the bond appears to have been taken for 'far shorter amount.' Under these circumstances I am of opinion that the bond is not proved to be void in virtue of section 257A in this case. It is not necessary, therefore, to consider the question whether compensation under section 65 of the Contract Act could be allowed, if the bond were void under section 257A.

As regards the 2nd point the facts are that the defendant obtained possession of the property from the date of the bond and continued in possession up to the date of the suit. The plaintiff brought the suit in 1910, to recover possession of the property. Until then it appears that no obstruction was caused to the defendants' possession under the bond. The plaintiff thought of recovering possession on the ground that the mortgage of an unrecognized portion of a *bhag* was void in this suit. There is nothing to show that the defendant was aware of the fact that the bond was void under the Bhagdari Act at the date of the bond. It is clear that the bond was discovered to be void after the suit was brought. Assuming for the sake of argument that the plaintiff's contention, that section 65 of the Contract Act has no application to a case in which the parties are aware at the time of the transaction that it is void, is good, I am of opinion that in this case the agreement is discovered to be void within the meaning of section 65 of the Contract Act long after the transaction. It is clear that if the agreement is discovered to be void, it is open to the Court to allow compensation to the person to the extent of the advantage received under such agreement by the other side. In this case we have the additional circumstance that there is a personal covenant in the bond to give compensation in case there is any hindrance caused to the possession of the defendant under the bond. I am of opinion that even under this covenant the order of compensation against the plaintiff would be justified. This view is supported by the ruling of *Jinibhai Lallas* v. *Nagji Gulab* (1). The lower Appellate Court appears to have thought that in view of *Jinibhai's* case (1) the defendant ought not to be ordered to give up the lands without receiving back his moneys. It is necessary, however, to remember that neither under section 65 of the Indian Contract Act, nor under the ruling in *Jinibhai's* case, (1) the Court is bound to award compensation in all cases as a matter of course where the document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case as to whether the agreement is discovered to be void and whether any person has received any advantage under such agreement as required by section 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case. In the present case there is no dispute about the amount. The parties were agreed in the lower Courts that if the compensation could be awarded to the defendant, the amount should be that which is allowed by the lower Courts. Under the circumstances of this case I feel satisfied that both under section 65 as also under the covenant contained in the bond the order as to compensation is correct.

Lastly, having regard to the variation in the terms of the decree of the Court of first instance made by the lower Appellate Court, the effect of which is not quite clear to us and which is likely to lead to complication in calculation, I am of opinion that it is desirable to restore the decree of the trial Court. That decree allows interest in a manner which under the circumstances of this case, I think, is fair. The difference between the decree of the trial Court and that of the Appellate Court, as I understand it, is not of a very substantial character and even in the absence of any cross-

(1) 3 Ind. Cas. 761; 11 Bom. L. R. 693.

objection on the part of the defendant, I think under the circumstances it would be proper to restore the decree of the trial Court.

I, therefore, modify the decree of the Appellate Court by restoring that of the trial Court subject to the proviso that the first instalment, if not paid, should be paid by the 31st of December 1913, the time for the payment of other instalments being the same as fixed by the decree of the trial Court.

The appellant should pay respondent No. 1's costs of this appeal and of the appeal in the District Court.

HEATON, J.—I concur in the decree which is to be made and I have very little to add. I do think it necessary to point out that apparently on the strength of the case of *Jijibhai* v. *Nagji* (1) there is a tendency to assume that because an agreement is in fact void, it follows without more ado that it is discovered to be void within the meaning of section 65 of the Contract Act. Personally I do not think that any such thing necessarily follows. As my learned colleague indicates, in every case the circumstances of the case have to be looked to, and it has to be determined whether in that particular case section 65 of the Contract Act can properly be applied.

Decree modified.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3351 OF 1910.

February 12, 1914.

Present:—Mr. Justice Teunon and Mr. Justice Mullick.

BHUBAN SAHU—PLAINTIFF—APPELLANT

versus

LAL SUNDER JHANKAR—DEFENDANT—RESPONDENT.

Nethersole *Settlement* Khasra—*Public record—Certified copy produced at late stage—Evidence, acceptance as—Burden of proof to show entry incorrect—Record of Rights—Central Provinces Tenancy Act (I of 1898 B. C.), ss. 44, 56 (2)—Occupancy right—Village service lands.*

The *khasra* of the Nethersole Settlement in Sambalpur is a public record.

A certified copy of it produced by the plaintiff before the witnesses for the defendant were examined may properly be accepted in evidence though filed at a late stage.

The burden of proof is upon the party who alleges that a certain entry in a Record of Right is incorrect.

Under section 44 of the Central Provinces Tenancy Act, occupancy rights cannot be acquired in village service lands, and under section 56, sub-s. (2), any sub-lease of such lands for a period not exceeding one year is void.

Appeal from the decree of the Sub-Judge of Sambalpur, dated July 29th, 1910, reversing that of the Second Munsif of Sambalpur, dated April 29th, 1910.

Babu *Dhirendra Krishna Roy* for Babu *Sarat Chandra Roy Chowdhury*, for the Appellant.

Babu *Shiba Prosonna Bhattacharyya* for Babu *Jotindra Mohun Ghose*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit brought for recovery of possession of certain lands on establishment of his title as an occupancy *raiyat*. The lands in question are situate in the District of Sambalpur and the findings of the learned Subordinate Judge are that the lands in question are part of the village service lands of the defendant, that the plaintiff is, therefore, not an occupancy *raiyat* and that he has no subsisting interest in these lands. In this appeal by the plaintiff the judgment of the learned Subordinate Judge is attacked on three grounds; *first*, that he has erroneously admitted in evidence a certified copy of a paper described as the *khasra* of what is called the Nethersole Settlement; *secondly*, that he has erroneously admitted in evidence a report made by the Superintendent of Land Records under section 16 of the Central Provinces Land Revenue Act; and *thirdly*, that he has misplaced the burden of proof.

The Nethersole Settlement Khasra is undoubtedly a public record. It was rejected in the first Court on the ground that it was not produced at an earlier stage of the proceeding. It appears that a certified copy of the *khasra* was produced before the witnesses for the defendant were examined. There can be no doubt that it is a genuine document and there can be no doubt that the Subordinate Judge acted properly in accepting it though filed at a late stage.

Whether the report of the Superintendent of Land Records was properly or improperly admitted in evidence does not seem to be material because in the judgment we can-

not find that the Subordinate Judge has, in any way, relied upon that report. What he has relied upon is the Deputy Commissioner's order, Exhibit A, which was based on that report. It is not suggested that that order is not admissible in evidence.

With regard to the onus it appears that, in the Record of Rights of the current Settlement, which is spoken of as the Dewar Settlement, the lands in question have been entered as the village service lands of the defendant. It follows that, in this suit brought by the plaintiff for the purpose of showing that the entry is incorrect and that these lands are not village service lands but his occupancy *raiyati* lands, the burden of proof has been correctly placed upon him. In village service lands, under section 44 of the Central Provinces Tenancy Act, occupancy rights cannot be acquired and under section 56 sub-section (2) of the same Act any sub-lease of such lands for a period not exceeding one year appears to be void. It follows that the plaintiff has no subsisting interest in these lands.

The appeal must, therefore, be dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 297 OF 1913.

November 2, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

KALURAM PIRCHAND MARWADI—PLAINTIFF—APPELLANT

versus

GANGARAM SAKHARAMSHET SHIMPI DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 97—*Preliminary decree—Accounts—Finding srecorded—No preliminary decree drawn up—Party omitting to have preliminary decree drawn up—Waiver—Appeal.*

The right to appeal under section 97 of the Civil Procedure Code arises only when a preliminary decree is passed by a Court and there is no right of appeal when in a suit for accounts a preliminary finding directing the accounts to be taken is recorded but no preliminary decree is drawn up.

There is no statutory provision requiring a party to ask a Court to draw up a decree in pursuance of a judgment and it is the duty of a Court to draw up a decree and the Pleaders of the parties are to see that the decree is in accordance with the judgment. Therefore no inference adverse to a party as to his right to appeal can be drawn from an omission on his part to ask the Court to draw up a decree.

Second appeal from the decision of the first Class Subordinate Judge at Dhulia, in Appeal No. 404 of 1910, confirming the decree passed by the second Class Subordinate Judge at Amalner, in Civil Suit No. 349 of 1909.

Mr. *M. V. Bhat*, for the Appellant.

JUDGMENT.

SHAH J.—The plaintiff brought the present suit for an account and for recovery of the balance due by the defendant, who was the owner of a ginning and pressing factory and with whom the plaintiff had dealings as a customer. Several issues relating to the agreement between the parties, custom of the trade, interest and other details, were raised by the trial Court. After recording findings on these issues the Court ordered accounts to be settled as per findings on the 30th June 1910. It was also ordered on the same day that the plaintiff ought to apply for commission within four days from that date or put in his own statement of accounts, so that defendant may check it and ascertain its correctness. Ultimately a Commissioner was appointed to take accounts. He took accounts and found that a certain sum was due by the plaintiff to the defendant. The Court accepted the Commissioner's report and dismissed the plaintiff's suit with costs on the 26th September 1910.

The plaintiff appealed to the District Court against the final decree and urged objections to the findings recorded by the trial Court, in accordance with which the account was taken between the parties. The lower Appellate Court refused to allow the appellant to urge his objections, on the ground that the order dated 30th June 1910 amounted to a preliminary decree and that the plaintiff having failed to take steps to appeal against the preliminary decree, he must be deemed to have waived his right to appeal against the preliminary decree based upon these findings. The lower Appellate Court accordingly confirmed the decree of the trial Court.

The present second appeal is preferred by the plaintiff against the decree of the lower Appellate Court, and it is urged that the

view taken by that Court as to the plaintiff's right to object to the findings in his appeal against the final decree is not correct. The defendant, though served, has not appeared. The learned Pleader for the appellant, however, has argued the case before us fairly.

After a careful consideration of the provisions of the Code of Civil Procedure and the decisions of this Court, I am of opinion that the appellant's contention ought to be allowed. In this case there was no preliminary decree drawn up in pursuance of the interlocutory judgment of the 30th June 1910. The plaintiff took no steps to have the preliminary decree drawn up. Under the Code, the right to appeal arises when there is a decree, *i.e.*, when there is a formal expression of the adjudication. There is no right to appeal from any preliminary judgment of the kind we have here. The obligation to appeal against a preliminary decree by which a party is aggrieved, contemplated by section 97 of the Code, arises when the right to appeal accrues and not before that. So far the point presents no difficulty and in the absence of any preliminary decree, it is clear that the party appealing against the final decree would have a right to object to findings which may have been recorded in the preliminary judgment.

It is said, however, that it is the duty of the party or his Pleader to ask the Court to draw up a preliminary decree and that if he fails to do his duty the party must be deemed to have waived his right to appeal. The lower Appellate Court has drawn that inference, but I am unable to accept it. Under the Code it is the duty of the Court to draw up a decree. The Civil Circulars also proceed upon this view of the provisions of the Code. There is no express provision of law which requires the party concerned to move the Court to draw up a decree. The only provision relating to the Pleader's duty in this respect is to be found in clause 159 of the Manual of Civil Circulars (1912). This clause provides that "in cases in which Pleaders are employed it is their duty to see that the decrees and final orders are properly drawn up in conformity with the terms of judgment and every facility shall be given them for that purpose and for being heard in cases of doubt and difficulty." So far as I know this provision has always been understood—and, in my opinion, rightly understood—as requiring the Pleaders employed in a case to see that the decree is in accordance with the judgment, when it is drawn up, and before it is signed, by the Court as required by the Code. It is not as if the decree is to be drawn up only *when applied for* as on the Original Side of this Court: see Rule 245 of the Rules and Forms of the Bombay High Court, (1909). The practice in the Mofussil Courts is in accordance with the provisions of the Code and the Civil Circulars, *viz.*, that the Court is to draw up the decree, and that the Pleaders, if any, in the case are to see that it is in accordance with the judgment. Thus it will appear that there is no provision requiring the party or his Pleader to move the Court to draw up a decree. Under these conditions I am unable to say that a party waives his right to appeal, when he or his Pleader omits to ask the Court to draw up a preliminary decree. Mere omission on his part to ask the Court to do that, which it is the duty of the Court to do of its own motion, cannot affect the right of the party to appeal, which can arise only when the decree is drawn up by the Court.

In this case there is no express waiver. And it can be implied when the person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is entitled. The appellant in this case has done nothing, which can be said to be inconsistent with that to which he is entitled, nor has he acquiesced in any such thing. His right to appeal did not arise as no preliminary decree was drawn up. The omission on his part to move the Court to draw up the preliminary decree is not inconsistent with his right to appeal, when it arises.

The lower Appellate Court has relied upon the case of *Govind Ramchandra* v. *Vithal Gopal* (1). Under similar circumstances a different view was taken of the duty of the party to apply to the Court to have a decree drawn up and of the inference of waiver to be drawn from the omission of the party to do that duty in the case of *Sakharam*

(1) 16 Ind. Cas. 159; 36 B. 536; 14 Bom. L. R. 560.

Vishram Surve v. *Sadashiv Balshet Lodha* (2). I, therefore, feel myself free to decide this appeal in conformity with the conclusion which I have come to in this case. I have stated my reasons for holding that in the absence of any statutory provision requiring the party or his Pleader to ask the Court to draw up a decree in pursuance of a judgment no inference adverse to the party as to his right to appeal ought to be drawn from an omission on his part to ask the Court to draw up the decree.

The result, therefore, is that the decree of the lower Appellate Court is reversed, and the case remanded to that Court for disposal according to law. Costs of this appeal to abide the result.

HEATON, J.—I am of the same opinion.

Decree reversed; Case remanded.

(2) 19 Ind. Cas. 894; 37 B. 480; 15 Bom. L. R. 382.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1570 OF 1911.

February 20, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

VENKATASUBBAIYAR—PLAINTIFF—APPELLANT

versus

SUBBARATHINAM AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage-bond—Assignment—Mortgage-debt paid to assignee—Cancellation of assignment—Notice of cancellation—Assignment treated by mortgagee as void—Inter-pleader suit, whether mortgagor bound to bring.

Where a mortgagee assigns his rights under the mortgage-bond to another, and gives notice of such assignment to the mortgagor, the latter is entitled to treat the assignee as the person to whom payment should be made, provided that before such payment the assignment has not been cancelled.

Trimbak Bhikaji v. *Shankar Shamrao*, 12 Ind. Cas. 532; 13 Bom. L.R. 947; 36 B. 37; *Raja Rajeswara Dorai (Rajah of Ramnad)* v. *Arunachellam Chettiar*, 19 Ind. Cas. 596; (1913) M. W. N. 453; 13 M. L. T. 469; 24 M. L. J. 592, followed.

A notice cancelling such an assignment, in order to be effective, should at least signify an intention to bring a suit to cancel it.

A decree, subsequently obtained, setting aside the assignment, speaks only from its date, and does not effect payments previously made.

Sayam Ramamoorthi v. *Secretary of State for India*, 19 Ind. Cas. 656; 24 M. L. J. 469; 36 M. 141, referred to.

Where the mortgagee does not deny the assignment but only treats it as one entirely void and of no effect, the mortgagor is not bound to bring an interpleader suit to make the mortgagee and the assignee interplead between themselves as to their respective rights under the assignment.

Gopalakrishna Iyer v. *Gopalakrishna Iyer*, 4 Ind. Cas. 420; 33 M. 123; 7 M. L. T. 97, distinguished.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 179 of 1910, presented against that of the Subordinate Judge of Trichinopoly in Original Suit No. 46 of 1909.

This second appeal coming on for hearing on the 15th of October 1912, the Court (Sundara Aiyar and Sadasiva Aiyar, JJ.) delivered the following

JUDGMENT.—Before disposing of this second appeal, we consider it desirable to have findings on the following questions:—

(1) Whether before the receipt of Exhibit VII by the 1st defendant, Doraisawmy Iyengar had agreed to receive payment of the amount due on the hypothecation bond from the usufructuary mortgagees under Exhibit VI, whether he had agreed to release the 1st defendant and whether he had received any payment from the usufructuary mortgagees or from the 1st defendant?

(2) Whether before the receipt of Exhibit VII, the 1st defendant had entered into any and what contract, agreement or undertaking with Doraisawmy Iyengar with reference to the hypothecation debt?

(3) Whether any and what payments were made to Doraisawmy Iyengar before the decree in Original Suit No. 235 of 1900, on the file of the Court of the District Munsif of Kulitalai?

The findings will be on the evidence on record.

The finding is to be returned within one month from the date of receipt of this order. Time for objections, seven days.

In compliance with the order contained in the above judgment the District Judge of Trichinopoly submitted the following

FINDING.—Before dealing with the matters on which I am asked to return findings I will briefly call attention to the pleadings in the plaint, and in the written statement, which appear to have been overlooked by the Subordinate Judge.

The plaintiff's averments are briefly as follows:—

On 3rd July 1894 the 1st defendant executed a hypothecation bond (Exhibit I) in favour of the plaintiff. On 3rd March 1897, the plaintiff executed a deed of assignment (Exhibit II) in respect of Exhibit I in favour of Doraisawmy Iyengar and one Ranga Rao, and on 24th March 1897, sent a notice (Exhibit III) to the 1st defendant directing him to pay the amount of the bond to the said persons. On 29th September 1897, the 1st defendant executed a usufructuary mortgage (Exhibit VI) in favour of Vembadi Moopan and Muthukaruppa Goundan directing them to discharge Exhibit I. On August 5, 1897, the plaintiff sent a second notice to the 1st defendant informing him that the assignment of 3rd March 1897 was void, and directing him not to pay any of the money due under the hypothecation bond to Doraisawmy Iyengar or Ranga Rao. No portion of the money has been paid by the 1st defendant or by his mortgagees to the assignees under Exhibit II.

The defendants state that the date of the second notice is wrongly given in the plaint, that the notice is dated 15th October 1897, but seems to have been posted on 15th November 1897 and was received by 1st defendant some days later. They aver that the 1st defendant executed the usufructuary mortgage-deed (Exhibit VI) on 29th September 1897 for Rs. 2,600 and directed the mortgagees to pay Rs. 1,800 out of the consideration to Doraisawmy Iyengar for the suit bond in accordance with the plaintiff's notice (Exhibit III). Doraisawmy Iyengar agreed to receive the Rs. 1,800 from the usufructuary mortgagees and a balance of Rs. 230-1-6 remained due on 3rd October 1897 and he received the same on that date from 1st defendant.

The 3rd issue framed by the Subordinate Judge is,

"Whether the suit bond was not discharged by the execution of the mortgage of 29th September 1897 referred to in paragraph 9 of the plaint and by the payment of Rs. 230-1-6 alleged by the defendants?

Is the payment of Rs. 230-1-6 true?"

And the 5th issue is "have the mortgagees under the deed of 29th September 1897 paid the suit debt?"

2. It would thus appear that at the time of the framing of issues there was no dispute between the parties as to the date on which Exhibit VI was executed, and indeed in view of the express statement in paragraph 9 of the plaint that the deed was executed on 29th September 1897, it was not, I think, open to the plaintiff to deny that Exhibit VI was executed on that date. The Subordinate Judge has entirely overlooked this, and has built up an argument on a theory, which he appears to have set up himself, that Exhibit VI was executed after the receipt of the second notice, Exhibit VII. But this premise is not allowable in view of the plaintiff's pleading that Exhibit VI was executed on 29th August 1897 and the Subordinate Judge's argument appears to me to be vitiated throughout by the error into which he has fallen in respect of this matter. In discussing the question sent down to me I shall accept the date given by the plaintiff as the date of the execution of Exhibit VI, *viz.*, 29th August 1897.

3. The first two issues on which I am asked to return findings are:—

(1) (*a*) Whether before the receipt of Exhibit VII by the 1st defendant, Doraisawmy Iyengar had agreed to receive payment of the amount due on the hypothecation bond from the usufructuary mortgagees under Exhibit VI,

(*b*) whether he had agreed to release the 1st defendant,

(*c*) whether he had received any payment from the usufructuary mortgagees or (*d*) from the 1st defendant.

(2) Whether before the receipt of Exhibit VII the 1st defendant had entered into any and what contract, agreement or undertaking with Doraisawmy Iyengar with reference to the hypothecation debt.

In regard to issue 1 (*a*), (*b*) and issue 2, attention of the parties, no doubt, was not directed to these matters, but as the evidence stands I am of opinion that the defendants, on whom the burden lies, have not proved that before the receipt of Exhibit VII there was any agreement between the mortgagees or the 1st defendant and Doraisawmy Iyengar that Doraiswmy Iyengar should receive payment of Rs. 1,800 from the mortgagees, or that Doraiswmy Iyengar agreed to release the 1st

defendant. The 1st defendant, examined as D. W. No. 2, says that two or three days after the execution of Exhibit VI, *i. e.*, about 3rd October 1897, he got the payment of Rs. 1,800 undertaken by the mortgagees and himself paid Doraisawmy the balance which came to Rs. 230 and odd. Doraisawmy himself, examined as D. W. No. 1, says that when the 1st defendant paid him Rs. 230-1-6, which is endorsed on Exhibit I as having been paid on 3rd October 1897, he took him to the mortgagees and made them undertake payment to him which he agreed to receive from them. Vembadi, one of the mortgagees under Exhibit VI, examined as D. W. No. 3, states, however, that the 1st defendant told him, sometime after the execution of Exhibit VI (say one month or so), that the money should be paid to Doraisawmy, and that after registration (17th November 1897) the 1st defendant brought Doraisawmy to him and pointed him out as the person that he should pay, while D. W. No. 5, the man who negotiated Exhibit VI, says that the 1st defendant brought Doraisawmy to his house and told him that he was the man that had to be paid before the registration of the document. The evidence as to the time when the various undertakings were entered into between Doraisawmy and the 1st defendant and the mortgagees is thus both meagre and contradictory. My finding on issue 1 (*a*) and (*b*) and issue 2 is against the defendants.

4. The defendants' case is that the payments they plead were made by mortgagees to Doraisawmy were in March 1898 which was after the receipt of Exhibit VII by the 1st defendant. I see no reason, however, to doubt the evidence of the 1st defendant that the payment of Rs. 230-1-6 was made by him to Doraisawmy on 3rd October 1897, the date on which payment is endorsed on Exhibit I. My finding, therefore, on issue I (*c*) and (*d*) is that Doraisawmy received payment of this sum from the 1st defendant before the receipt of Exhibit VII, but that he received no payment from the usufructuary mortgagees before the receipt of the second notice.

5. The 3rd issue on which I am asked to return a finding is: "whether any and what payments were made to Doraisawmy Iyengar before the decree in Original Suit 235 of 1900 on the file of the Court of the District Munsif of Kulitalai?" The date of this decree is 22nd December 1900. I have already found that the 1st defendant paid Rs. 230 1-6 to Doraisawmy on 3rd October 1897. Payments by the mortgagees are endorsed on the document as having been made on March 3rd, 4th and 10th, 1898. Doraisawmy (D. W. No. 1) speaks to the payment and says the last payment was made on 10th March 1898. D. W. No. 3 says D. W. No. 5 acted for him, and that he paid D. W. No. 5 10 or 15 days after the registration of Exhibit VI, and the latter paid Doraisawmy and got possession of Exhibit I, which was handed to his co-mortgagee before the witness gave evidence in Original Suit No. 235. D. W. No. 5 says he paid Doraisawmy Rs. 1,800 with interest and wrote the endorsements on Exhibit I. If the payments were made, I see no reason to doubt that they were made on the date on which payment is endorsed, but it is urged for the plaintiff that there is reason to doubt that any payment was made at all, and the plaintiff's Vakil practically adopts the arguments set out by the Subordinate Judge in paragraphs 17 and 18 of his judgment. These briefly are (1) that the hypothecation bond (Exhibit I) was not produced at the hearing of Original Suit No. 235 of 1900, on the file of the Kulitalai District Munsif, in which the present plaintiff sued for declaration that the assignment, Exhibit II, executed by him to Doraisawmy Iyengar and Ranga Rau was invalid as against him, and for recovery of hypothecation bond Exhibit I; and (2) that it is improbable that the 1st defendant, after receiving Exhibit VII, should not have informed his mortgagees of the risk involved in making any payments to Doraisawmy, or that if he had so informed them they would have made any payment. Neither argument appears to me conclusive. Vembadi (D. W. No. 3) states that when he was summoned to produce Exhibit I by the Kulitalai Court in Original Suit No. 235, he told the Court the document was not with him but with his co-mortgagee, Muthukaruppa Goundan, who was in Salem. The plaintiff's prayer in Original Suit No. 235 for the recovery of Exhibit I was obviously unsustainable, as the mortgagees under Exhibit VI were not parties and though it is true an issue was framed in that suit

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as to whether Exhibit I had been discharged, it was no concern of the mortgagees to prove discharge, nor so far as I can see had the issue anything to do with the question for decision. As to the improbability of any payment being made by the mortgagees after the receipt of Exhibit VII by the 1st defendant, the latter states that on receipt of Exhibit VII he asked plaintiff if he would give him an indemnity against loss, offering in that case to tell his mortgagees not to pay Doraisawmy, but that the plaintiff declined, and if this is true it seems to me more probable that the 1st defendant would not have told the mortgagees anything about the second notice, for it was to his interest that they should pay Doraisawmy. Moreover, the 1st defendant sold the property usufructuarily mortgaged under Exhibit VI to the mortgagees in 1903 under Exhibit VIII, and part of the consideration for the sale is shown in the sale-deed as Rs. 2,600 received as per Exhibit VI. My finding on issue 3 is that the 1st defendant paid Doraisawmy Iyengar Rs. 230-1-6 and that the mortgagees paid him Rs. 1,800 before the decree in Original Suit No. 235 of 1900, on the file of the Court of the District Munsif of Kulitalai.

Mr. *S. Sreenivasa Aiyangar*, (with him Mr. *S. Varadachariar*), for the Appellant.

Mr. *C. V. Ananthakrishna Iyer* with him Mr. *N. S. Rangasami Aiyangar*), for the Respondent.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—I accept the facts as found by the lower Appellate Court. Those facts are :—

(*a*) that the 1st defendant as mortgagor paid Rs. 230 and odd in October 1897 to Doraisawmy Iyengar who had obtained the assignment from the plaintiff of plaintiff's rights as first mortgagee;

(*b*) that the person who obtained the second usufructuary mortgage from the 1st defendant paid at the 1st defendant's request the balance of Rs. 1,800 and interest, due under the plaintiff's mortgage-bond, to the plaintiff's assignee in March 1898, after the 1st defendant had got notice in November 1897 from the plaintiff that the assignment was obtained by coercion and undue influence;

(*c*) that the 1st defendant has redeemed his second (usufructuary) mortgage by payment of money, including the money which the said mortgagee had paid to the plaintiff's assignee at the 1st defendant's request;

(*d*) that the plaintiff has by the decree Exhibit D (passed in a suit of 1900) succeeded in having it declared as against the plaintiff's assignee, Doraisawmy Iyengar, that the assignment is not binding on the plaintiff.

On these facts, it is admitted by the plaintiff (who is the appellant in the second appeal before us) that he ought to give credit (in his claim in this suit for money due under his mortgage-bond) to the 230 and odd rupees paid by the 1st defendant after the date of plaintiff's assignment to Doraisawmy Iyengar and before the date of the notice (Exhibit VII) of November 1897 given by the plaintiff to the 1st defendant. The plaintiff, however, contends that the 1st defendant's second mortgagee's payment of Rs. 1,800 and interest in March 1898 was made at the 1st defendant's risk as it was made after the notice of November 1897. In the first place, this notice (Exhibit VII) is worded as if the assignment by the plaintiff to Doraisawmy Iyengar by registered deed was altogether a void transaction and not a merely voidable transaction. There is no trace of an intimation by the plaintiff in Exhibit VII that he intended to bring a suit against Doraisawmy Iyengar to have the assignment set aside. On the other hand (as I said before) it treats the assignment deed as of no legal effect at all. Now, the 1st defendant would have had no defence to a suit by Doraisawmy Iyengar on the plaintiff's mortgage-deed if that suit had been brought before the plaintiff had the assignment set aside by a decree obtained in a suit brought by him (plaintiff) [See *Trimbak Bhikaji* v. *Shankar Shamrao* (1), *Raja Rajeswara Dorai (Rajah of Ramnad)* v. *Arunachellam Chettiar* (2) and

(1) 12 Ind. Cas. 532; 36 B. 37; 13 Bom. L. R. 947.
(2) 19 Ind. Cas. 596; 24 M. L. J. 592; (1913) M. W. N. 453; 13 M. L. T. 469.

4 American Cyclopædia page 62. The first defendant, therefore, was entitled, and, in fact, *bound* to treat Doraisawmy Iyengar as the owner of the mortgage right under the plaintiff's mortgage-bond till the assignment was so set aside by the plaintiff (and the plaintiff may or may not choose to do so). The first defendant was not bound to wait to pay up the money due on the mortgage charge binding on his property to the person owning the legal right in the mortgage till the plaintiff so chose to bring a suit and to obtain a decree, divesting the plaintiff's assignee of the latter's rights under the assignment. A decree so obtained by the plaintiff against his assignee might have the effect of cancelling the assignment from the date of the assignment itself as *between those two*, but it cannot be given that effect as against those who were bound to treat the assignment as valid till it was set aside and who made payments accordingly to the assignee in order to protect and conserve their own rights and interests. The case of *Sayam Ramamoorthi Dhora* v. *Secretary of State for India* (3) merely decided that a decree establishing *A*'s title to a land as against *B* was binding on *B* if *A*'s title was set up by *C* as against *B* even in a suit by *B* against *C*. I do not think that that case is relevant to the decision of the question now in dispute, namely, whether payments made by a third person who is the owner of a land and who treated the assignee of a mortgagee over the land as the mortgagee entitled to receive the mortgage amount, the payments having been made before the assignment was set aside by the assignor through the instrumentality of the decision of a Court of Justice, whether such payments could be questioned by the assignor as payments made to a person who had no right to receive such payments. In other words, can the assignor ignore such payments and compel the owner of the land to make the payments again to him? I think that he cannot do so. It may be that the third person after he got notice that the assignor was disputing the validity of the assignment might have brought an interpleader suit, but in the circumstances of the present case I think that the 1st defendant was not bound to bring an interpleader suit as the assignment, on the assignor's own case, was merely voidable and not void. An observation in *Gopalakrishna Iyer* v. *Gopalakrishna Iyer* (4) is relied on by the appellant's learned Vakil. That observation is that "when the fact of the assignment" by the creditor "or its validity and operation is in dispute," the safest course for the debtor is to ask the assignor and the assignee to interplead and if he pays either of them, "he does so at his risk." I do not think that this observation applies to cases where the creditor does not deny the fact of the assignment and only pleads that it is voidable by him and where the third person acts as an ordinary and reasonably prudent man would do to protect his own interests. The plaintiff was asked by the 1st defendant to give security against the plaintiff's assignee's claims and the plaintiff refused to do so. The plaintiff might have brought a suit at once against his assignee and obtained an injunction against the 1st defendant and the 1st defendant's second mortgagee, preventing them from making payments to the plaintiff's assignee, but he did not choose to do so. I, therefore, hold that the payments made to the plaintiff's assignee before the plaintiff brought his suit to cancel the assignment deed are binding on the plaintiff and I would dismiss the second appeal with costs.

TYABJI, J:—I agree generally.

Appeal dismissed.

(3) 19 Ind. Cas. 656; 24 M. L. J. 469; 36 M. 141.

(4) 4 Ind. Cas. 420; 33 M. 123 at p. 130; 7 M. L. T. 97.

GOPALA AIYANGAR v. VENKATAKRISHNA AIYANGAR.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 226 OF 1912.

January 23, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

GOPALA AIYANGAR—DEFENDANT—APPELLANT

versus

VENKATAKRISHNA AIYANGAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Promissory-note—Payee dying leaving widow—Joint family—Suit by surviving members, whether maintainable.

Where the payee of a promissory-note dies leaving a widow, the surviving member or members of his joint family cannot maintain a suit on the same, if it is found that it was not taken for the benefit of the family.

Subba Narayana Vaithiyar v. *Ramaswami Aiyar*, 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 508, followed.

Appeal under section 15 of the Letters Patent against the order and judgment of the Hon'ble Mr. Justice Sadasiva Aiyar, dated the 23rd day of September 1912, in Civil Revision Petition No 426 of 1911, preferred against the decree of the Court of the Subordinate Judge of Trichinopoly, in Small Cause Suit No. 1382 of 1910.

Messrs. *K. V. L. Narasimham* and *C. Padmanabha Aiyangar*, for the Appellant.

Mr. *K. V. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—The promissory-note sued upon is executed in favour of the deceased Venkata Varada Aiyangar who has left a widow. The suit is brought by the surviving members of the family to recover the debt on the ground that the debt is due to the family and the bond is taken in the name of the deceased on behalf of the family. There is no finding that the debt was due to the family, but it is found that the promissory-note was taken for the joint benefit of the 1st plaintiff and the deceased, who constituted "a family partnership" and therefore the 1st plaintiff as the survivor is entitled to sue. As the bond is taken only in the name of Venkata Varada Aiyangar and it is not found to be for the benefit of the family, we are of opinion that the 1st plaintiff is not entitled to maintain the suit, *Subba Narayana Vaithiyar* v. *Ramaswami Aiyar* (1).

We must, therefore, set aside the decree of the learned Judge and dismiss the suit. Each party will bear his own costs throughout.

Suit dismissed.

(1) 30 M. 88; 1 M. L. T. 377 (F. B.); 16 M.L.J. 508.

ABDUL KARIM v. AHAMMAD ALI MEAJI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3085 OF 1910.

February 20, 1914.

Present:—Mr. Justice Teunon.

ABDUL KARIM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AHAMMAD ALI MEAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 111 (d)—Merger—Leases created prior to passing of Transfer of Property Act—Vesting of superior and lease-hold interests in one person after passing of Act—Doctrine of merger in Mofussil—Sikmi taluq—*Specified boundaries - Creation of new* taluq.

Section 111 (*d*) of the Transfer of Property Act is applicable to leases created prior to the passing of the Act when the vesting of the superior and lease-hold interests in one and the same person occurs subsequent to the passing of the Act.

Ulfat Hussain v. *Gayani Dass*, 3 Ind. Cas. 994: 36 C. 802, relied upon.

Where a document purports to convey to the plaintiff lands within specified boundaries to be held by him at a specified rent on a *sikmi taluq* tenure, it may have the effect of either reviving an old *sikmi taluq* or of creating a new *sikmi taluq* on the same terms.

Obiter dictum:—Prior to the Transfer of Property Act, the doctrine of merger did not apply to property in the Mofussil.

Appeal from the decree of the District Judge of Noakhali, dated August 31st, 1910, reversing that of the First Munsif of Lakhmipur, dated February 18th, 1910.

Babus *Brojendra Nath Chatterjee* and *Romesh Chandra Sen*, for the Appellants.

Babu *Ram Dayal De*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit brought by him for recovery of *khas* possession of the lands comprised in certain under-tenure on the ground that the under-tenure had been annulled by appropriate proceedings under section 167 of the Bengal Tenancy Act.

It appears that in a certain *patni taluq* a ⅔rd share was held by one Ram Kanai Guha and that by a series of devolutions the owner thereof is now one Dwarka Nath Mozumdar.

Under this 2/3rd share of the *patni* were created 3 *sikmi taluqs*, of which one representing a moiety of the 2/3rd share came to be held by one Akramaddi Sardar. At a sale in execution of a decree for arrears of rent against Akramaddi, Dwarka Nath Mozumdar's father and predecessor-in-interest, one Jadab Krishna Mozumdar purchased the *sikmi* on the 9th August 1905, and after proceedings for the annulment of encumbrances, the son, Dwarka, sold the same to

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the plaintiff. Plaintiff next sold the moiety of the *sikmi* to defendant No. 3 and now seeks to recover *khas* possession in proportion to the 2nd moiety jointly with him and the other two defendants who are the owners of the 2nd and 3rd *sikmis* (each of 4-annas) representing the 2nd half of the *patni*.

The case of the defendants Nos. 1 and 2 is that the 2nd moiety of the 8-anna *sikmi* of which plaintiff seeks *khas* possession is held by them on a *howla* tenure created by Akramaddi's predecessor-in-interest on the 16th *Aswin*, 1276. They deny that this *howla* has been annulled and further say that on the 9th August 1905 on the purchase of the 8-anna *sikmi*, the *sikmi* and the superior or *taluki* interest vested in one and the same person, that is Dwarka's predecessor and that, therefore, by reason of the doctrine of merger, as embodied in section 111 (*d*) of the Transfer of Property Act, the *sikmi* lease was determined, and consequently by his purchase from Dwarka of that interest on the 24th April 1907 the plaintiff obtained nothing.

The plaintiff succeeded in the Court of first instance, but on appeal the learned District Judge has upheld this 2nd contention of the defendants and without deciding the other issues has dismissed the plaintiff's suit.

Plaintiffs now appeal and their contentions before me are (1) that the *sikmi* or subordinate interest having been created prior to the passing of the Transfer of Property Act section 111 (*d*) of that Act has no application, (2) that section 111 (*d*) having no application, the property being in the Mofussil, the doctrine of merger does not apply and that in any case the conduct of the parties shows that merger was not intended, and (3) that in any case by the deed of sale to the plaintiff the *sikmi* lease or tenure was resuscitated, or recreated.

In support of the 1st and 2nd contentions reliance is placed on clause (*c*) of section 2 of the Act, and on a number of reported cases, for instance, *Jibanti Nath Khan* v. *Gokool Chunder Chowdhry* (1), *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (2), *Lal Mahomed Sarkar* v. *Jagir Sheikh* (3), *Womesh Chunder Goopto* v. *Raj Narain Roy* (4). But from the report of the first of these cases, it does not appear that the vesting of the two interests in one and the same person took place subsequently to the passing of the Transfer of Property Act and of the others none are directly in point. Of the two cases *Surja Narain Mandal* v. *Nanda Lal Sinha* (5) and *Ulfat Hossain* v. *Gayani Dass* (6), cited on behalf of the respondents, the 2nd is similar in all its facts to the present case and therein it was distinctly held that section 111 (*d*) is applicable to leases created prior to the passing of the Act when the vesting of the superior and lease-hold interests in one and the same person occurs subsequently to the passing of the said Act. Though I am not to be understood as agreeing in all the reasons advanced by the learned Judge who decided that case, I agree in the decision and, therefore, hold that the 1st contention of the appellant fails.

In this view the decision of the 2nd contention becomes unnecessary, but I may say that on the whole the weight of authority appears to be in favour of the view that prior to the Transfer of Property Act the doctrine of merger did not apply to property in the Mofussil. In any case if it did apply the Courts here as in England would have to be guided by the intention, and in the present case the conduct of the lessor may be taken as showing that merger was not intended.

In support of the 3rd contention reliance is placed on the case of *Cottee* v. *Richardson* (7), and on the terms of the deed of sale or conveyance. Examination of the document shows that it purports to convey to the plaintiff lands within specified boundaries to be held by him at a specified rent on a *sikmi taluq* tenure. That may, therefore, be held to have the effect of either reviving the old *sikmi taluk* or of creating a new *sikmi taluq* on the same terms.

In this view I decree this appeal and remand the case to the District Judge in order that

(1) 19 C. 760.
(2) 28 C. 744.
(3) 2 Ind. Cas. 654; 13 C. W. N. 913.
(4) 10 W. R. 15 at p. 17.
(5) 33 C. 1212 at p. 1217.
(6) 3 Ind. Cas. 994; 36 C. 802.
(7) 86 R. R. 585; 7 Ex. 143; 21 L. J. Ex. 52.

he may re-admit the appeal and proceed to determine all the other questions arising between the parties.

Costs of this hearing will be costs in the case.

Appeal decreed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 565 OF 1911.

November 18, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

AHMEDBHOY HABIBBHOY—APPELLANT

versus

WAMAN DHONDU AND OTHERS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 54—Civil Procedure Code (Act V of 1908), s. 96 (1)—Bombay Civil Courts Act (XIV of 1869), s. 16—Award below Rs. 5,000—Reference to Assistant Judge—Appeal to District Judge—Second appeal to High Court, whether maintainable.

As no second appeal is allowed by law in a Land Acquisition case, no appeal would lie in the High Court when on a reference under the Land Acquisition Act an Assistant Judge awarded less than Rs. 5,000 and an appeal against his award was dismissed by the District Judge.

Second appeal from the decision of the District Judge of Thana, in Appeal No. 129 of 1909, confirming the decree passed by the Assistant Judge of Thana, in Reference No. 9 of 1907.

Mr. *D. G. Dalvi*, for the Appellant.

Mr. *R. W. Desai*, for Respondents Nos. 1 to 3

JUDGMENT.—In this case an award was made under the Land Acquisition Act which did not exceed Rs. 5,000. The reference to the Court was, in accordance with the provisions of the Bombay Civil Courts Act, to the Assistant Judge, and he tried the reference. Under the same Act an appeal lay to the District Judge as the amount or value of the subject-matter did not exceed Rs.5,000, and he heard the appeal. That was analogous to an appeal from an original decree.

An appeal is now preferred from the decision of the District Judge to the High Court, and the question is whether such appeal lies. An appeal lies only if it is expressly given by the Act. It does not lie merely by analogy to appeals in civil suits: see *Rangoon Botatoung Company Ld.* v. *Collector, Rangoon* (1).

Now an appeal lies to the High Court in proceedings under the Land Acquisition Act under the conditions specified in section 54 of that Act. That section says: "Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award, or from any part of the award, of the Court in any proceedings under this Act." The section is there obviously dealing with appeals from original decrees, and impliedly it recognizes that there may be cases in which the appeal from the original decree will not lie to the High Court.

Turning to the provisions of the Civil Procedure Code relating to appeals from original decrees we find that section 96 (1) provides: "Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court." Now, under section 16 of the Bombay Civil Courts Act, the Court authorized to hear appeals from the Assistant Judge's Court where the value of the subject-matter is less than Rs. 5,000 is the District Court and not the High Court. We are, therefore, of opinion that the preliminary objection is good that the appeal to the High Court is not maintainable. One set of costs.

Appeal dismissed.

(1) 16 Ind. Cas. 188; 14 Bom. L. R. 833; 39 I. A. 197; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W.N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 10 A. L. J. 271; 5 Bur. L. T. 205; 207; 40 C. 21; 6 L. B. R. 150 (P. C.)

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 661 OF 1913.

February 18, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

MITTADAR VENKOBA ROYAR AND ANOTHER—DEFENDANTS—PETITIONERS

versus

MITTADAR KHADIRIAPPA GOUNDER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 8,

SHASHI BHUSHAN HAZRA *v.* DENAMOYEE DASI.

O. XVII, r. 3—Plaintiff and his witnesses absent—Pleader instructed to apply for adjournment only—Dismissal of suit—Restoration.

Where the plaintiff in a case and his witnesses are absent and his Pleader has instructions only to apply for an adjournment, the Court can dismiss the suit only under Order IX, rule 8, and not under Order XVII, rule 3.

A Court has power to restore a suit if dismissed under Order IX, rule 8, only.

Gaura Bibi v. *Ghasitiya*, 12 Ind. Cas. 603; 34 A. 123; 8 A. L. J. 1265; *Gopala Row* v. *Maria Susaya Pillai*, 30 M. 274; 17 M. L. J. 225, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Munsif of Krishnagiri, in Original Side Petition No. 1495 of 1912, in Original Suit No. 16 of 1910.

Mr. *T. M. Krishnasawmi Aiyer*, for the Petitioners.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—The question in this case is whether the judgment of the District Munsif, dated 6th November 1912, was passed under Order IX, rule 8, or under Order XVII, rule 3. If it is the former the Munsif had power and jurisdiction to restore the suit to the file as he did on the 31st March 1913. If it is an order passed under Order XVII, rule 3, then the only remedy the party has is by way of appeal. See *Gaura Bibi* v. *Ghasitiya* (1). I have come to the conclusion that in this case the order of the District Munsif was passed under Order IX, rule 8. In the affidavit filed in support of the application for restoration the plaintiff stated that he himself and his witnesses were not present. Notice was given of this application to the counter-petitioner and he did not deny the plaintiff's allegations that he was not present; plaintiff's Pleader had only instructions to ask for adjournment That is clear from the judgment of the District Munsif. The judgment dismissing the suit, therefore, came under Order IX, rule 8, and the Munsif was justified in restoring the suit to the file. Mr. Krishnaswamy Aiyer argues that the facts that the Munsif begins his judgment by saying, that the "burden is upon the plaintiff....."and that the judgment is followed by a decree show that he intended to deal with the case under Order XVII and not under Order IX. As pointed out by the learned Chief Justice in *Gopala Row* v. *Maria Susaya Pillai* (2) the form in which an order is couched will be no indication that it was not passed under Order IX, rule 8. The passing of a decree does not take the matter any further. The learned Chief Justice points out later on: "A generous construction should be placed on the enactment which gives the power to restore." In my opinion upon the facts of this case, namely that the plaintiff was absent and that the Pleader had instructions only to ask for an adjournment and was not able to conduct the case, show that the District Munsif dismissed the suit only under Order IX. Following *Gopal Row* v. *Maria Susaya Pillai* (2) I hold that the Munsif was right and that he had jurisdiction to restore the suit to the file and I dismiss the petition with costs.

Petition dismissed.

(1) 12 Ind. Cas 603; 34 A. 123; 8 A. L. J. 1265.

(2) 30 M. 274; 12 M. L. J. 225.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 28 OF 1912.

February 6, 1914.

Present:—Mr. Justice Teunon.

SHASHI BHUSHAN HAZRA—PLAINTIFF—APPELLANT

versus

DENAMOYEE DASI—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 103B, 105, 105A, 107—Rent suit—Entry in Record of Rights—Presumption—Entry not conclusive even on failure of tenant to take proceedings to rebut presumption.

In proceedings taken on an application by the landlord under section 105, Bengal Tenancy Act, prior to the enactment of section 105A, it was not open to the tenant to question the correctness of the entries in the record, though it was open to him to do so by a suit under section 106 or by a declaratory suit in the Civil Court.

Shambhu Chandra Hazra v. *Purna Chandra Pal*, 35 C. 176; 7 C. L. J. 103; 12 C. W. N. 122 and *Pandab Dowari Das* v. *Ananda Kisun Chakrabutty*, 7 Ind. Cas. 102; 14 C. W. N. 897; 12 C. L. J. 195, relied upon.

But under section 103B, the entries only give rise to a presumption and neither the defendant's failure to take proceedings for the purpose of annulling or rebutting that presumption nor a decision under section 105 prior to the enactment of section 105A can avail to make them conclusive.

Appeal from the decree of the Second Sub-Judge of Hooghly, dated July 18th, 1911, reversing that of the Additional Munsif of Ulubaria, dated December 8th, 1910.

SHASHI BHUSHAN HAZRA *v.* DENAMOYEE DASI.

Babus *Sarat Chandra Rai Chowdhuri*, *Jyotish Chandra Hazra* and *Debendra Nath Kumar*, for the Appellant.

Babu *Nagendra Nath Ghose*, for the Respondent.

JUDGMENT—This is an appeal by the plaintiff in a suit for rent.

It appears that in respect of the *mahal* in question a Record of Rights was prepared under Chapter X of the Bengal Tenancy Act, and that under section 105 of the Act a fair rent was settled for a holding comprising according to the record four plots of land, measuring in the aggregate 4 *bighas* 6 *cottahs* of land. The fair rent settled was Rs. 10-14-3.

Plaintiff is the tenure-holder and sues for rent at that rate for the years 1313 to 1315 and the first three quarters of 1316. The defence is that defendant's holding under the plaintiff consists of only one plot (plot No. 2) measuring 1 *bigha* 18 *cottahs* and that the other three plots are her *lakhraj* or rent-free lands. The defendant further alleges that the rent payable in respect of her holding was and is Rs. 1-15-10 *gandas* and that this is a rent fixed in perpetuity, that she was ignorant of the proceedings under section 105, and that the order under that section had been fraudulently obtained. In the Court of first instance the Munsif held that he could not go behind the Record of Rights and the decision of the Revenue Officer under section 105 and accordingly decreed the plaintiff's claim. On appeal the Subordinate Judge has held that entries in the Record of Rights and the decision of the Revenue Officer under section 105 are not conclusive, and that it is open to the defendant in these proceedings to show that of the four plots in question three are her rent-free lands and that the rent payable in respect of the remaining plot is Rs. 1-15-10 *gandas* only. He has, therefore, remanded the suit to the Munsif for re-trial and for determination on evidence of all the questions arising between the parties.

Plaintiff appeals to this Court and the only question that has been urged before me is whether apart from the question of fraud the learned Subordinate Judge is right in holding that notwithstanding the entries in the Record of Rights and the decision of the Revenue Officer under section 105 it is open to the defendant to show that she is not bound to pay at the rate fixed by that officer.

Now it is conceded that the plaintiff's application under section 105 was made and decided after Bengal Act III of 1898 but before Bengal Act I of 1907 came into force, that is to say, before the enactment of the present section 105A. Now in the cases of *Shambhu Chandra Hazra* v. *Purna Chandra Pal* (1) and *Pandab Dowari Das* v. *Ananda Risun Chakrabutty* (2) it has been held by this Court that in proceedings taken on application by the landlord under section 105 prior to the enactment of section 105A it was not open to the tenant to question the correctness of the entries in the record, though it was open to him to do so by a suit under section 103 or by a declaratory suit in the Civil Court.

The contention of the appellant then amounts to this that not having instituted a suit in either the Civil or Revenue Courts, the question that would have been open to the tenant in such a suit may not be raised by him in the defence to a rent suit. No authority in support of this contention has been cited before me and, in my opinion, it is not well founded on principle. Under section 103B the entries only give rise to a presumption and neither the defendant's failure to take proceedings for the purpose of annulling or rebutting that presumption nor a decision under section 105 prior to the enactment of section 105A can avail to make them conclusive.

A second branch of the appellant's contention then is that, no matter what the real area of the holding or the real status of the tenant, by virtue of the provisions of section 105 and section 107 the yearly rent payable has been finally determined to be Rs. 10-14-3. In support of this contention I am referred to the decision of a Division Bench of this Court in Second Appeal No. 3574 of 1910 decided on the 20th November 1912. That decision is an authority for the contention now put forward, but it appears to be in conflict with the decision of this Court in *Shambhu Chandra Hazra* v. *Purna Chandra Pal* (1) and *Pandab Dwari Das* v. *Andada Kisun Chackrabarty* (2) and I regret that

(1) 35 C. 176; 7 C. L. J. 103; 12 C. W. N. 122.
(2) 7 Ind. Cas. 102; 14 C. W. N. 897; 12 C. L. J. 195.

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I am unable to follow it. If it is eventually found that the tenant is merely an occupancy *raiyat* and that the holding does comprise four plots with an area of 4 *bighas* 6 *cottahs* then the rent of that holding may be taken to have been conclusively determined. But if it is found that the tenant holds at a fixed rent that decision will override the decision based on the assumption that he is merely an occupancy *raiyat*. On the other hand if it is found that the tenant is merely an occupancy *raiyat* but that the holding comprises a fewer plots and a lesser area, whether the rent previously payable continues to be payable or whether in determining the rent now payable the Court should proceed in the manner indicated in the proviso to section 109 A (3) or section 113, may depend on the question whether the essential portion of the Revenue Officer's decision is applicable to the holding as it may be found to exist. The decision itself apart from the entry and the principle on which it was arrived at has not been placed before me and this question must, therefore, be left open till the facts have been ascertained.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 296 OF 1912.

December 2, 1913.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

RAMCHANDRA ANANDRAO KULKARNI—DEFENDANTS—APPELLANT

versus

PANDU DAGDU TELI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *ss.* 4, 100—*Regulation IV of* 1827, *cl.* 99—*Regulation XIII of* 1830, *cl.* 5—*Vinchur Court's decision—Special appeal lies to High Court.*

A special appeal lies to the Bombay High Court against a decree of the Civil Judge at Vinchur, on the grounds mentioned in section 100 of the Civil Procedure Code.

First appeal from the decision of the Civil Judge at Vinchur, in Suit No. 85 of 1912.

Mr. *S. S. Patkar*, for the Appellants.

Mr. *R. R. Desai*, for Respondents Nos. 1 to 3.

JUDGMENT.

SHAH, J.—This is an appeal by defendant No. 2 against the decree passed by the Court of the Civil Judge at Vinchur in Suit No. 85 of 1912. A preliminary objection is raised by the plaintiffs that no appeal lies from the decree of the lower Court, and that if a special appeal lies it can lie only on the grounds mentioned in clause 99 of Regulation IV of 1827. The appeal is registered as a first appeal.

The lower Court in this case exercises its powers under Regulation XIII of 1830. It has been ascertained by this Court in the unreported case of *Bhika* v. *Fakirchand* (1) that the Jagirdar of Vinchur is enumerated in the list furnished by Government, and the fact has not been disputed before us. It is clear, therefore, that under the first clause of section 3 of Regulation XIII of 1830 his decision is final, and that no first appeal in the ordinary sense lies to this Court. It is equally clear that under section 5 of the same Regulation a special appeal is open in all such cases to this Court. In two unreported cases [*Bhika* v. *Fakirchand* (1), and *Mahadu* v. *Keshav* (2)] it has been held that a special appeal lies to this Court.

It was argued on behalf of the plaintiffs-respondents that as the Regulation IV of 1827, which contained the provisions relating to special appeals, had been repealed, and as there was no provision in the present Code of Civil Procedure relating to special appeals, the right of appeal provided in clause 5 of Regulation XIII of 1830 was practically non-existent. This contention appears to me to be wholly untenable. In the first place the right of appeal expressly conferred by a statute cannot be negatived in this manner. Indeed, if necessary, the scope of the special appeal provided by Regulation XIII of 1830 may have to be determined by a reference to the provisions of the repealed Regulation IV of 1827. But a reference to the statutes relating to Civil Procedure from time to time shows that though the expression 'special' appeal does

(1) F. A. No. 4 of 1908 (Unrep.)
(2) F. A. No. 9 of 1908 (Unrep.)

not occur in the present Code. Broadly speaking, the provisions relating to second appeals correspond to the provisions relating to special appeals in Regulation IV of 1827. It is, therefore, not accurate to say that there is no provision in the present Code relating to special appeals as contemplated by Regulation XIII of 1830.

It was next urged that even though a special appeal might lie to this Court, it could be entertained only on the grounds mentioned in clause 99 of Regulation IV of 1827. In neither of the two unreported cases mentioned to us in the argument is the nature of the special appeal distinctly specified. It may be that the point was not raised in those cases or that it was assumed that a special appeal was substantially the same as a second appeal. The point has been raised and argued before us. It is necessary to determine the nature of the special appeal contemplated by Regulation XIII of 1830 before we can decide the present appeal. We have come to the conclusion that a special appeal under Regulation XIII of 1830 is synonymous with a second appeal under the Code of Civil Procedure, and should be heard and determined in the same manner as a second appeal is heard and determined. In other words, the special appeal lies to this Court only on the grounds mentioned in section 100 of the Code of Civil Procedure. It is not necessary to refer in detail to the relevant sections of different Acts. It is enough to say that a careful perusal of clause 99 of Regulation IV of 1827, sections 372 and 384 of Act VIII of 1859, the repealing Act XII of 1873 (so far as it repeals in section 5 of Regulation XIII of 1830 the words "under the rules provided in Chapter XXII, Regulation IV of 1827, for the admission of special appeals,") sections 7 and 584 of Act X of 1877, sections 7 and 584 of Act XIV of 1882 and sections 4 and 100 of Act V of 1908 will show that 'special appeal' contemplated by the Regulation corresponds to 'second appeal' under the Code of Civil Procedure. Barring slight alterations it is clear that the limitations of a special appeal coincide with the limitations of a second appeal. I am inclined to think that after Act VIII of 1859, special appeals under Regulation XIII of 1830 were to be heard according to the provisions of section 372 of the Act, and not of clause 99 of Regulation IV of 1827, as apparently there was nothing inconsistent in the rules relating to special appeals in the Act with the specific provisions of Regulation XIII of 1830. It is not necessary, however, to come to a definite conclusion on this point. It is quite clear that after the repealing Act XII of 1873there was nothing inconsistent in the Act of 1859 or in any of the subsequent statutes with any provisions of Regulation XIII of 1830, which could stand in the way of hearing and determining special appeals under the Regulation in the same manner as special appeals under Act VIII of 1859 or as second appeals under Acts X of 1877, XIV of 1882 and V of 1908. A mere change in phraseology cannot make any difference in the result. Special appeals are practically the same as second appeals. I may add that I have not overlooked the change in the wording of section 4 of the present Code as compared with section 7 of Act XIV of 1882. But I am clear that it is only another way of expressing the same thing; the result is the same. I, therefore, overrule the preliminary objection, and hold that a special appeal lies to this Court, and that it lies only on the grounds mentioned in section 100 of Act V of 1908.

On the merits the appellant has no case. There is no error of law. The decision of the lower Court is based upon an appreciation of evidence, with which we cannot interfere in this special appeal. I, therefore, confirm the decree of the lower Court with costs.

HEATON, J.—My consideration of this matter has led me to the same conclusion for substantially the same reasons.

Decree confirmed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4829 OF 1912.
December 13, 1912.
Present:—Mr. Justice Stephen and Mr. Justice D. Chatterjee.

HARI NARAIN DAS AND ANOTHER—DEFENDANTS—PETITIONERS
versus
ELEMJAN BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 9—"Possession",

meaning of—Joint possession—Dispossession from whole—Co-sharer suing for possession of his share only, whether suit maintainable.

The words of section 9 of the Specific Relief Act refer to exclusive possession and a Court has no jurisdiction to grant joint possession under that section. Consequently a party entitled to an eight-annas share in a property is not entitled to proceed under the section when the dispossession is in respect of the whole.

Rule against the order of the Second Munsif of Kishoregunj.

Babu *Harendra Narayan Mittra*, for the Petitioners.

Babu *Gobind Chundra Dey Roy*, for the Opposite Party.

JUDGMENT.—In this case three plaintiffs brought a possessory suit under section 9 of the Specific Relief Act claiming possession of certain property. During the pendency of the suit plaintiff No. 3 withdrew from it leaving plaintiffs Nos. 1 and 2 entitled according to their case to the possession of the 8-annas share of the property. The lower Court holding the defendants to be trespassers and being disposed to think that plaintiff No. 3 had withdrawn from the suit in a collusive manner gave judgment in favour of the plaintiffs Nos. 1 and 2 in respect of the whole.

A Rule has been granted calling upon the opposite party to show cause why this order should not be set aside on the ground that the Munsif acted without jurisdiction in decreeing the suit, after plaintiff No. 3 who was admittedly in joint possession of the land with the other plaintiffs had withdrawn from it.

We are of opinion that the Rule must be made absolute. The question involved in this case is a very short and simple one, namely, whether a party entitled to an eight-annas share in a property is entitled to proceed under section 9 of the Specific Relief Act when the dispossession is in respect of the whole. This turns on the question whether possession in this section includes joint possession, and we have to decide it without the assistance of any authority. Looking at the words of the section as they stand, we are of opinion that they refer to exclusive possession and the Court had no jurisdiction to grant joint possession under the section. We have treated the case as being one where a party seeks possession of his share only of property from which he himself and his co-sharers have been dispossessed, and it is incompetent for the Court to give possession of the whole of the property in such a case.

The Rule must, accordingly, be made absolute and the order of the Munsif set aside.

The case is one in which we think each party must bear its own costs.

Rule made absolute.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 1019 TO 1025 OF 1912.

January 6, 1914.

Present:—Mr. Justice Ayling.

RALLABAMDI SUBBIAH AND OTHERS—PETITIONERS

versus

Sri Rajah VENKATARAMIAH APPA RAO BAHADUR ZEMINDAR GARU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Notice of higher rent—Estoppel.

If a landlord gives no notice, demanding rent at a higher rate, to his tenant who had cultivated land with wet crops for a long time, the landlord is estopped from claiming the higher rent, inasmuch as had the notice been given the tenant might have elected to raise dry crops only and thus escaped the higher demand.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the District Munsif of Gudivada in Small Cause Suits Nos. 429, 430, 435, 436, 440, 442 and 444 of 1910, dated 19th June 1912.

Mr. *T. R. Venkatrama Sastri*, for the Petitioners.

Dr. *Swaminathan*, for the Respondents.

JUDGMENT.—The District Munsif does not appear to have considered the legal effect of his finding on the third issue, that defendants had no notice of plaintiffs' intention to demand a higher rent for the suit *faslis*. It is in evidence that the suit lands had been cultivated with wet crops for at least fifteen years (according to defendants twenty-four or twenty-five years), and that during the whole of that time *kist* was collected only at the rate of 15 annas 10 pies per acre. In the absence of intimation to the contrary the tenants were justified in inferring that they would be allowed to

cultivate on the same terms for the suit *faslis*, which expired on 30th June 1909. Plaintiffs gave them no notice of their intention to make a higher claim, but in 1910 filed suit for rent at a higher rate. If the tenants had received notice, they might have elected to raise dry crops only and thus escape the higher demand. It appears to me that in these circumstances plaintiffs are estopped from demanding the higher rent they claim for the suit *faslis* [Vide *Narasimha Chari* v. *Gopala Ayyangar* (1) and *Sree Sankarachari Swamiar* v. *Varada Pillai* (2)].

The Munsif's decree also appears to be erroneous as regards the allowance of *Karnam's selagam*. The defendants disputed their liability to pay this. The only evidence adduced in support of the demand consists of entries in Exhibit A, series, *Muchilikas* dated 1875. No evidence is adduced to show that this *selagam* was ever collected, and there is positive evidence that it was not paid for a period of 15 or 25 years

The Munsif's decree must be set aside and plaintiffs given a decree for rent for *Faslis* 1317 and 1318 at the rate of 15 annas 10 pies per acre only with interest thereon at Rs. 6 per cent. per annum. Each side will get proportionate costs both here and in the Small Cause Court.

This judgment will govern Civil Revision Petitions Nos. 1020 to 1025 also.

Decree modified.

(1) 28 M. 391.
(2) 27 M. 332; 13 M. L. J. 429.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1115 OF 1909.

January 21, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

SOKKAPPA REDDI—APPELLANT

versus

SINGANA REDDI AND OTHERS—RESPONDENTS.

Benami—*Transfer to defraud creditors—Creditors not defrauded—Estoppel—Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Powers of Appellate Court—Party not appealing—Power to reverse decree against him—Ground of reversal common.*

Property transferred to another, *benami*, to defraud creditors is still the transferor's when no creditor is defrauded by the transfer, and the transferor is not estopped from proving that the transferee has no title and that the property is the transferor's.

Petherpermal Chetty v. *Muniandy Servai*, 35 C. 551; 12 C. W. N. 562; 35 I. A. 98; 7 C. L. J. 528; 5 A. L. J. 260; 14 Bur. L. R. 108; 10 Bom. L. R 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.), followed.

Where the ground of reversal is common, an Appellate Court can under Order XLI, rule 4, reverse the decree not only against the party appealing, but also against those who have not appealed.

Second appeal against the decree of the Court of the Additional Subordinate Judge of Madura, in Appeal Suit No. 199 of 1908, preferred against that of the District Munsif of Manamadura, in Original Suit No. 516 of 1906.

FACTS.—This is a suit on a mortgage-bond. The father of defendants Nos. 2 and 3 was the owner of the lands; on 17th October 1873, he usufructuarily mortgaged the same to defendants Nos. 4 and 5 who are brothers. The fourth defendant arranged to create a sub-mortgage in favour of the 6th defendant, but as the latter was pressed by his creditors, in order to screen this property from them, he induced the 4th defendant to execute the mortgage in favour of the plaintiff on 20th January 1898 for Rs. 175, while the 6th defendant himself continued to be in possession of the lands and paid *kist* thereon till 1906. The plaintiff instituted the present suit to recover from the 4th defendant the amount due under the mortgage bond by the sale of the mortgaged properties. Defendants Nos. 4 and 6 contested his claim. The fourth defendant pleaded that no consideration was paid on the date of transfer by the plaintiff and that the mortgage was executed *benami* for the 6th defendant; the 6th defendant pleaded that he was in fear of creditors and in order to screen this property from them he had it transferred in the name of the plaintiff and that he (the transferor) paid all his creditors in full and none of them was ever defrauded by the transfer.

The District Munsif found that consideration passed for the mortgage and accordingly decreed the suit as against the mortgaged property, and *passed also a personal decree against the 4th defendant. The 6th defendant only* then appealed. The Sub-Judge held on appeal, that there was clear evidence of the *benami* nature of the transaction, and the fact that the *pattah* itself stood in the name of the 6th defendant and that he was in possession of the land for a long time after 1898 was clear evidence of it. Accordingly

he reversed the decree of the District Munsif and also the personal decree even as against the 4th defendant. The present appeal is by the plaintiff.

Mr. *M. Narayanasawmi Iyer*, for the Appellant.

Mr. *K. N. Aiya*, for the Respondents.

JUDGMENT.—We take the Subordinate Judge's finding to be that the 6th defendant's statement that none of his creditors was really defrauded might be accepted as true even though the Subordinate Judge goes on to say that "in any case," that is, even if that statement is false, his conclusion would be the same. We accept that finding of fact and on that finding, there is no estoppel to prevent the 6th defendant from proving that the plaintiff had no title to, and that the 6th defendant is the real owner, of the sub-mortgage right on which the plaintiff (appellant) brought his suit [See *Petherpermal Chetty* v. *Muniandy Servai* (1).]

As regards the right of the lower Appellate Court to set aside even the personal decree passed in the plaintiff's favour against the 4th defendant on the appeal of the 6th defendant, though the 4th defendant was not made a party to the appeal, Order XLI, rule 10, of the Civil Procedure Code applies and the Appellate Court was entitled to pass a decree in favour of the 4th defendant also. The second appeal is dismissed with 8th and 9th respondents' costs.

Appeal dismissed.

(1) 12 C.W.N. 562; 35 C. 551; 35 I. A. 98; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L T. 12; 4 L. B. R. 266 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 826 OF 1911.

July 25, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

S. TIRUVENKATACHARIAR—PLAINTIFF—APPELLANT

versus

VENKATACHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Performance—Agreement to sell—Subsequent purchaser—Notice—Valuable consideration—Bona fides—*Burden of proof—Party to agreement—Hindu Law—Right of son to contest liability under father's agreement*

After a plaintiff has established a prior agreement to sell immoveable property, it is for the subsequent purchaser to prove (*a*) that he paid valuable consideration, (*b*) that he acted *bona fide*, and (*c*) that he had no notice of the prior agreement.

If a party to an agreement to sell is a Hindu and, in a suit for the specific performance of the agreement, the son of such party raises any question as to his liability to fulfil the obligations of his father, the Court will go into and decide such questions.

Second appeal from the decree of the District Court of Chingleput, in Appeal Suit No. 202 of 1909, preferred against that of the Court of the District Munsif of Chingleput, in Original Suit No. 218 of 1908.

Mr. *T. R. Ramachandra Aiyar* for the Appellant.

Mr. *M. Krishnaswami Aiyar*, for the Respondent.

JUDGMENT.—The learned District Judge in considering the evidence in the case has proceeded upon the ground that the burden of proving, that the 3rd defendant's purchase from the 2nd defendant was made with notice of the prior contract to sell alleged to have been made with the plaintiff by defendants Nos. 1 and 2, lay on the plaintiff. The case of *Himatlal Motilal* v. *Vasudeo Ganesh* (1) decides that the burden of proving (*a*) that the subsequent purchaser paid valuable consideration (*b*) that he acted *bona fide* and (*c*) that he had no notice lies on that purchaser, assuming, of course, that the plaintiff has established the prior agreement to sell alleged in his plaint. Further the District Judge has not at all considered several circumstances mentioned by the Munsif as pointing to *mala fides* on the defendant's part; see paragraphs 31 to 33 of the Munsif's judgment.

Lastly, the District Judge is clearly wrong in saying that, even after his findings in favour of the defendant, he need not go into the questions involved in issues Nos. 8 and 9 and that the plaintiff should be relegated to another suit to obtain the reliefs he would be entitled to as against the 2nd defendant when the plaintiff failed as against the 3rd defendant. It is also unsatisfactory that the District Judge has not given a finding on the question whether there was really a contract to sell made between the plaintiff and defendants Nos. 1 and 2, and whether a

(1) 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634.

sale-deed was executed by defendants Nos. 1 and 2 in 1905 (see paragraph 2 of the District Judge's judgment where he says "assuming the sale alleged by the plaintiff in his favour to have been really executed.")

We reverse the judgment of the District Judge as unsatisfactory on all points and remand the case to the District Court to decide the appeal *de novo*. The District Court is requested to give definite findings on all the issues in the case when deciding the appeal and also on the question as to the approximate value of the plaint property at the time of the plaintiff's sale-deed and the 3rd defendant's sale-deeds, the payments alleged by the 3rd defendant to have been made towards the purchase-money of Rs. 1,250, whether Rs. 1,250 was a real or a fictitious price, and so on. Costs of this second appeal will be costs in the cause. Defendants Nos. 1 and 2 having both died; if the 2nd defendant's son raises any question as to his liability to fulfil the obligations of the father the District Court will go into and decide such questions also.

Judgment reversed; Case remanded.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 20 OF 1912.

June 27, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Justice Sir Asutosh Mookerjee, Kt.

UPENDRA NATH BOSE—PLAINTIFF—APPELLANT

versus

SAILENDRA NATH GHOSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Kabuliat—*Reclamation lease—Forfeiture on failure to comply with condition as to reclamation—Condition as to grant of fresh lease on application within one month of forfeiture notice—Transfer to plaintiff of rights under lease after forfeiture and before new lease—Certificate sale of land—Auction purchase by defendant—Suit for possession—Right of plaintiff.*

On August 12th, 1895, a *kabuliat* was executed by one *K* in favour of the Government in respect of certain lands for reclamation. There was a provision that on failure to comply with the condition as to clearing, the lessee was to forfeit all rights in the land under the existing lease, but this was subject to a provision that if the lessee gave up the lease to certain officer of the Government within one month of the date of the notice of forfeiture, a fresh lease would be given to him on certain conditions. There was a failure to comply with the clearing condition, notice was given to the sons of the lessee who had died, and they within one month made an application for a fresh lease which was granted. In the meantime, the defendant No. 2 purchased the property at a certificate sale for arrears of cesses, and after that the sons of the original lessee sold their interest under the lease to the plaintiff. The certificate sale was of no valid effect for lack of observance of the statutory requirements and so nothing passed to defendant No. 2 under the sale. The plaintiff brought this suit and prayed that the certificate sale might be declared fraudulent and irregular and that the same might be set aside and possession of the property purchased under the sale might be given to the plaintiff:

Held, (1) that the plaintiff was entitled to possession, as claiming under the original lessee and his sons, on the strength of the original *kabuliat* of 1895; and

(2) that the plaintiff, even before the new lease was granted, was entitled to possession by virtue of his right to possession under the lease in the circumstances that happened.

Appeal under section 15 of the Letters Patent from a judgment of Mr. Justice Coxe, dated Jaunary 30th, 1912, in Second Appeal No. 1005 of 1909.

FACTS.—The plaintiffs, who are the appellants before us, by their plaint ask that an auction-sale in execution of a certificate decree, No. 459 of 1905-1906, described in the plaint may be declared to be fraudulent and irregular and that the same may be set aside They also seek an adverse declaration as to the certificate decree and pray for possession of the property purchased under the auction sale. The facts that have given rise to this litigation are briefly these: On the 12th of August 1895, a *kabuliat* was executed by Kali Krishna Mitra in favour of the Government. The lands to which it related were in the Sunderbans and the lease was for the purpose of reclamation. There was a provision that on failure to comply with the condition as to clearing contained in the lease, the lessee was to forfeit all rights in the land under the existing lease, while the Government should have the right of immediate re-entry. But this was subject to a provision that if the lessee gave up the lease to the Sunderbans Commissioner or other officer appointed by the Government within one month of the date on which notice of the forfeiture should be given to him and should demand a fresh

lease, that fresh lease should be given to him on the following conditions, namely, that the lessee should forfeit all claims to continued possession of the land free of assessment and that his holding should at once become liable to an annual payment at the lowest rate of assessment therein indicated and should continue liable to payment at such rate for the remaining free term of the lease and should also be liable to a payment at a rate of Rs. 20 per cent. higher than that which had been fixed in the existing lease, for each period up to the termination of the settlement. There was a failure to comply with the clearing condition. Notice was given to the sons of the original lessee on the 22nd of August 1906, the original lessee having died prior to this. Within a month, the application was made by the sons for which provision was made in the clause that I have read. This led to a prolonged negotiation which only recently resulted in a new lease. In the meantime, however, the second defendant purchased at a sale for arrears of cesses on the 19th of March 1906, and in February 1907 the sons of the original lessee sold their interest under the lease to the present plaintiff. The sale to defendant No. 2 which was an involuntary sale in execution has been shown to be of no valid effect for lack of observance of the statutory requirements and so nothing passed to defendant No. 2 under the sale. It is in these circumstances that the plaintiff seeks the relief which I have indicated as being the prayer to his plaint.

Defendant No. 2 says that nothing passed to him under the sale by reason of its faulty nature; and so he claims to hold the land against the plaintiff. The Munsif has decided in his favour and dismissed the plaintiff's suit; but on findings, which appear to be satisfactory, the District Judge, Mr. Roe, has granted a partial decree in the plaintiff's favour, that is to say, he has declared the invalidity of the sale, and has merely refrained from passing a decree for possession. Both parties were dissatisfied with this decree and both appealed to this Court. The appeals were heard before Mr. Justice Coxe, and he has not accepted even the limited decree of the learned District Judge but has set it aside and remanded the case in its entirety, directing that costs should abide the result. From that judgment the present appeal has been preferred by plaintiff No. 1. The judgment of Coxe, J., ran as follows:—

"This appeal arises out of a suit for recovery of possession of land. The land was originally let to one Kali Krishna with conditions that if he did not bring an eighth of it under cultivation in a certain time the lease should be forfeited but that he might apply within a month for a fresh lease which would be granted on more onerous conditions. The first condition of the lease was not kept and on the 22nd August 1904, Government issued a notice on the heirs of Kali Krishna forfeiting the lease and directing them to take a fresh lease. They applied accordingly on the 22nd September 1904. Orders were not passed till the 9th February 1906 and a fresh lease was then ordered on condition that they surrendered all their rights under the old lease and filed a statement that they had not transferred those rights. Meanwhile a certificate had been issued for unpaid cesses and the property was subsequently sold in execution, and bought by the defendants on the 19th March 1906. On the 10th February 1907, the heirs of Kali Krishna who had not by then obtained the new lease, sold their rights to the plaintiffs. The plaintiffs have now sued for the land and have obtained a partial decree. The lower Appellate Court has found that what was sold to the first plaintiff was the right to negotiate with Government for a new settlement as the old settlement was dead. This right in the learned District Judge's opinion entitled the plaintiff to a decree declaring the purchase by the defendants null and void but not to a decree for possession. Both sides appeal. The plaintiffs contend that they are entitled to possession. The defendants have no title themselves as the sale under which they purchased is found to be invalid but they are in possession and plead that the plaintiffs have no title, inasmuch as they purchased only a mere possibility of obtaining a lease which could not be the subject of a valid transfer.

"It appears to me that the decision of these contentions must turn on the

question whether the heirs of Kali Krishna had a valid subsisting interest in the lease on the 10th February 1907. That interest, if it existed, could not be affected by the invalid sale of the 19th March 1906. The lower Appellate Court holds that the first settlement was dead but I am not quite certain what is meant by this finding. The Munsif considers it established by a petition of the heirs of Kali Krishna, dated the 10th August 1906, that the old lease had come to a complete end and that possession had been resumed by Government. If this were so I think that the contentions of the defendants would have to prevail and that the purchase by the first plaintiff being a purchase of an untransferable possibility would give him no title.

"The District Judge, however, does not find that the interest of the heirs of Kali Krishna in the land had completely terminated. The terms of the original *kabuliat* on this point run as follows: "On failure to comply with the above clearing condition I shall forfeit all rights in the land under existing lease and the Government shall have the rights of immediate re-entry, provided that if I shall give up the lease to the Sunderbuns Commissioner or other officer appointed by the Government within one month of the date on which notice of such forfeiture shall be given to me, and shall demand a fresh lease, such fresh lease shall be given to me on the following conditions." Now assuming that the Government had a right of re-entry, it seems to me that if Government did not choose to exercise that right and allowed the tenants to take the action allowed by the proviso without ejecting them from the land, the rights of the tenants could not be regarded as extinguished. The petition of the 10th August 1906 does not necessarily indicate that their right had been extinguished though it may be so construed. In that they say, it is true, that their property has been brought under *khas* by the Collector, but they do not ask to be relieved of liability to rent but only for time to pay it until the new lease which has been ordered is received by them. The petition also recites that as the petitioners have prayed for partition and deposited the cost, rent may be taken according to their shares, a prayer that at first sight seems somewhat inconsistent with the theory that they had been ousted from the land. It is not, however, for me to construe this document and I have no desire to influence the mind of the lower Appellate Court in dealing with it.

"No doubt, it may be said that by the sale to the first plaintiff his vendors put it out of their power to comply with the condition imposed on the grant of a new lease, namely, that they should file a statement that they had not transferred their interests. But that did not by itself necessarily extinguish their rights and there is, so far as I know, no reason to suppose that the first plaintiff would have been unwilling to join in a statement disclaiming all further rights under the old lease when the new one was granted.

"It seems to me, therefore, that the question whether the first plaintiff's vendors had a valid subsisting interest in the land and not a mere possibility of obtaining it, at the time of the sale, depends on the further question whether Government enforced its right of re entry in the land and so terminated the existing interest of the tenants in the land itself, whatever right may have remained to them to obtain a subsequent settlement. The District Judge has come to no definite finding on this point, and the case should go back for that finding. If the point is decided in the affirmative the suit must fail but if in the negative the plaintiffs will be entitled to a decree for possession. Costs to abide the result."

From the above judgment the plaintiff appealed under section 15 of the Letters Patent.

Babus *Tarakishore Chowdhry*, *Brojo Lal Chakravarty* and *Sachindra Prosad Ghose*, for the Appellant.

Babus *Ram Charan Mitra*, for the Secretary of State, for the Respondent.

Babus *Mohendra Nath Roy* and *Bipin Chunder Mullick*, for other Respondents.

JUDGMENT.

JENKINS, C. J.—[After stating the facts, as set out above, his Lordship proceeded as follows:—]

The appellant claims first that the decree of the District Judge so far as it went was correct; *secondly*, he maintains that that decree should have gone further and awarded him possession; and finally he claims that the judgment of Mr. Justice Coxe was erroneous.

AMIR BEGAM *v.* BADR-UD-DIN HUSAIN.

In our opinion these contentions are well founded. There has been no real contest as to the correctness of Mr. Roe's decree so far as it impugned the sale to defendant No. 2 on the 19th of March 1906. But I think beyond that that the plaintiff-appellant is entitled to a decree for possession. To prolong this litigation would be useless and a waste both of time and money, because it is brought to our notice that although the new lease contemplated by clause 4 had not been granted by the Government at the time when the case was before Mr. Roe, in fact it was granted before the case came before Mr. Justice Coxe. I do not, however, base my decision on that, and I merely allude to it by the way. I base my decision, that the plaintiff is entitled to possession, on what I take to be the clear right of the plaintiff as claiming under the original lessee and his sons, on the strength of this *kabuliat* of the 12th of August 1895. I think the plaintiff even before this formal lease was granted in performance of the obligation contained in clause (4), was entitled to possession by virtue of his right to possession under the lease in the circumstances that happened. It is true that this clause (4) contemplates the termination of certain rights and what it provides is that the lessee shall forfeit all claims to continued possession of the land free of assessment: the right to possession still continued, and it appears to me that that is a sufficiently sound foundation on which to base a decree in favour of the plaintiff for possession of this land, to which unquestionably he is entitled in justice and good conscience

The result then is that, in my opinion, the judgment of Mr. Justice Coxe must be reversed and the decree of the District Judge must be restored with the modification that there shall be added the decree for possession claimed by the plaintiff. Mesne profits were not sought and, therefore, are not awarded

The plaintiff-appellant must have his costs from defendant No. 2 throughout.

Judgment reversed.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH AT LUCKNOW.

March 27, 1914.

Present:—Lord Sumner, Lord Parmoor, Sir John Edge and Mr. Ameer Ali.

Musammat AMIR BEGAM—APPELLANT

versus

Khwaja SAIYAD BADR-UD-DIN HUSAIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15, 20—*Arbitration—Award—Corruption or misconduct—Good portion of award separable from bad portion, effect of—Irregularities in procedure—Desirable that arbitrator takes notes of proceedings—Arbitrator bound to give evidence—What questions can be put to arbitrator—Inquiry into dishonesty or partiality—Examination of arbitrator to be confined to charge of corruption—Suspicion—Guilt.*

When a separable portion of an award is bad, the remainder of the award, if good, will be maintained.

If irregularities in the procedure of an arbitrator can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate his award without any imputation on his honesty or impartiality; for example, if the parties are not properly summoned to appear before the arbitrator and one of the parties is not given an opportunity of meeting the case set up by the other party, it would be held that there has been no proper inquiry.

It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceeding before him; but in the absence of such notes there is no warrant for holding that an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied.

An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence and where a charge of partiality or dishonesty is made, any relevant evidence, which he can give, is properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction on which his decision is final, for example, a Court should not utilize evidence relevant on a charge of corruption to criticise methods adopted by an arbitrator in determining the *quantum* of his valuations. The charge of corruption ought to be put to him fairly and squarely so as to enable him to give a direct answer or explanation. A critical cross-examination into the details of figures used by him in making his award, should not be permitted.

An arbitrator who is called as a witness in a legal proceeding to enforce his award may be asked questions

as to what passed before him and as to what matters were presented to him for consideration, but no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matter submitted to him.

Buccleuch v. *Metropolitan Board of Works*, 41 L. J. Ex. 137; 5 H. L. 418; 27 L. T. 1, relied upon.

However, where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established. To infer the grave charge of dishonesty and partiality against an arbitrator there should be strong evidence in support of each particular instance of dishonesty.

Although in each instance the evidence of dishonesty might amount to more than a case of suspicion, yet the aggregate effect would not be sufficient to support the charge of corruption. Suspicion, in short, will not become facts and facts guilt.

Appeal from an order and decree of the Court of Judicial Commissioner of Oudh, dated August 15, 1911, reversing those of the Court of the Subordinate Judge of Lucknow, dated May 5, 1911.

FACTS.—The facts of the case are stated in their Lordships' judgment as well as in 13 Ind. Cas. 520; 14 O. C. 308, where the judgment appealed against is reported.

Messrs. *De Gruyther*, *K. C.*, and *Dube*, for the Appellant, contended that the arbitrator did not decide but assumed the validity of the Will. Under the terms of reference he had no power to divide the property by specific allotments, but could only settle the respective shares of the claimants. He was not empowered to decide the questions of title to property as between the estate of the deceased and third parties. He misconducted himself in the allotments he made to the claimants by deliberately undervaluing the property allotted to Badr-ud-Din and by over-valuing the property allotted to others, as also in deliberately allotting to Badr-ud-Din the best and unencumbered property. He also deliberately allotted to the appellant's share a fictitious debt of Rs. 4,000 and refrained from giving her money admittedly due to her. The award was bad, as it was not based upon inquiry or evidence given in the presence of the parties or anything approaching a judicial investigation and rested on arbitrary assumptions of the arbitrator or on assumed personal knowledge. The submission to arbitration was made in ignorance of the fact that the person named as arbitrator was an attesting witness to the Will in dispute.

Reference was made to *In re Enoch* and *Zaretzky Bock & Co.'s Arbitration* (1), section 20 of the Civil Procedure Code, *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee* (2).

Messrs. *Upjohn*, *K. C.*, and *Lowndes*, for the Respondents, contended that the award was good and binding between the parties. The arbitrator did not exceed the powers entrusted to him by the reference. He was not guilty of any misconduct which could vitiate the award.

Mr. *De Gruyther* replied.

JUDGMENT.

LORD PARMOOR.—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated 15th August 1911, reversing a decree of the Subordinate Judge of Lucknow passed by him upon an application by respondent No. 1 for the filing of an award.

On the 6th of May 1909, one Khwaja Farid-ud-din Husain (hereinafter called the testator) died at Lucknow, leaving considerable property, and had as heirs, according to Muhammadan Law, a full sister (the appellant herein), two step-brothers, respondents Nos. 2 and 3, two step-sisters, respondents Nos. 4 and 5, and a widow, respondent No. 6. Shortly before his death, the testator made a Will by which he appointed respondent No. (1) his executor, and, as he was entitled to do by Muhammadan Law, bequeathed him one-third of his property. After the death of the testator disputes arose between the parties interested, and litigation was commenced. On the 6th August 1909, the matters in dispute were referred to the sole arbitration of Munshi Sakhawat Ali under a submission of reference in the following form:—

"Whereas there exists a dispute amongst us, the executants, regarding the estate of Khwaja Farid-ud-din, deceased, and the deed of Will, dated the 30th April 1909, we, the executants, have, of our own accord, appointed Munshi Sakhawat Ali as a referee for the purpose of settling the matters in dispute. We agree and record that the said referee may decide it in whatever way he may

(1) (1910) 1 K. B. 327; 79 L. J. K B. 363; 101 L. T. 801.

(2) 25 C. 141.

deem proper, we, the executants, shall remain bound by the award. Therefore, we have executed these few presents by way of a deed of agreement so that they may serve as an authority."

The arbitrator entered upon the reference and published his award on the 16th July 1910. He confirmed the appointment of respondent No. 1 as executor, and gave him one-third of the property. The remaining property fell to be divided according to Muhammadan Law. The parties were entitled in the following shares: The appellant to a third share, the respondents Nos. 1 and 6 jointly to a moiety, the respondents Nos. 2 and 5 to a sixth share. The arbitrator then proceeded to distribute the property in proportion to the shares to which the respective parties were entitled and for this purpose to make a valuation. The property so valued amounted in the aggregate to Rs. 91,042. There was a further item of Rs. 4,000, which was in no sense an ascertained or settled amount, but was based on a right to claim a rendition of accounts from a certain Ahmad Khan, and this item, for what it was worth, was allotted to the appellant. The respondents Nos. 1 and 6 in respect of their joint half share were allotted property valued at Rs. 45,010. The appellant in addition to the above item of Rs. 4,000 was allotted property valued at Rs. 30,879 and respondents Nos. 2 and 5 were allotted property valued at Rs. 15,153. On the face of the award the distribution appears to be fairly made. So far as there is any advantage it is in favour of the appellant. This apparent advantage is referred to and explained by the arbitrator in his award.

At the time of the testator's death there was a considerable mortgage (Rs. 20,000) affecting certain portion of his property. The arbitrator recognised that the allottees of the mortgaged property would be under a disadvantage with an apprehension of possible loss. He, therefore, decided that the debt of Rs. 20,000 and its interest should, as among the parties entitled under the Will, be a charge on the entire property of the testator, and proportionately on all the co-shares, and that each co sharer should be liable to pay in proportion to his share, and that each co sharer should as soon as possible pay his proportionate share, both capital and interest to the creditor. Whether this provision in the award did give full protection to the allottees of the mortgaged property, it is not within the province of their Lordships to decide. It is sufficient that the matter was considered by the arbitrator and his decision cannot be questioned unless the charge of corruption or misconduct is established. The award further purported to assign specific lands in the *Zemindari* of Rasulabad by way of partition, a matter clearly outside the power of the arbitrator and which would render his ward invalid, unless this portion of his award is separable from the rest. In the opinion of their Lordships there is no difficulty whatever in separating this portion of the award from the rest. It is well recognised law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. In this respect their Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and it becomes necessary to consider the grounds on which the remainder of the award has been attacked.

On the 10th June 1910 respondent No. 1 made an application to the Court of the Subordinate Judge of Lucknow to file the award in Court, under paragraph 20 of the second Schedule of the Code of Civil Procedure, 1908. On such an application the Court, if satisfied that the matter has been referred to arbitration and that an award has been made thereon and that no ground such as is mentioned or referred to in paragraphs 14 and 15 is proved, shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 states the grounds on which the Court may remit the award to the reconsideration of the same arbitrator or umpire. Paragraph 15 states the grounds on which alone an award shall be set aside. The first of these grounds is corruption or misconduct of the arbitrator or umpire. It was on this ground that the Subordinate Judge refused to order the filing of the award and disallowed the application of the respondent No. 1 who had been treated as plaintiff in the proceedings.

On the 7th September 1910 issues were framed by the Subordinate Judge. The only material one is: Is the award vitiated by the misconduct of the referee as alleged under

the paragraphs 9 to 20 of the first defendant's (the appellant's) written statement?

The misconduct alleged against the referee was two-fold:—

(1st) That the referee had acted corruptly and dishonestly in his capacity of Judge.

(2nd) That the proceedings in the reference had been conducted in such a way that the matters in dispute had not been properly tried.

Their Lordships will deal first with the less important point of irregularity of procedure.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. In the present case it was alleged on behalf of the appellant that there had been no proper inquiry, since the parties had not been properly summoned to appear before the arbitrator, and the appellant had not had an opportunity of meeting the case set up by the respondent No. 1. The burden of proving this allegation was upon the appellant and other defendants at the trial before the Subordinate Judge. The only relevant witness called on behalf of the appellant was Shaban Ali, who admitted in cross-examination that he was sent for by the arbitrator on several occasions and questioned in respect of the value of immoveable property. As against this evidence, which in itself is quite insufficient to prove the alleged irregularities, the arbitrator stated on oath that he invited all parties to put in written statements before him, but that they declined to do so; that he was never asked by any of the parties to hear oral evidence and that no oral evidence, was tendered at any time, and that he got little or no assistance from any of the parties in making his inquiries. It is, however, unnecessary in their Lordships' opinion, to further analyse this evidence since they agree with the Court of the Judicial Commissioner of Oudh that the allegations of irregularity in procedure were not proved against the arbitrator, and that there is no justification for the strictures passed by the Subordinate Judge upon the conduct of the arbitrator. Further, severe comment was made that the arbitrator did not make and retain any adequate notes of the proceedings. No doubt, it is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him, but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied.

The last point, and the most important, is the grave charge that the arbitrator acted dishonestly and with partiality in conducting the inquiry and making his award. This charge was found to be established by the Subordinate Judge. The main evidence relied upon to support this conclusion was that given by the arbitrator himself in cross-examination. An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose; namely, to scrutinise the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case *Buccleuch* v. *The Metropolitan Board of Works* (3), but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established.

In the opinion of their Lordships the Subordinate Judge did not take sufficient care in the discrimination of the purpose for which the evidence was admissible, and utilised evidence relevant on the charge of corruption to criticise methods adopted by

(3) 5 H. L. 418; 41 L. J. Ex 137; 27 L. T. 1.

the arbitrator in determining the *quantum* of his valuations. The course adopted in the cross-examination of the arbitrator was not satisfactory. There was a prolonged and critical examination into the details of figures, used by the arbitrator, in making his award, but the charge of corruption was not put fairly and squarely to him, so as to enable him to give a direct answer or explanation. It is not surprising that a cross-examination so conducted should lead to a certain amount of confusion and contradiction, but their Lordships cannot find in this respect any warrant for supporting the grave charges of corruption and partiality.

The distribution and valuation of the testator's property amongst the parties entitled are stated without ambiguity on the face of the award. In the first place the arbitrator sets out the details of the property allotted to respondent No. 1 and in each instance his estimation of value. The first property allotted is the entire village of Mohi-ud-dinpur, *alias* Hajiganj and the estimated value is Rs. 28,785. In respect of this allotment and valuation three charges are made against the arbitrator. It is said, *first*, that Hajiganj was a choice portion of the property of the testator and that its allotment to respondent No. 1 showed partiality in his favour to the detriment of the appellant. The arbitrator's answer is that it was undesirable to divide Hajiganj and that the only way in which division could be avoided was by its allotment in entirety to respondent No. 1. This explanation is in itself reasonable and effectively answers the charge.

The second allegation is of under-valuation. The arbitrator is said to have dishonestly assessed this property at a low valuation intending to give an unfair preference to respondent No. 1. The evidence adduced in support of this charge is that the valuation was made on the Patwari's figures to the rejection of those appearing in the accounts of the testator, the former figures giving a lower rate of profit income, and thereby diminishing the capitalised value. Their Lordships can see no reason for not accepting the arbitrator's explanation given in cross-examination. He considered the Patwari's figures more likely to form an accurate basis for valuation than those in the private accounts, and stated that there were reasons which made him think that the private accounts were not satisfactory. This is just one of the matters on which an arbitrator is bound to exercise his discretion in estimating value, and the evidence is quite insufficient to prove that the arbitrator's choice of materials was influenced by a corrupt motive. Apart from the charge of corruption, it was beyond the competency of the Subordinate Judge to scrutinise the estimate of value appearing on the face of the award. Their Lordships can find no reason for coming to the conclusion that the basis of valuation suggested by the Subordinate Judge is preferable to that of the arbitrator.

The third charge made under the head of Hajiganj is that in the valuation no account was taken of the *Zemindar's* office said to be worth Rs. 500. The arbitrator's answer is that it was included as part of the village property, and that in any case it was covered by the addition of Rs. 2,000 which he had made to the value of the village as a whole. The second property allotted to respondent No. 1 consists of houses at Lucknow. It was said that the arbitrator had unfairly under-valued this property to the detriment of the appellant, and that he had included in his valuation a house which belonged to the appellant and not to the testator. There is not weight in the criticism made by the Subordinate Judge of the valuation of this property when the actual method adopted by the arbitrator is understood. The arbitrator, having a difficulty in obtaining any satisfactory basis for fixing a valuation, invited the parties to send in tenders, stating the price they would be prepared to pay for each of the houses. The only party who tendered for all the houses was respondent No. 1, whose tender in the aggregate amounted to a price of Rs. 11,900. The appellant sent in a tender for three of the houses at a slightly lower figure under each head, but the difference is so small as to be negligible. The arbitrator fixed the value at Rs. 11,800, reducing the tender price in the case of two houses by the comparatively insignificant sum of Rs. 50. The method of valuation adopted by the arbitrator was within his discretion, and it is impossible

ta find that the small alteration in the cose of the two houses was inconsistent with honesty and impartiality.

It was necessary for the purpose of making his award that the arbitrator should determine whether or not to include in his distribution of property the house at Lucknow claimed by the appellant. He gave his reasons for the decision at which he arrived. He knew that the house in question had been assigned to the appellant many years ago under a deed of compromise, but found that the testator had not given up possession, always treating the house as his own and mentioning it in his Will as a portion of his estate. He came to the conclusion that the testator, notwithstanding the deed of compromise, had a good title by adverse possession, and that the appellant's claim could not be sustained. He may have been right or wrong in the conclusion he arrived at, but their Lordships find no warrant for the inference that he was in any way actuated by a dishonest motive. If he was wrong and the house was not the property of the testator, its inclusion in the award might be detrimental to respondent No. 1, but could have no effect whatever in defeating the title of the true owner. In addition to Hajiganj and the house property, the arbitrator allotted to respondent No. 1 certain properties of comparatively small importance. Having regard to the decision at which their Lordships have arrived on the more important portions of the property allotted to respondent No. 1, it is unnecessary to follow under these heads the criticisms of the Subordinate Judge, which denote no more than a difference of opinion from the arbitrator on questions not within the jurisdiction of the Subordinate Judge to determine. No attack was made on the allocation of house-hold furniture, cash, and ornaments in Lucknow, or on their estimated value of Rs. 4,200.

Having allotted his share to respondent No. 1, the arbitrator next proceeds in his award to allot her share to the appellant, and to estimate the value of such share. There are three heads. The entire village of Kundri; a share in the village of Rasulabad : and a sum of Rs. 4,000. The testator's share in the village of Rasulabad was at this time subject to a considerable mortgage of Rs. 20,000, and it is alleged on behalf of the appellant that the arbitrator acted dishonestly in allotting to the appellant property subject to the disability of the mortgage ; that he unfairly over-valued the testator's property in Rasulabad ; and that he must have known that the allocation of the sum of Rs. 4,000 was practically illusory. In the allotment of the testator's share in the village of Rasulabad, the arbitrator was asked by respondents Nos. 2 to 5 to give them a share in Rasulabad adjoined to their share in Mahal Pachhim which they already possessed. The award shows that he complied with this request. The question, therefore, arises whether there is any evidence of dishonesty in his allotting the remaining share of the testator's property in the village of Rasulabad to the appellant. The appellant was already a co-sharer in Mauza Rasulabad, holding a share in co-tenancy with the testator. It was, therefore, quite reasonable that the arbitrator should assign a share to the appellant of the testator's property in that village. If the allocation under the above circumstances was properly made, the disability attached to the mortgage could not be avoided. It was necessary that some of the parties should be subject to this disability, and the matter was obviously present to the mind of the arbitrator, who in his award provided against an apprehension of loss by deciding that the mortgage-debt and its interest should be a charge on the entire property of the testator, and proportionately to all the co-sharers, each co-sharer being liable to pay in proportion to his share, and that each co-sharer should so soon as possible pay his capital and interest to the mortgagee. Their Lordships have already referred to this portion of the award, indicating their opinion that the arbitrator had dealt with the liability of the mortgaged property, providing what in his opinion appeared to be the best remedy. Under these circumstances their Lordships can find no evidence for the alleged dishonesty in the allotment of a share of the mortgaged property to the appellant, and agree in the decision of the Court of the Judicial Commissioner.

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Their Lordships have found some difficulty in understanding on what ground the Subordinate Judge has based his finding that the Rasulabad property was dishonestly over-valued. In his criticism on the valuation he states that the referee has valued the entire estate of the deceased at Rs. 95,042, but this in itself is an error, since it is clear on the face of the award that the estate was valued for distribution at Rs. 91,042 and that the additional sum of Rs. 4,000 was only thrown in as an item which might possibly be recovered on a claim for a rendition of accounts from Ahmad Khan. This initial mistake affects the subsequent inference and their Lordships can find no evidence of dishonesty in the detailed criticism of the arbitrator's figures. The Subordinate Judge places considerable weight on the allotment of Rs. 4,000 to the appellant as an element of misconduct in the arbitrator. It was objected that this was at best a doubtful item and ought not to be estimated in calculating the value of the appellant's share. The answer to this objection appears on the face of the award. In calculating the value of the appellant's share of the testator's property, this sum was not taken into account, but thrown in as an additional item after the appellant had been allotted property estimated at Rs. 30,879, in itself rather more than her third share of the valued property.

Ahmad Khan was a *karinda* in the employ of the testator, and had been collecting his rents. It was alleged before the arbitrator that this man had money in his possession which was owing to the estate, and for which he had not accounted. Some figures were placed before the arbitrator, but there was no reliable evidence either of liability or of amount. Ahmad Khan refused to appear before the arbitrator to give any explanation of his accounts, and he was not called at the trial before the Subordinate Judge. The respondent No. 1 had given Ahmad Khan acquittance for any sums that might be due to him, and the arbitrator was informed by Mr. Mohammad Fasih, a Pleader, and the son-in-law of the appellant, that he, too, had given Ahmad Khan discharges, as he desired to get Ahmad Khan in his power to support the appellant's claim for mutation. Under these circumstances, what was the arbitrator to do? If he had made no reference to the matter in his award, no question would have arisen, and, on the face of the award, the appellant would have had a full one-third share of the valued property. The course he took was evidently intended to be in favour of the appellant for what it was worth, and the finding of the Subordinate Judge that there was evidence of dishonesty appears to be founded on a misapprehension of the terms of the award in relation to the distribution of this item.

It was argued before their Lordships by Counsel for the appellant that, although in each instance the evidence of dishonesty might not amount to more than a case of suspicion, the aggregate effect would support the charge of corruption, since in every instance the decision was given in favour of respondent No. 1, and to the detriment of the appellant. In their Lordships' view, this is not an accurate summary, but, in any case, there would be no sufficient ground to infer such a grave charge as dishonesty and partiality against an arbitrator unless much stronger evidence was adduced in support of the particular instances relied upon than was forthcoming in the present case. It is just to the arbitrator to say that, in their Lordships' view, the charges of dishonesty and partiality have entirely failed.

Their Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellant: Mr. *Douglas Grant.*

Solicitors for the Respondent: Messrs. *Watkins & Hunter.*

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PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 4, 19 4.

Present:—Lord Shaw, Lord Moulton and Mr. Ameer Ali.

ARTHUR HENRY FORBES—APPELLANT

versus

MAHARAJ BAHADUR SINGH AND OTHERS—RESPONDENTS.

Patni Taluks Regulation (VIII of 1819*), s.* 13, *cls.* 2 *and* 4—Patni Taluks—*Zemindar*—Patnidar—Dar-patnidar—*Their rights and duties—Tenure saved from sale—Lien—Bengal Tenancy Act (VIII of* 1885*), ss.* 65, 148, *cl. (h)*, 163, 165, 195—*Permanent tenure—Ex-landlord, rights of, against tenure—Execution—Sale—Money-decree—Hypothecation—Construction of Statute.*

A Patni Taluk is a permanent heritable and transferable tenure, which a Zemindar may create over the whole or part of his estate, whilst a Patni Talukdar has a similar right to let the entire property held by him in Patni or in parcels to subordinate Talukdars called Dar-patnidars. And this process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the Zemindar has a right to apply to the Collector to sell the Patni Taluk for arrears of rent, and the sale has the effect of cancelling all under-tenures; but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent, and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the Zemindar possesses for the realisation of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession.

There are many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of the Patni Regulation VIII of 1819, and which have no relation to Patni Taluks. The incidents of these tenures are governed by the Bengal Tenancy Act (VIII of 1885). The former Regulation is a self-contained Statute which in express terms is excluded from the operation of the latter Act (section 195). The governing idea throughout the multifarious provisions contained in Chapter VIII of the Bengal Tenancy Act is the subsistence of the relationship that gives rise to those rights and obligations.

Where at the instance of the Zemindar a Patni Taluk is advertized for sale for arrears of rent and a Dar-patnidar pays the arrears to save the Patni Taluk from sale, he acquires on the Taluk so preserved a special lien expressly created by sub-section 4 of section 13 of the Patni Regulation, which may well be called a statutory salvage lien, arising not from any implication of the law but under the express directions and declarations of the Regulation.

The prohibition contained in section 148, clause (*h*), of the Bengal Tenancy Act refers to decrees obtained by the landlord under section 65 of the Act; and to acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists.

The right to bring the tenure or holding to sale under section 65 appertains exclusively to the landlord, and a person, to whom certain rents are due and who obtains a decree therefor after he has parted with the property, in which the tenancy is situate, has no such right. In short, the existing landlord alone can execute his decree for arrears of rent, the ex-landlord is an outsider and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself.

From the nature of the debt being arrears of rent or the decree being for arrears of rent, the tenure does not become *ipso facto* hypothecated for the debt and a total stranger to the property, with which the landlord's rights and obligations are inseparably connected, cannot avail of the special remedy given to the landlord alone to recover arrears attached to the tenure.

Therefore, the special right created in favour of the landlord under section 65 cannot be claimed also by one who has parted with the property which gives this right and to which it is attached.

Appeal from a judgment and decree of the Calcutta High Court, dated April 8th, 1908, reversing those of the Subordinate Judge of Purneah, dated September 14th, 1905.

FACTS.—The facts of the case have been sufficiently set forth in their Lordships' judgment as well as in the judgment appealed against and reported in 35 C. 737 and 7 C. L. J. 652.

Messrs. *De Gruyther, K. C.*, and *Dunne*, for the Appellant, contended that the appellant's charge on the Patni still subsisted. The decree obtained by the respondents was not a rent decree within the meaning of section 65 of the Bengal Tenancy Act. They were assignees of the said decree within the meaning of section 134 (*h*) of the said Act. The decree did not constitute a charge upon the said Patni tenure. The appellant was a Dar-patnidar and being placed in possession of the Patni by virtue of the Patni Regulation, he was entitled to a charge upon the Patni tenure, by reason of depositing money to save the tenure in question, in priority to that claimed by the respondents. The tenure could not be sold by the respondents in execution of their decree free from the appellant's charge.

Reference was made to Bengal Tenancy Act, 1885, sections 148, 9, 21, 103, 65 and 66; Land Registration Act of 1876, sections 87,

79, 38 and 42; Patni Regulation of 1819, sections 10, 11 and 8; *Nagendra Nath Bose* v. *Bhuban Mohan Chakravarti* (1).

Sir *Robert Finlay*, *K. C.*, and Mr. *Ross*, *K.C.*, for the Respondent, contended that the respondent's decree was for rent and, therefore, could be enforced against the Patni under the provisions of the Bengal Tenancy Act. As it was for rent it was the first charge on the Patni and had priority over the lien claimed by the appellant. The Patni could lawfully be sold free from the said lien.

Mr. *De Gruyther* replied.

JUDGMENT.

MR. AMEER ALI.—This appeal, which is from a judgment and decree of the High Court of Calcutta, dated the 8th of April 1903, raises certain questions of particular importance under the Rent Law of Bengal, for the proper apprehension of which it is necessary to set out in some detail the facts of the case.

The Zemindari of Lot Saifganj, situated in the district of Purneah, was owned at one time by a rich Zemindar of the name of Roy Dhanpat Singh, since deceased. The estate, however, was settled in Patni, and has been held for some years past by the defendant Chatrapat Singh as the Patni Talukdar; Chatrapat, on his side, has settled the Patni tenure in several parcels with subordinate tenure-holders called Dar-patnidars. Two of these Dar-patnis are held by the plaintiff-appellant. These tenures are special to Bengal, the Sonthal Pergunas and certain parts of Chota Nagpur, and their incidents are governed by Regulation VIII of 1819, commonly called the Patni Regulation. To some of these incidents reference will be made in the course of this judgment.

But it may be conveniently premised here that a Patni Taluk is a permanent, heritable and transferable tenure, which the Zemindar may create over the whole or part of his estate, whilst the Patni Talukdar has a similar right to let the entire property held by him in Patni or in parcels to subordinate Talukdars called Dar-patnidars. And the process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the Zemindar has a right to apply to the Collector to put up the Patni Taluk to sale for arrears of rent, and the sale has the effect of cancelling all under-tenures, but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent, and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the Zemindar possesses for the realisation of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession.

On the 27th of June 1893, Dhanpat Singh transferred the Zemindari, subject of course, to Chatrapat's Patni, to a Hindu lady, Bhagwanbati Chowdhrain, who has unquestionably been in possession of the estate since her purchase.

It appears that certain arrears of rent in respect of the Patni had become due before the sale to Bhagwanbati Chowdhrain. For these arrears Dhanpat Singh brought a suit in the Civil Court on the 21st September 1893. The final decree in this action was passed by the High Court on 10th of July 1896. Nine days after, Dhanpat Singh executed a deed of trust by which he assigned to the defendants Nos. 2 to 4 in trust for the defendant Maharaj, among other properties, the decree for arrears of rent.

Dhanpat Singh died shortly after leaving Maharaj his only son and heir.

In 1897 the trustees proceeded to execute the decree against Chatrapat but were met with various objections on his part which were finally overruled by the High Court in 1899.

In the meantime, Chatrapat had fallen into arrears in respect of the Patni rent payable to the Chowdhrain; and that lady had instituted in the Court of the Collector of Purneah the special proceedings under Regulation VIII of 1819 for the realisation of her dues. The defaulting tenure was accordingly advertised for sale on the 14th of May 1901. The plaintiff-appellant there-

(1) 6 C. W. N. 91.

upon deposited the amount of the arrears in Collector's Court and was put by him in possession of the Patni Taluk. Since then, he has been and still is in possession of the superior tenure paying rent to the Zemindar and realising the rents due to the Patni Talukdar from the subordinate holders.

The trustee defendants, having obtained the decision of the High Court that they were entitled to execute Dhanpat Singh's decree, applied for the sale of the Patni Taluk under section 163 of the Bengal Tenancy Act. It is to be observed that a sale held under this section does not give power to the decree-holder to annul "notified and registered incumbrances." The plaintiff thereupon preferred a claim under section 278 of the Civil Procedure Code of 1882, which, however, after some protracted proceedings, was withdrawn. Apparently, a sale under section 163 was held, but it did not fetch a sum sufficient to liquidate the arrears and costs, and the defendants then applied for a sale under section 165 under which the decree-holder has the power to annul all incumbrances including under-tenures. On this application the 6th of August 1906 was fixed for the sale of the Patni. The present suit was then brought by the plaintiff on the 9th of July in the Court of the Subordinate Judge of Purneah to restrain the defendants from proceeding with the sale.

It should be noted here that there exist many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of Regulation VIII of 1819, and which have no relation to Patni Taluks. The incidents of these tenures are governed by the Bengal Tenancy Act passed in 1885, to regulate, subject to certain exceptions to which attention will be drawn, the relations in general between landlord and tenant.

The Bengal Tenancy Act of 1885, whilst it protected the permanent tenure-holder and other tenants having similar permanent interests against ejectment for arrears of rent, gave to the landlords certain rights which they either did not possess before or possessed only in a qualified form. One was the right to bring to sale the tenure or holding in execution of a decree for arrears of rent. Section 65, which declares this liability of the defaulting tenure, also declares that "the rent shall be a first charge thereon." It is round these words that the controversy between the parties is mainly centred. Their Lordships say mainly, because there is another question of vital importance in this case which relates to the applicability of the provisions of the Bengal Tenancy Act to Patni tenures.

The defendants in their endeavour to bring Chatrapat's Patni Taluk under the provisions of section 165 of the Tenancy Act contend that as the relationship of landlord and tenant existed between Dhanpat Singh and Chatrapat when the rents became due, the decree obtained by him became by virtue of section 65 a first charge on the tenure. The plaintiff's contention, on the other hand, is that as Dhanpat Singh had parted with his interest in the Zemindari before the institution of his suit for arrears, the decree of which execution was sought was a rent-decree within the meaning of section 65.

The Subordinate Judge has upheld the plaintiff's contention, and granted him an injunction restraining Maharaj Bahadur and the trustee defendants, who are called in the suit "first party defendants," from executing their decree of the 10th of July 1896, against the Patni under the provisions of the Bengal Tenancy Act. His decision has been reversed by the High Court on appeal and the plaintiff's suit been dismissed with costs. The learned Judges considered that the decree being for rent the mere fact that the Zemindar had sold the estate after it became due, does not affect his right to "a first charge." At least that is what their Lordships understand to be the meaning of the learned Judges in the following passage of their judgment:—

"The decree of the 10th July 1896 is a decree for rent. Rai Dhanpat Singh was the landlord at the time, when the rent he sued for accrued due. His claim for rent, when found due, became a 'first charge' on the Patni. There is nothing in the law, which disentitles him to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the Zemindari."

This conception is further developed at a later stage of their judgment, where they say as follows:—

"Now, no doubt, the decision of this Full Bench does not deal with a case such as the

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present, in which the landlord had parted with his interest before he instituted his suit for rent, but it would seem to follow that, if he can execute a decree for arrears of rent as a rent decree after he has parted with his interest as landlord, he can also do so when he obtained his decree for rent, even after he had parted with his interest in the property. The character of the decree a suitor obtains, depends on the nature of the claim and of his right to the relief sought for and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue."

Their Lordships cannot help observing that the learned Judges have fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal In the Full Bench case of *Khetra Pal Singh* v. *Kritarthamoyi Dassi* (2) the landlord did not part with the property and put an end to the relationship of landlord and tenant until after the decree in his suit for rent; whereas in the present case he transferred his interest to Bhagwanbati Chowdhrain before his suit for the arrears. The broad question, however, for determination in this appeal is whether the special right created in favour of the landlord under section 65 can be claimed also by one who has parted with the property which gives this right and to which it is attached.

There is no doubt that there is a divergence of opinion among the Judges of the High Court of Calcutta with regard to the construction of section 65. The section itself runs as follows:—

"Where a tenant is a permanent tenure-holder, a *raiyat* holding at fixed rates or an occupancy-*raiyat*, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

It is not a happily worded section, and the words "and the rent shall be a first charge thereon," seem, from their collocation, to have been inserted as an afterthought without sufficient consideration of their applicability to the rest of the provisions contained in the section. They give no indication as to when it becomes a "first charge." Does it become a first charge from the nature of the claim, as some of the learned Judges seem to imagine, or does it become a first charge after it has been ascertained and made the subject of a decree? Again, the section does not sufficiently indicate at whose instance the tenure or holding shall be liable to sale in execution of a decree for rent thereof, though from the reason of the thing it is obvious that it must be at the instance of the landlord.

These questions cannot, therefore, be answered by a reference to the mere section itself; to understand its meaning, their Lordships apprehend, the general scope of the Statute as well as of the Chapter in which it occurs must be taken into consideration. The Act, as stated in the preamble, was designed "to amend and consolidate certain enactments relating to the law of landlord and tenant." The words "tenant, landlord, and rent" are carefully defined. "Landlord" is declared to mean "a person immediately under whom a tenant holds, and includes the Government," whilst "rent" is declared to mean "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant." Chapter VIII embodies the "general provisions as to rent." After dealing with "rules and presumptions as to amount of rent," "the alteration of rent," "the payment of rent," "receipts and accounts," "deposit of rent" in Court when the landlord refuses to receive payment, it treats of "arrears of rent". The governing idea throughout the multifarious provisions contained in Chapter VIII, to regulate the respective rights and obligations of landlords and tenants, is the subsistence of the relationship that gives rise to those rights and obligations.

Section 65 declares that a certain class of tenants shall not be liable to ejectment for "arrears of rent," but that their tenure or holding "shall be liable to sale in execution of a decree for the rent thereof." Section 66 provides that in the case of other tenants not coming within the purview of section 65, the landlord "may institute a suit to eject" the defaulting tenant. The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact

(2) 33 C. 566; 10 C.W.N. 547 (F. B.); 3 C. L. J. 470.

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corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. A reference to section 148, clause (*h*), clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord. It declares that "notwithstanding anything contained in section 232 of the Civil Procedure Code an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him."

The prohibition contained in this section refers to decrees obtained by the landlord under section 65. To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists.

It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under section 65 appertains exclusively to the landlord; and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A Zemindar to whom certain arrears are due, as in the present case, may sell his property without assigning, for purposes of his own, the back rents as he is entitled to do: he may then sue for those back-rents; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtained decrees for their respective arrears. In whose decree and on whose application is the tenure to be sold? The question admits of only one answer—that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself.

The learned Judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated, so to speak, for the debt; and that consequently the person to whom the debt is due, although he has ceased to be the landlord and is to all intents and purposes so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the charge created by section 65 is clearly in favour of the landlord.

There is another equally fatal objection to the application of the contesting defendants to bring to sale the Patni tenure in execution of Dhanpat Singh's decree.

The Patni Regulation is a self-contained statute. It lays down certain well-defined rules for the realisation by the Zemindar of arrears of rent from a tenure-holder; it makes the tenure primarily liable, and it gives to the Zemindar the right of applying to the Collector for the periodical sale of defaulting Taluks.

Section 8 provides for the manner in which the Zemindar, that is "the proprietor under direct engagement to Government," shall be entitled to apply for the sale of these tenures.

Section 11 declares that—

"Any Taluk or saleable tenure that may be disposed of at a public sale, under the rules of this Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assignees."

It is unnecessary to refer to the rest of this section for the purposes of this judgment.

Section 13 provides the method by which the "holder of a Taluk of the second degree" may save his tenure "from the ruin that must attend" the sale of superior tenure.

Sub-section 2 declares—

"Whenever the tenure of a Talukdar of the first degree may be advertised for sale in the manner required by the second and third clauses of section 8 of this Regulation, for arrears of rent due to the Zemindar, the Talukdars of the second degree, or any number

of them, shall be entitled to stay the final sale, by paying into Court the amount of balance that may be declared due by the person attending on the part of the Zemindar on the day appointed for sale; in like manner they shall be entitled to lodge money antecedently, for the purpose of eventually answering any demand that may remain due on the day fixed for the sale, and, should the amount lodged be sufficient, the sale shall not proceed, but, after making good to the Zemindar the amount of his demand, any excess shall be paid back to the person or persons who may have lodged it".

And sub-section 4, after referring to certain conditions which it is unnecessary to consider here, declares that "such deposit shall not be carried to credit in, or set against, future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the Taluk so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon, in the same manner as if the loan had been made upon mortgage; and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto".

It will be seen, therefore, that the appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Chowdhrain Zemindar, acquired the special lien expressly created by the Regulation which may well be called a statutory salvage lien, arising not from any implication of the law but under the express directions and declarations of the Act.

Regulation VIII of 1819 being thus, as already observed, a self-contained Act embodying the rules relative to the rights of Zemindars and Patni Talukdars, the Legislature, in enacting Act VIII of 1885, excluded in express terms from the operation of the Tenancy Act the special legislation relating to Patni tenures. Section 195 of Act VIII of 1885 declares (omitting the immaterial portions) that "nothing in this Act shall affect . . . any enactment relating to Patni tenures, so far as it relates to those tenures".

The plaintiff's right to hold the Patni Taluk exempt from any proceeding under the Tenancy Act, is founded on steps taken by him under the Patni Regulation.

For these considerations their Lordships are of opinion that the judgment and decree of the High Court should be set aside, and the decree of the Subordinate Judge restored. The first party defendants, the contesting respondents, must pay the costs of this appeal and of the appeal to the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Decree set aside.

Solicitors for the Appellant: Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondents: Messrs. *Downer* and *Johnson.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 25, 1914.

Present:—Lord Dunedin, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

HARENDRA LAL ROY CHOWDHURI —APPELLANT

versus

Srimati HARI DASI DEBI AND OTHERS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 28—Mortgage-deed—Fictitious entry—Property not in existence—Entry made to obtain registration at a certain place—Decree—Concurrent findings—No evidence—Decision of law—Mistake—Evidence—Rectification of mistake—Pleadings.

If the parties to a mortgage-deed fictitiously describe therein certain non-existent properties to be situate in a certain District and thus obtain registration of the mortgage-deed in that District, they commit a fraud upon the Registration Law and the registration of the deed is invalid as without jurisdiction. Similarly a Court, which would have had jurisdiction to entertain a suit based on a mortgage if the mortgaged property were really in existence and situate within its jurisdiction, acts without jurisdiction if it grants a mortgage decree on the basis of the mortgage containing such a fictitious entry.

The principle of concurrent findings of fact does not apply to a case of no evidence. A decision that there is no evidence to support a finding is a decision of law.

A mistake means that parties intending to do one thing have by unintentional error done something else.

Where both parties to a transaction intentionally make a fictitious entry there is no question of mistake.

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Where mistake is pleaded, it must be strictly proved and the fact, that the party who could give evidence in support of the suggestion of the mistake has abstained from giving any evidence whatever on the subject, would go against that party.

Where property is mis-described in a mortgage-deed, the mis-description cannot be directed by a Court to be amended unless there is a suit for rectification before it.

Appeal from a judgment and decree of the Calcutta High Court, dated March 3rd, 1909, reversing those of the Subordinate Judge of Midnapore, dated May 31st, 1906.

FACTS.—The facts of the case relevant to the decision of the Board are sufficiently set forth in their Lordships' judgment.

Mr. *De Gruyther, K. C.*, with him Mr. *O'Gorman*, for the Appellant, contended that the decree obtained by the appellant was a real charge. It must be treated as a decree for money. Under ordinary sale a purchaser took the interest of the original debtor. The existence of money-decree did not affect title. Any attachment might be executed and other creditors might come in under the distribution clause. There was no priority in attachment. After decree it became a real charge.

Reference was made to sections 254, 266, 274, 284, 295 and 252 of Act XIV of 1882; *Bazayet Hossein* v. *Dooli Chand* (1), *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhry* (2), *Musammat Izzatunnissa Begam* v. *Kunwar Pertab Singh* (3).

Messrs. *Upjohn, K. C.*, and *Dunne*, for the Respondents, contended that as to the mortgage-deed in question there was no registration and as to the decree of the High Court it was no decree. Certain property which gave jurisdiction to the registry in Calcutta did not exist nor did it belong to the mortgagor. The High Court, in its ordinary original jurisdiction, could not try cases in respect of properties situated outside Calcutta. Could the policy underlying registration be defeated by sticking in some property with which the mortgagor had nothing to do? It was all right if the parties honestly intended to deal with the property. The effect was that the appellant did not fulfil statutory requirements for registration.

Mr. *De Gruyther* in reply argued that the object of registration was to give notice and publicity to the transfer of property and referred to sections 21, 64, 65 and 51 of the Registration Act of 1877 and to *Hari Ram* v. *Sheodayal* (4); *Muhammad Ewaz* v. *Brij Lal* (5) and to section 12 of the Charter of the High Court and section 19 of the Code of Civil Procedure.

JUDGMENT.

LORD MOULTON.—In this appeal the appellant Harendra Lal Roy Chowdhuri is the plaintiff in the action which was commenced by a plaint filed on the 16th September 1905. The claim of the plaintiff was based on a mortgage-decree dated 28th July 1905, granted in a civil suit in the High Court of Judicature at Fort William in Bengal, acting under its ordinary original civil jurisdiction. That mortgage-decree purported to enforce an English mortgage of the 23rd September 1895 executed by the *pro forma* defendant, Mani Mohan Roy, in favour of the plaintiff of certain properties, among which was an eight-anna share of lands known as *Mahal* Gumokpota. The object of the present suit is to obtain a declaration that the female defendant, Hari Das Debi, acquired no right of ownership or possession in that property by virtue of an auction-purchase made by her on the 23rd of November 1904. It is, therefore, brought to establish the title of the plaintiff to those lands as being lands charged under his mortgage and subject to the decree free from any prior right of the female defendant.

The transactions between the parties to the suit and the litigation arising therefrom are of the most complex character, and raise questions of considerable difficulty, both in fact and law. But the respondents, at the hearing of the appeal, raised a preliminary point which goes to the root of the action, namely, that the plaintiff shows no title enabling him to bring such an action. They submit that the mortgage of the 23rd September 1895 was not duly registered, and further that the Court which granted the mortgage-decree of the 28th July 1905 had no jurisdiction to entertain the suit in which

(1) 5 I. A. 211; 4 C. 402.
(2) 9 C. 406.
(3) 36 I. A. 203; 13 C. W. N. 1143; 10 C. L. J. 313; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 31 A. 583; 3 Ind. Cas. 793; 6 A. L. J. 817.
(4) 16 I. A. 12; 11 A. 136.
(5) 4 I. A. 166; 1 A. 465.

that decree was granted. If these contentions of the respondents can be sustained, it is clear that the plaintiff's action must fail, and that the decision of the High Court dismissing this action must be affirmed.

The facts of the case, so far as they are relevant to this preliminary point, are as follows: On 23rd September 1895 Mani Mohan Roy purported to mortgage to the plaintiff various properties set out in a schedule to the mortgage-deed for the purpose of securing an account current of Mani Mohan Roy with the plaintiff, and freeing him from certain liabilities. The properties in question as set out in the schedule are 28 in all, the first being the eight-anna share of *Mahal* Gumokpota, to which the suit relates, and the last a property described as follows:—

"All that two-storied brick-built messuage, tenement, or dwelling-house, with the piece or parcel of rent-free land on part whereof the same is erected and built, containing by estimation ½ *cottah*, situate, lying, and being premises No. 25, Guru Das Street, Jorasunko, in the town of Calcutta, and butted and bounded—on the north, by a private lane of Ashutosh Dey; on the east, by the dwelling-house of Nandakumari Dasi; on the south by the dwelling-house of Khetra Mohan Dhara; and on the west by a Government drain."

This last property is the only one which purports to be in the town of Calcutta. All the other properties enumerated in the schedule are outside Calcutta and outside the local limits of the ordinary original jurisdiction of the High Court of Judicature at Fort William in Bengal.

This mortgage was presented for registration at the Calcutta Registry Office by the executant, Mani Mohan Roy, on the day of its execution and registered by the Sub-Registrar in the usual manner. In 1903 the plaintiff brought a suit on this mortgage-deed against the defendant Mani Mohan Roy and others, in the High Court of Judicature at Fort William in Bengal, and on the 28th July 1905 obtained the ordinary decree for sale. Neither of the two effective defendants in the present suit were parties to such action. The parties to the suit upon the mortgage seem to have set up that there was a mistake in the description of parcel 28, and that the words Ashutosh Dey Lane should be substituted for Guru Das Street. The learned Judge accepted this contention and accordingly held that property situate in Calcutta was included in the mortgage and that he had jurisdiction. No such decision, if erroneous, could extend the jurisdiction of a Court of limited territorial jurisdiction, and, therefore, the validity of this decree is open to challenge by the present defendants, who were no parties to the proceedings. Similarly, the direction of the said Judge that the description of the parcel in question should be amended (even if it was effective between the parties to that suit) cannot affect the present defendants, whose title is of earlier date, or render valid the registration, if they can maintain their contentions relating thereto. It is difficult, indeed, to see how the direction to amend the description of the parcel which formed part of the decree came within the scope of the suit, which was in no respect a suit for rectification.

The defendant, Mani Mohan Roy did not appear in the present suit. The female defendant, Hari Dasi Debi, and the third defendant, Hem Chandra Bose, (who was interested in the suit as claiming an interest in the property through her), appeared and filed written statements clearly putting in issue the existence of the property No. 28 above set forth, and alleging that no portion of the property mortgaged by the mortgage-bond lay within the jurisdiction of the High Court of Judicature at Fort William in Bengal in its original jurisdiction or within the jurisdiction of the Sub-Registrar of the Calcutta Registry. Accordingly they contended that the alleged mortgage was not legally registered, and that the decree was given by a Court which had no jurisdiction to entertain a suit on the mortgage-bond in question.

At the hearing of the action the plaintiff called no evidence with regard to the parcel No. 28. Neither the plaintiff nor Mani Mohan Roy went into the box to give evidence as to there being any mistake in the description of the parcels. On the other hand, the defendants proved that there is not and has never been any such property as No. 25, Guru Das Street, in Calcutta. and they further proved that the property lying within the metes and bounds set out in parcel No. 28 did not belong to

Mani Mohan at the date of the mortgage-bond, and that on the contrary he had not then and never has had any interest in the property within those metes and bounds. Such property has always belonged to parties wholly unconnected with the parties in this suit and has been continuously registered in their names in the Calcutta Registry.

It follows, therefore, that No. 25, Guru Das Street, which is the parcel No. 28, was a non-existing property. It was, no doubt, open to the plaintiff to prove that there was a clerical or other error in the description of the property, and that in fact an existing property situate in Calcutta was intended by both parties to be mortgaged and to be described in parcel No. 28. But there is not a particle of evidence that such was the case. Neither the mortgagor Mani Mohan nor the mortgagee, the plaintiff Harendra Lal Roy, went into the box to give evidence as to this. As to Mani Mohan their Lordships cannot see how it would have been possible for him to give any such evidence because it would amount to stating that he intended that the deed should purport to mortgage an existing property in which he had not and knew that he had not any property or interest whatever. This being so their Lordships, in the absence of evidence, decline to accept an unsupported suggestion of Counsel that the description of the property mortgaged as No. 25, Guru Das Street, was inserted by mistake. It must be remembered that the proper description of houses in towns for the purpose of registration is by the street in which they are situated, and the number which they bear in that street, so that the description No. 25, Guru Das Street, is that to which one should primarily look.

It may well be that the above is sufficient to preclude any rectification of the mortgage-bond. If the mortgagor intended it to stand, as it appears in the deed, there is no question of mutual mistake. But if the case of the mortgagee be considered, there is similarly no ground whatever for thinking that there was any mistake. The only witness whose evidence has any bearing on the point is Harakumar Chakravarti. He was clerk to Messrs. Sen & Co., who were the plaintiff's attorneys at the time, and drew up the mortgage, and he witnessed its execution by Mani Mohan and the admission of that execution before the Sub-Registrar. He does not refer to the matter in his examination-in-chief, but in cross-examination he says that he did not himself inquire about the house No. 25, Rajah Guru Das Street, but sent the broker to ascertain the boundaries of the house which shows that it was the above description of the house that he relied on, and that it was a house so described that was intended by the parties to be included in the mortgage. But with regard to this house he makes some very serious admissions. He says:—

"I do not know whether there is such a house as No. 25, Rajah Guru Das Street. I did not keep any original title-deed respecting this property. I did not see any original title-deed regarding No. 25, Rajah Guru Das Street, before or after the mortgage."

Considering that he was acting on behalf of the mortgagee, the fact that he took no steps to ascertain whether the mortgagor had any title in this property points strongly to the knowledge of the mortgagee that the entry was a fictitious one. Coupling this with the fact that neither this witness nor the plaintiff gave any evidence as to there being any mistake or as to their knowledge and belief as to the existence of the property at the date of the mortgage (although these issues were plainly raised in the pleadings of both the defendants), their Lordships decline to accept the suggestion that there was a mistake on the part of the mortgagee any more than that there was a mistake on the part of the mortgagor. The fact that neither the mortgagee nor the mortgagor gave evidence in support of the suggestion of a mistake has great weight with their Lordships. The defendants, having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in parcel No. 28 was property of strangers in which the mortgagor had not and never had any interest, had proved all that was necessary to throw upon the plaintiff the burden of showing that the entry of this parcel was not a fictitious entry. He might have done this by showing mistake or otherwise, but he did not do so, but abstained from giving any evidence whatever on the subject,

although both he and Mani Mohan were available to give evidence and were the persons who could establish the facts of the case. Taking all these matters into consideration, their Lordships can come to no other conclusion than that parcel No. 28 was to the knowledge of the parties to the deed a fictitious entry probably designed to give to the deed the appearance of relating to property situated in Calcutta and, therefore, within the jurisdiction of the Sub-Registrar and the Calcutta High Court, so that registration could be obtained and actions brought in Calcutta.

It was strongly contended before their Lordships that a Subordinate Judge had found that it was a mistake and that the High Court had accepted his finding, so that the principle of two concurrent findings of fact would apply.

But their Lordships are of opinion that the principle of concurrent findings of fact does not apply to such a case as the present inasmuch as it is a case of no evidence, and according to the well-known principles of our law a decision that there is no evidence to support a finding is a decision of law. The issue is that the existing description of the parcels was inserted by mistake. A mistake means that parties intending to do one thing have by unintenional error done something else. There is no evidence whatever here that the error was unintentional or indeed that there was any error at all, and their Lordships are, therefore, free to set aside the finding without in any way departing from their practice regarding concurrent findings of fact.

It is perhaps necessary in this connection to point out that the document upon which the Subordinate Judge based his finding of mistake was not evidence between the parties nor relevant to the issue. In some other mortgage-deed of later date and to other mortgagees Mani Mohan had apparently purported to mortgage the same property by the same description, and had been compelled by the mortgagees to consent to rectification. Such a fact was wholly irrelevant, and it is extraordinary that it should have been allowed to be proved at the trial.

It remains to consider the effect of their Lordships' finding. It may be looked at in two ways. In the first place the property, 25 Guru Das Street, purporting to be mortgaged, is a non-existing property, and, therefore, no portion of the property mortgaged is situated in Calcutta. The deed, therefore, could not be registered there, nor had the Court of ordinary original jurisdiction of Fort William in Bengal any jurisdiction to entertain the suit upon the mortgage-bond, and its decree is of no validity. The plaintiff, therefore, has no title to maintain the suit and it must be dismissed.

But the point may be put in another way upon broader grounds. Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry, intentionally made use of by the parties for the purpose of obtaining registration in a District where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item. The same considerations apply to the question of jurisdiction of the High Court of Fort William in Bengal in its ordinary original jurisdiction. No such fictitious item inserted to give a colourable appearance of the deed relating to property in Calcutta, when in reality such is not the case, could bring the deed within the limited jurisdiction of the Court. For the same reasons, therefore, as have been stated above, the plaintiff's case fails.

Their Lordships, therefore, will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Messrs. *Watkins & Hunter.*

MAHABIR PRASAD *v.* TAJ BEGAM.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 18, 1914.

Present:—Lord Moulton, Lord Sumner, Lord Parmoor, Sir John Edge and Mr. Ameer Ali.

Lala MAHABIR PRASAD AND OTHERS—APPELLANTS

versus

Musammat TAJ BEGAM AND OTHERS—RESPONDENTS.

Pardanashin *lady—Pleader and client—Mortgage by lady and her brother—Property solely of lady—Pleader securing mortgage in name of another*—Benami *transaction—Deed not explained to lady—Burden of proof—Extortionate bargain—Gross advantage taken of unprotected position of lady—Void deed—Mortgaged property—Condition—More property to be considered subject to mortgage after partition of mortgagor's share—Such condition, whether operative.*

Where a legal adviser to a *pardanashin* woman, acting the part of money-lender to her, procures the execution by her of a mortgage-bond to secure its re-payment, the Court would be entitled, and indeed obliged, to examine the transaction with closer scrutiny, or to insist more sternly on the mortgagee supporting the heavy onus of showing that the lady was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one.

A *pardanashin* lady and her younger brother were engaged in family litigation to recover their shares of inheritance in the property of their father. A decree of partition was passed in their favour but before the time for appeal expired, their Pleader got a mortgage-bond executed *benami* in favour of another person. The property mortgaged belonged solely to the lady and by the transaction of mortgage her brother obtained the discharge of debts for which he alone was liable. The interest stipulated in the mortgage-deed was compound interest at the rate of one per cent. per month (with half-yearly rests). In addition a clause was inserted in the mortgage-bond that after the partition the whole of the property allotted to the lady shall be substituted for the property mortgaged, the effect of this clause would be to quadruple the amount of property mortgaged. It was further established that the other relatives of the lady were also taking gross advantage of her unprotected state by refusing to give consent to her marriage unless she surrendered the whole of her share in the family property. It was also proved that the terms of the mortgage-bond had not been adequately explained to the lady and she did not understand the terms of the deed:

Held, that the terms of the mortgage-bond were extortionate and, therefore, the deed, which was void, could not be enforced against her.

Held, also, that if the mortgage-bond had been held valid, the clause relating to the substitution of the whole of the lady's share for what had been originally mortgaged would have been operative and would have subjected the whole of her share to the mortgage.

Consolidated appeals by special leave from judgments and decrees of the High Court of Allahabad, dated December 2, 1910, reversing those of the Additional Judge of Meerut, dated January 12, 1909.

FACTS.—The facts of the case have been sufficiently set forth in their Lordships' judgment.

Mr. *De Gruyther, K. C.*, with him Mr. *Dube*, for the Appellants, contended that the respondent lady executed the bond in suit after fully understanding the nature and the effect thereof. She received adequate consideration and executed the bond with her free consent. Her relations were also helping her and protecting her interests.

[SIR JOHN EDGE: You are not suing the lady for ordinary debt, but for the performance of a contract with compound interest]

[LORD MOULTON: If it were a simple contract debt, there would have been limitation.]

The lady entered into the transaction with her eyes open.

Mr. *Dunne* appeared for the respondents but was not called on.

JUDGMENT.

LORD MOULTON.—In this case their Lordships have before them two appeals from two decrees and judgments, dated 2nd December 1910, of the High Court of Judicature for the North-Western Provinces, Allahabad. The suit in which these appeals are brought is a suit for the recovery of money due on a registered mortgage-bond alleged to have been executed by the defendants, *Musammat* Taj Begum and Syed Sultan Muhammad Khan, in favour of Lala Ramanuj Dayal (since deceased), father of the appellants. The facts of the case are as follows:

Musammat Taj Begum is a *pardanashin* woman, and Sultan Muhammad Khan is her younger brother. Prior to June 1895 they had been engaged in law suits with the members of their family to recover their shares of inheritance in the property of their father, Syed Mir Khan, and one Babu Raghubir Saran had been the Pleader respresenting them in these suits. The litigation terminated in their favour, and a decree of partition had been pronounced, but the time for appeal had not expired and it is not seriously contested that at the

date of the execution of the mortgage-bond Babu Raghubir Saran still stood to the defendants in the position of their legal adviser. The mortgage-bond was nominally executed in favour of Lala Ramanuj Dayal, but it is admitted that he was only *benamidar* for Babu Raghubir Saran who was the real mortgagee. The amount of the money advanced by the mortgagee was Rs. 8,000 of which Rs. 4,773 is said to have been cash, and the balance went mainly, if not entirely, in the discharge of moneys due from the defendant, Syed Sultan Muhammad Khan. The greater part of this indebtedness appears to have been to Babu Raghubir Saran himself. The whole of the property mortgaged belonged solely to *Musammat* Taj Begum.

It follows, therefore, that we have a case of the legal adviser to a *pardanashin* woman acting the part of money-lender to her, and procuring the execution by her of a mortgage-bond to secure its re-payment. It is difficult to conceive a case in which the Court would be entitled, and indeed obliged, to examine the transaction with closer scrutiny, or to insist more sternly on the mortgagee supporting the heavy onus of showing that the client was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one. The appellants have entirely failed to support either of these issues. The Judge of the Court of first instance has found that the interest, which was compound interest at the rate of 1 per cent. per month (with half-yearly rests) unconscionable, and has accordingly reduced it, and although an appeal was brought against this part of his decision it was dismissed by the High Court, and the appeal against that decision has not been persisted in before their Lordships. The case of the appellants with regard to the other issue is equally hopeless. There are concurrent decisions of the two Courts to the effect that the plaintiffs have failed to prove that the meaning and effect of the mortgage-bond was duly explained to the real defendant *Musammat* Taj Begum. The facts relating to this issue are as follows:

The property set out in the schedule to the mortgage-bond, as being the property mortgaged, consisted of property belonging to and in the possession of the defendant *Musammat* Taj Begum. But a clause was inserted in the mortgage-bond to the effect that after the partition should have been effected the property awarded to that defendant in that partition should be substituted for the scheduled properties. It is admitted that the effect of this clause would be to quadruple the amount of property mortgaged. The Judge of first instance finds that there is no evidence that this was properly explained to *Musammat* Taj Begum, but holds that this does not invalidate the execution because in his opinion the clause would be inoperative Their Lordships are unable to agree with this opinion. The clause is clear in its language, and if the mortgage-bond had been valid would have subjected the whole of the lady's share to the mortgage. The High Court also finds that the plaintiffs have not shown that this clause was properly explained to the lady, and their Lordships entirely concur in its finding.

It follows, therefore, that as against the present appellants it must be taken that the terms of the mortgage-bond were extortionate and that the lady, the mortgagor, did not understand the effect of the deed by reason of its not having been adequately explained to her The deed is, therefore, void and cannot be enforced against her.

The Judge at the trial who decided in favour of the deed (subject to alteration in respect of the rate of interest) appears to have been influenced by the consideration that the relatives of the lady must have been aware of the transaction because her brother was a co-signatory of the deed, and two of her relatives were the identifying witnesses. Apart from the question of the sufficiency of such a consideration, their Lordships are of opinion that the facts of the case entirely destroy any inference that the relatives of the lady were acting as a protection to her in the transaction. Her brother was personally interested in carrying through the transaction, because by it he obtained the discharge of debts for which he alone was primarily liable, and this relief was obtained by mortgaging property in which he had no interest. With regard to the other relatives it is clear that the family generally were taking gross advantage of the unprotected state of this *pardanashin* lady. She had been betrothed but the relations

would not give consent to her marriage unless she surrendered the whole of her share in the family property. Their Lordships can only express their great surprise that under these circumstances the relatives should have been regarded by the trial Judge as defenders of the lady's interest.

This point is sufficient to decide the case, it is not necessary to refer to other points raised in the proceedings.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be dismissed with costs.

Appeals dismissed.

Solicitors for the Appellant: Messrs. *Barrow, Rogers & Nevile.*

Solicitor for the Respondent. Mr. *Douglas Grant.*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 11, 1914.

Present:—Lord Shaw, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

BATUK NATH—APPELLANT

versus

Musammat MUNNI DEI AND OTHERS—RESPONDENTS.

Privy Council Appeal—Practice—Order in Council, 1853, rule 5—Dismissal for non-prosecution—Order of His Majesty in Council—Limitation Act (XV of 1877), Sch. II, Arts. 179, 180—*Execution.*

Where an appellant or his agent does not take effectual steps for the prosecution of his appeal before the Privy Council, the appeal stands dismissed for non-prosecution under rule 5 of the Order in Council of 13th June 1853; there is no order of His Majesty in Council dismissing the appeal, nor is it necessary that any such order should be made in the appeal. Therefore, where a Privy Council appeal is dismissed for non-prosecution, the executable decree is that of the lower Court and the period of limitation for execution is that prescribed by Article 179 of the second Schedule of the Indian Limitation Act, 1877.

Appeal from the judgment and decree of the High Court, Allahabad, dated June 4th, 1910, affirming the judgment of the Subordinate Judge of Agra, dated September 8th, 1908.

FACTS.—The facts of the case on which the decision of the Privy Council is based have been sufficiently set forth in their Lordships' judgment as well as in the judgment appealed against, reported in 7 Ind. Cas. 36.

Messrs. *De Gruyther, K. C.*, and *Parikh*, for the Appellant, contended that the decree of March 29th, 1903, was never made absolute and was, therefore, still operative. The Court had power to extend the time to pay off the prior mortgage debt and under the circumstances ought to have exercised the power.

Sir *E. Richards, K. C.*, and Mr. *Dube*, appeared for the respondents but were not called on.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 4th June 1910, of the High Court of Judicature at Allahabad, which dismissed an appeal by the appellant here from a decree of the Subordinate Judge of Agra, dated the 8th September 1908, dismissing an application which had been made on the 2nd October 1907 to the Court of the Subordinate Judge by Babu Batuk Nath for the execution of a decree of the 29th March 1898.

The decree of the 29th March 1898 had been made by the then Subordinate Judge of Agra in favour of one Sheo Narain in a suit which had been brought by him under the Transfer of Property Act, 1882, for sale of certain immoveable property. By that decree it was ordered that if Sheo Narain should fail to pay a prior mortgage-debt within five months from the 29th March 1898, his suit should stand dismissed with costs. From that decree of the 29th March 1898, an appeal was brought to the High Court of Judicature at Allahabad. That appeal was dismissed by the High Court by its decree of the 12th February 1900, but in dismissing the appeal the High Court extended the time for payment of the prior mortgage-debt to the 9th August 1900. It has not been alleged or proved that any certified copy of the decree of the 29th March 1893 was registered within the meaning of Article 179 of the second Schedule of the Indian Limitation Act, 1877. From the decree of the 12th February 1900 of the High Court an appeal to His Majesty in Council was brought. On the 15th December 1904 the appeal to His Majesty in Council stood dismissed for non-prosecution under rule 5 of

the Order in Council of the 13th June 1853 without further order.

On the 26th September 1901, Sheo Narain had assigned his decree of the 29th March 1898 to Babu Batuk Nath. During the pendency of the appeal to His Majesty in Council some orders had been made by the Court of the Subordinate Judge of Agra extending the time for the payment of the prior mortgage-debt, but the last application for an extension of time for the payment of the prior mortgage-debt which was made to his Court was dismissed by the then Subordinate Judge of Agra by his order of the 20th March 1902, and on the 7th June 1902, the Subordinate Judge dismissed an application for a review of his order of the 20th March 1902.

In making his decree of the 8th September 1908, dismissing the application of the 2nd October 1907, the Subordinate Judge held that the period of limitation which was applicable to the case ran from the dismissal for want of prosecution of the appeal to His Majesty in Council, that is to say, from the 15th December 1904, and consequently that the application for execution had been made within time; he doubtless was under the impression that the appeal had been dismissed by an order of His Majesty in Council made in the appeal. The Subordinate Judge dismissed the application on the ground that the terms as to the payment of the prior mortgage-debt imposed by the decree of the 29th March 1898 not having been complied with within the extended time, the suit by the terms of that decree had stood dismissed. The attention of the learned Judges of the High Court does not appear to have been drawn to the question of limitation; they dismissed the appeal to their Court on the ground upon which the application had been dismissed by the Subordinate Judge.

It appears to their Lordships that the application of the 2nd October 1907 was made after the period of limitation prescribed for such an application by Article 179 of the second Schedule of the Indian Limitation Act, 1877, had expired, and that the application should, in accordance with section 4 of that Act, have been dismissed unless the dismissal of the 15th December 1904 for want of prosecution of the appeal to His Majesty in Council was by a final decree or order of His Majesty in Council made in the appeal. There was, however, no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under rule 5 of the Order in Council of the 13th June 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order.

As their Lordships hold that the application of the 2nd October 1907 was barred by limitation, and should on that ground have been dismissed, they do not consider it necessary to express any opinion on the grounds upon which the High Court made the decree which is under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the Appellant. Mr. *Edward Dalgado.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers & Nevile.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

March 17, 1914.

Present:—Lord Shaw, Lord Moulton and Mr. Ameer Ali.

CHUNILAL PARVATISHANKAR—APPELLANT

versus

BAI SAMRATH—RESPONDENT.

Will—Construction—Intention of testator—Costs.

A Will must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by the testator's words. It may be that if the words he employs are *voces signatæ* they must be so accepted whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole Will, that is, the whole of the words employed by the testator, must be looked at together so as to determine the whole intention. It is not legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply.

Where, therefore, a Hindu executed a Will in the Mofussil in favour of his two sons with the provision that in the event of the death of one of the sons the survivor would take the whole of the property, after undertaking to defrary the expenses of the maintenance of the widow and the minor

CHUNILAL PARVATISHANKAR v. BAI SAMRATH.

daughters of the deceased, and the event happened after the death of the testator:

Held, that the surviving son was entitled to the estate conveyed by the Will with the correlative obligation.

O'Mahoney v. *Burdett*, 7 Eng. Ir. 388; 44 L. J Ch. 56*n*; 31 L. T. 705; 23 W. R. 361, followed.

Edwards v. *Edwards*, 15 Beav. 357; 21 L. J. Ch. 324; 16 Jur. 259; 51 E. R. 576; 92 R. R. 464, referred to.

Allen v. *Farthing* [*Farthing* v. *Allen*], 2 Madd. 310; 17 R. R. 223; 56 E. R. 349, approved.

In view of the special difficulties in the construction of the Will the respondent was held entitled to all her costs from the appellants.

Appeal from a judgment and decree of the High Court, Bombay, dated July 20th, 1910, reversing decrees of the two lower Courts, dated respectively February 4th, 1907, and August 27th, 1908.

FACTS.—Parvathishankar, a Hindu resident of Surat, died in July 1901, leaving a considerable property and two sons, Shambhuprasad and Chunilal, who were joint with him, and one grandson, the son of his predeceased son, Surajlal, who had separated from his father many years before. He made a Will in favour of his two sons. They divided the property between themselves. Shambhuprasad died in 1903, leaving no male issue but a widow and a daughter. Chunilal then filed a suit in the Court of the first Class Subordinate Judge, claiming a declaration that he was entitled to the property in possession of the late Shambhu Prasad by virtue of their father's Will. The widow, Bai Samrath, contested it. The Court of the Subordinate Judge partly decided against her. On appeal to the District Court her appeal was dismissed entirely and the decree of the lower Court in her favour was also modified against her. The High Court reversed the order of the two lower Courts. An appeal to the Privy Council was then preferred.

Mr. *De Gruyther*, *K. C.*, and Mr. *Parikh*, for the Appellant, contended that the gift to the sons by the Will of the father was good and the appellant was entitled to the share which on division was given to the deceased brother. The testator clearly intended that his property should remain in his own family and should not pass into another family.

Mr. *Lowndes*, for the Respondent, contended that the property left by Parvatishankar was joint family property over which he had no power of disposal by Will. On the construction of the Will the deceased son took an absolute interest in the moiety of the property. The clause in question was meant to apply to the case if one of the sons died before the death of the father. If the devolution was intended to be controlled after the distribution of the property, it was bad in law inasmuch as it was an attempt to prescribe a special method of devolution in the case of property which was subject to an absolute gift. The 9th clause of the Will was never intended to apply to moveables. The appellant had waived his right, if he had any, by allowing his deceased brother to deal with the property as his own. Under section 42 of the Specific Relief Act the appellant was not entitled to sue for a declaration without also suing for the property.

Reference was made to *Haidar Ali* v. *Tassaduk Rasul Khan* (1); *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2); *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (3); *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (4); *Lallubhai Bapubhai* v. *Mankuvarbhai* (5) and Indian Succession Act, sections 111, 178, and Hindu Wills Act, 1870.

Mr. *De Gruyther* in reply.

JUDGMENT.

LORD SHAW.—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 20th July 1910, reversing a decree of the Court of the District Judge, Surat, dated 27th August 1908, which had affirmed with modifications a decree of the Court of the first Class Subordinate Judge, Surat, dated the 4th February 1907.

The only question for determination in the appeal relates to the construction of a Will, dated the 20th August 1899, made by a Hindu named Parvatishankar Dargashankar. He was a resident of Surat in the Bombay Presidency: and it may be at once stated that it was admitted by both parties at their Lordships' Bar that the Hindu Wills Act, Chapter 21, of the year 1870, did not

(1) 17 I. A. 82; 18 C. 1.
(2) 23 I. A. 18 at p. 26; 23 C. 563.
(3) 6 M. I. A. 526; 4 W. R. 114 (P.C.); 19 E. R. 198.
(4) 9 M. I. A. 123 at p. 125; 19 E. R. 688.
(5) 2 B. 388 at p. 428.

apply to this case, which falls to be determined not by the law operative within the territories subject to the Lieutenant-Governor of Bengal or the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay. It may well be that the sections of that Act upon interpretation would yield the same result as has been arrived at in the present case. But no decision on that topic is given: and the case is treated as one applying in the Mofussil, and, therefore, to be dealt with on ordinary legal principles. It must also be stated that the various terms employed in the particular Will are special, and that no general rule can be said to be precisely applicable in its construction except that the Court must make its best endeavour to extract the intention of the testator.

Parvatishankar, the testator, died on the 4th July 1901. He left surviving him two sons, Shambhuprasad (who died on the 2nd January 1903, leaving a widow, the respondent in this appeal, and a daughter) and Chunilal, the appellant. A third son of Parvatishankar, Surajlal, had predeceased his father, but had left one son. Surajlal had separated from his father many years previous to his death; the other sons were in family with him.

The Will was executed about two years before the testator's death and it purports to dispose of the whole of his property. By Clause 2 he appointed his two sons executors, heirs and owners of the whole. In various other clauses details as to the immoveable property are given, and directions that his sons are to divide and take in equal shares the whole of it with certain exceptions. In clause 7 there is a declaration as follows:—

"As to the moveable property which I possessed, I have during my life-time divided the same between my two sons, Shambhuprasad and Chunilal, according to my wishes and have made over the same in their possession."

A certain enumeration with directions is also given as to gold and silver ornaments in his possession. By clause 8 the testator gives each of his said two sons a half of his estate not specifically disposed of by his Will.

It is clear up to this point in the Will that the one predominant desire of the testator was that his two sons should have his property between them.

It was in the course of the case, however, found in fact that he had not accomplished, or completely accomplished, this desire. And the Will accordingly falls to be appealed to as the governing instrument in regard to the distribution.

The question of survivorship as between these two sons was not dealt with until clause 9 of the Will was reached, and it is in the following terms:—

"I have divided between and given to my two sons, Shambhuprasad and Chunilal, the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters. But under these circumstances the heirs of my deceased son Surajlal shall not get any right whatever."

Various issues were raised in the case, including whether the estate in question was self-acquired. This was answered in the affirmative, and that answer is not now disputed. As stated, the one question remaining in the case has reference to the construction of clause 9 above quoted. The learned Judges of the High Court of Bombay have held that—

"The period of distribution contemplated by the testator is clearly the period of his death, and under these circumstances the event which may interfere with that distribution and give rise to the necessity for other arrangements must be an event occuring prior to his death."

As already mentioned, Shambhuprasad survived the testator. And the result of the judgment is that one-half of the property now to be disposed of is held to have vested in him *a morte testatoris* and that the whole provision of clause 9 with reference to survivorship falls, in the events which have occurred, to the ground. The effect

of the learned Judges' decree is that the clause must be read as if the survivorship there provided for was limited to survivorship as at the testator's death.

Their Lordships are clearly of opinion that this judgment cannot be maintained. There is nothing specifically either English or Indian in the idea that the Will of a testator must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by his words. It may be that if the words he employs are *voces signatæ* they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole Will, that is, the whole of the words employed by the testator, must be looked at together so as to determine his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply. It may be true that there is a body of older cases which would warrant a suggestion that the term employed in this Will, namely, "should either of these two sons die without having had (leaving) any male issue", should be limited to such death occurring before the death of the testator himself, but the Will does not say that, and it has for many years been a settled principle that words of this class, being in general terms, must receive their full, and not a restricted, meaning.

The leading authority on the subject is, of course, *O'Mahoney* v. *Burdett* (6), and two sentences of Lord Hatherley's opinion may be here repeated. He refers to the duty of the Courts always to consider carefully the whole Will, "and having regard to all the various clauses contained in it, to see what is the full and complete and perfect intention of the testator."

He corrects the case of *Edwards* v. *Edwards* (7) and makes the statement of the principle run thus:

"that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the Will which are inconsistent with that supposition."

If it did not appear presumptuous to say so one might comment on the case of *O'Mahoney* v. *Burdett* (6) as one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense It was also, of course, fortified by authority, and notably by the case of *Allen* v. *Farthing* [*Farthing* v *Allen* (8)] the fullest report of which was given by Mr. Jarman in his Work on "Wills." (6th Edition page 2160).

But so far from the language empolyed in the present Will leaving any serious ambiguity as to the intention of the testator, their Lordships are of the opposite opinion. In their view the words clearly point to survivorship whenever it should occur. When Shambhuprasad, having, with his brother Chunilal, survived his father, died, leaving a widow and a daughter, the language employed to cover such a situation seems exact and clear.

"Should either of these two sons," it says, "die without having had (leaving) any male issue, the survivor . . . is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue."

And, as if this were not sufficient, the Will proceeds to lay upon the surviving brother a duty in the event of that survivorship in the following language:

"after undertaking (to defary) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters."

It seems to their Lordships that it would be a strained construction of a Will in that form (which manifestly contemplates death occurring at any time—with the receipt of property by way of survivorship—on the one hand, and the duties to be laid upon the survivor at any time, on the other hand) to say that the whole of these provisions fall to the ground, although Shambhuprasad had in point of fact left no male issue, because he did not die in that situation before the testator himself. The testator, in their Lordships'

(6) 7 Eng. & Ir. 388; 44 L. J. Ch. 56*n*; 31 L. T. 705; 23 W. R. 361.

(7) 15 Beav. 357; ; 21 L. J. Ch. 324; 16 Jur. 259; 51 Eng. Rep. 576; 92 R. R. 464.

(8) 2 Madd. 310; 17 R. R. 223; 56 E. R. 349.

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opinion, had clearly in view a much wider and more general provision, and they think that the events which have in fact occurred, *viz.*, the survival of the testator by his two sons and the death of one of these sons leaving a widow and daughters but no male issue, are events to which the Will has operative application. They accordingly do not doubt that Chunilal, the survivng son, is, as such survivor, entitled to the estate conveyed by this clause, and that the correlative obligation resting upon him comes into play.

Their Lordships desire to put on record an admission made by Counsel for the appellant to the effect that he had no knowledge of any property of the deceased testator in possession of the respondent, Shambhuprasad's widow, and that, if the respondent came into possession of such property under arrangements made in the life-time of her husband with his brother the appellant, the present judgment would not be used to disturb such an arrangement.

Their Lordships do not feel themselves able to give effect to the argument presented under section 42 of the Specific Relief Act or to interfere with the judgment of the District Judge on this question of procedure.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the cause be remitted to the High Court in order that upon provision being made and security being given to its satisfaction for the maintenance of the respondent and for the maintenance and marriage expenses of the minor daughter a declaration and injunction be given in terms of the plaint. In view of the special difficulties in the construction of the Will the appellant will pay to the respondent all costs incurred by her before this Board and in the Courts below.

Appeal allowed.

Solicitor for the Appellant: Mr. *Edward Dalgado.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

April 7, 1914.

Present:—Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

Chaudhri ABDUL MAJID—APPELLANT

versus

JAWAHIR LAL AND OTHERS—RESPONDENTS.

Limitation Act (XV of 1877), *Sch. II, Arts.* 179, 180 —*Appeal—Dismissal for want of prosecution—Decree capable of execution, that of lower Court—Interpretation of statutes—Barred rights cannot be revived.*

An order dismissing an appeal for want of prosecution does not deal judicially with the suit and can in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognizes authoritatively that the appellant has not complied with the conditions under which the appeal was open to him, and that, therefore, he is in the same position as if he had not appealed at all

Where an appeal pending before the Privy Council is dismissed for want of prosecution the decree of the lower Court is not constructively turned into a decree of His Majesty in Council. The only decree which is in existence is the decree of the lower Court inasmuch as there is no decree of His Majesty in Council in which it has become merged. Consequently, the period of limitation for executing such a decree is three years under Article 179 and not 12 years under Article 180 of the Limitation Act.

A right to enforce a decree which had become barred before the Civil Procedure Code of 1908 came into force cannot be revived.

Appeal from a judgment and decree of the High Court, dated August 5th, 1910, affirming those of the Court of the Subordinate Judge of Allahabad, dated October 6th, 1909.

FACTS are stated in their Lordships' judgment and in the Full Bench judgment of the Allahabad High Court reported in 7 Ind. Cas 926.

Mr. *Lowndes*, for the Appellant, contended that the application by the respondents ought not to have been treated as an application to enforce the order of His Majesty in Council of May 13th, 1901. The order did not purport to be and ought not to be treated as a decree in the suit deciding the rights of the parties under the mortgage and was not capable of enforcement in execution as sought by the respondent. In any view of the said application it was barred by limitation.

[LORD MOULTON.—Appeal is no stay.]

[LORD MOULTON.—There is no execution here; there is no appeal. Order for non-prosecution is anything but allowing the

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appeal. It only says that it is of no effect. Dismissal for non-prosecution does not raise it into a decree of the Privy Council.]

Reference was made to *Beni Rai* v *Ram Lakhan* (1); Order XXXIV, rule 5, of the Civil Procedure Code, 1908; Article 183 of the Limitation Act of 1908; sections 88 and 89 of the Transfer of Property Act, 1882, repealed by Order XXXIV, rules 4 and 5 of Civil Procedure Code of 1908; *Batuk Nath* v. *Munni Dei* (2).

Messrs. *De Gruyther, K. C.*, and *Dube*, for the Respondents, contended that the proceedings were started under the old Civil Procedure Code of 1882 and, therefore, all the subsequent proceedings should be dealt with in accordance with the provisions of the same.

[LORD MOULTON.—Yours was an application to enforce the decree of this Board.]

Effect of dismissal of an appeal or of a petition in India was to incorporate it into the original. Appeal to His Majesty stood on the same footing.

[LORD MOULTON.—You will enforce that order of His Majesty with costs. There was no enforceable order.]

[LORD MOULTON.—The point is whether the order of the lower Court merged into that of the Privy Council. It applies to acts in India and not to the Privy Council.]

Reference was made to *Raja Tasadduq Rasul Khan* v. *Manik Chand* (3); *Luchmun Persad Singh* v. *Krishun Persad Singh* (4).

Mr. *Lowndes* was not called on to reply.

JUDGMENT.

LORD MOULTON.—In this case the relevant facts necessary and sufficient to determine their Lordships' decision on the appeal are very simple and are undisputed.

The appellant is in the position of mortgagor and the respondents of mortgagees under a mortgage, dated 3rd September 1868. In 1889 a suit was commenced before the Subordinate Judge of Allahabad to enforce that mortgage, and on 12th May 1890 a decree was passed by him for the sale of the property unless payment was made on or before 12th August 1890. An appeal was brought from that decree to the High Court and on 8th April 1893 that appeal was dismissed and the decree of the Subordinate Judge confirmed. The mortgagor obtained leave to appeal to this Board but did not prosecute his appeal, and on 13th May 1901 the appeal was dismissed for want of prosecution.

The present appeal relates to an application to the Subordinate Judge, dated 11th June 1909, for an order absolute to sell the mortgaged properties; in other words, for an order directing enforcement of the order *nisi* which had been confirmed by the decision of the High Court of 8th April 1893. It is not necessary to go into the particulars of this application because their Lordships are of opinion that any such application was barred by the Statute of Limitation, Article 179, at the expiry of three years from the date of the decree, and, therefore, before the passing of the Code of Civil Procedure of 1908 under which the present proceedings purported to be taken, and their Lordships have no doubt whatever that inasmuch as the right to enforce the decree had once been barred no provisions of the Civil Procedure Code, 1908, operate to revive it.

The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of 13th May 1901 by virtue of the dismissal of the appeal for want of prosecution on that date, and that, therefore, the period of limitation was twelve years from 13th May 1901 by virtue of Article 180 of the Indian Limitation Act. Their Lordships see no foundation for this contention, which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could, in no sense, be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that, therefore, he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree dated 8th April 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed, and there is

(1) 20 A. 367; A. W. N. (1898) 77.
(2) 23 Ind. Cas. 644; 18 C. W. N. 740.
(3) 30 I. A. 35; 25 A. 109; 5 Bom. L. R. 100.
(4) 8 C. 218; 10 C. L. R. 425.

no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was, therefore, a period of three years. The respondents' right is, therefore, barred by limitation.

Their Lordships' will, therefore, humbly advise His Majesty that this appeal should be allowed, and that the application of 11th June 1909 should be dismissed and that the respondents should pay the costs of that application and of the appeal to the High Court as well as of this appeal.

Appeal allowed.

Solicitor for Appellant: Mr. *Douglas Grant.*

Solicitors for Respondents: Messrs. *Barrow, Rogers & Nevile.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 7 OF 1913.

January 28, 1914.

Present:—Sir Arnold White, Kt., Chief Justice, and Mr. Justice Tyabji.

RAHIMAN BI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHOMED FATIMA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammdan Law—Gift, essentials of—Possession—Presumption—Father—Gift of corpus—Son—Life-estate in produce reserved, effect of.

Where a gift under the Muhammadan Law is the subject-matter of a suit, it is necessary to consider its validity under two aspects, *viz.*, whether the transaction is permissible under that law and, if so, whether the requirements of the law for giving effect to it have been fulfilled.

In considering what is the exact kind of possession that must be required to complete and effectuate a particular gift, two things have to be considered, *firstly*, the nature of the subject of the gift, or when the subject of the gift consists of rights in or over some object, the nature of that object or thing as well as of the rights themselves, and *secondly*, whether the donee is in need of anything being done by the Court in order that he may derive that benefit which he alleges it to be the purpose of the gift that he should derive.

There is nothing inherently impossible in possession being transferred of the corpus of the subject of the gift though there is a stipulation that the donee will give to the donor the income of the subject of the gift

The presumption that after the gift by a father to his minor son possession by the father must be deemed to be on behalf of the son, cannot be extended to cases where the property is of such a nature that a mere physical control over it is not the only indication as to the ownership of the property.

Where a father made a gift of his house to his minor son under a registered-deed of gift which ran as follows: "I have this day given to you as a present the aforesaid house and ground according to the condition mentioned below out of my affection towards you. The condition is as follows: Till my death I myself will collect and take the rent of the aforesaid house and ground for my livelihood," and there was nothing to show that anything was at all done beyond the execution of the registered deed:

Held that the gift could not be said to be valid without a consideration of the question whether possession of the property was transferred and in what way.

Nawab Umjad Ally Khan v. *Mohumdee Begum*, 11 M.I.A. 517; 10 W.R. 25; 20 Eng. Rep. 195, *Shaik Ibhram* v. *Shaik Suleman*, 9 B. 146, *Sharifa Bibi* v. *Gulam Mahomed Dastagir Khan*, 16 M. 43, *Vahazullah Sahib* v. *Boyapati Nagayya*, 30 M. 519; 17 M. L. J. 562, *Mahomed Buksh Khan* v. *Hosseni Bibi*, 15 C. 684, *Said Kasim* v. *Shaista Bibi*, 7 N. W. P. H. C. R. 313, *Khajooroonissa* v. *Roushan Jehan*, 2 C. 184; 26 W.R. 36; 3 I.A. 291, *Jainabai* v. *Sethna*, 6 Ind. Cas. 513; 12 Bom. L. R. 341; 34 B. 615, referred to.

A appeal from the decree of the Hon'ble Mr. Justice Wallis, dated 19th day of November 1912, in the Ordinary Original Civil Jurisdiction of the High Court and made in Civil Suit No. 50 of 1911.

Messrs. *C. V. Ananthakrishna Iyer* and *C. P. Ramaswami Iyer*, for the Appellants.

Mr. *G. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

WHITE, C. J.—I have read the judgment which has been written by my learned brother, and I concur.

TYABJI, J.—The plaintiffs sue for a declaration that each of the two deeds of gift dated the 5th October 1904, Exhibits A and B in the case, "was not complete and that it is incapable of conveying any property" to the donee. The deeds of gift were (so far as material) *identical in terms* and are translated in the following terms: "On the 5th October 1904 the deed of gift known as conditional gift of house and ground is written and given to Shahi Amed Sahib .....by Ka Mahomed Ibrahim Sahib as follows.....My own house and ground which are my self acquisition, which are now in my possession and which are situated on.....are valued at" (Rs. 3,000 in the

one case and in the other case Rs. 1,500). "As I have become an old man and as I intend that there should not be any disputes among my heirs after my life-time, I have this day given to you as a present the aforesaid house and ground according to the condition mentioned below out of my affection towards you. The condition is as follows:—Till my death I myself will collect and take the rent of the aforesaid house and ground for my livelihood. After my life-time you should use and enjoy the aforesaid house and ground together with their entire income, fruit trees, wood trees, water, treasure, stone, etc., with power to sell, mortgage, gift away, etc., from generation to generation. . . . . "

Both deeds are executed by a father in favour of a minor son. The first issue framed in the case was as follows:—"Are the deeds of gift invalid for the reasons given in paragraph 5 of the plaint?"

The allegation in paragraph 5 of the plaint, to which the issue refers, is that the donor "by the terms of the said deeds of gift retained expressly the possession of the said properties with himself. The plaintiffs, therefore, submit that the said deeds of gift are incomplete according to Muhammadan Law and are inoperative."

The suit was heard by Mr. Justice Wallis, who begins his judgment with the words: "The main object of the suit is to question certain allegations made by a Muhammadan in his life-time in favour of his children reserving to himself a life-interest in the subject of gifts". Mr. Justice Wallis, after referring in detail to the case of *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1) and to the passage in the Hedaya, Volume II, pages 293 and 298 (page 483 of the one Volume edition) came to the conclusion that the gift is valid.

The law governing the transfers contained in Exhibits A and B is the Muhammadan law and not laid down in the Indian Contract Act; for though Exhibits A and B are registered, "and are made on account of natural love and affection between the parties standing in a near relation to each other," yet they contain no agreement, nor any such promise, to do anything as may be specifically enforced and as is referred to, for instance, in illustration (*b*) to section 25 (1) of the Indian Contract Act.

It seems to me that the questions involved in this case are two-fold: *first*, whether or not the transactions purported to be made are such that under the Muhammadan Law the parties have power to effectuate them by any act on their part, and, *secondly*, if the transactions are permissible under law, then whether the requirements of the law have been fulfilled so as to effectuate them.

Where gifts under the Muhammadan Law are the subject-matter of a suit, it is particularly necessary to consider their validity from both aspects, though in cases such as the present, the interdependence of the two considerations may be so great as to make it difficult to discuss them separately. Thus it may be argued, as was apparently done in *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1) that the validity of the gift purported to be made can never be established because it is in its terms such that there can be no transfer of possession, that the necessary requirements for the completion of the transaction are by the very terms of the gift made impossible. The requirement in question in the case referred to was transfer of possession. The Privy Council, in considering whether that requirement had been fulfilled in that case, laid down that where there is a real transfer of property by donor in his life-time and where the transfer is given effect to by possession being given of the "dominion over the *corpus* of the property," in such a case the transfer of possession is not to be deemed the less complete or effectual because it is shown that the donor has stipulated with the donee that the recurring produce of the subject of the gift will be made over to the donor during the life-time by the donee.

In coming to the conclusion they rely upon the authority of the passage in the Hedaya, which I have cited, and hold *first* that the corpus and the produce are distinguishable, and, therefore, *secondly*, that possession of the produce not being given does not affect the complete transfer of the *corpus*: *thirdly*, that "if the agreement for the reservation of the interest to the donor for his life is to be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here

(1) 11 M. I. A. 517 at p. 547; 10 W. R. 25; 20 Eng. Rep. 195.

the Muhammadan Law defeats not the grant, but the condition", *fourthly*, that the arrangement between the donor and the donee was founded on a valid consideration and could have been enforced in the Courts of India as an agreement raising a trust (there was no question of its being enforced as the donor had died at the time of the suit).

This illustrates the close connection in cases of this nature between the question whether the transaction sought to be given effect to can in itself be considered to be permissible under the law, and the question whether, assuming that it is permissible, the requirements of the law for giving effect to gifts have been fulfilled.

It would be a truism to say that if the transaction sought to be effected is in its nature such that that cannot be done which is required by law to be done for effectuating the gifts, then the transaction can never be upheld as a completed gift. The difficulty arises in considering what is the exact kind of possession that must be required in order to complete and effectuate the particular gift—what particular acts must be done by the donor in order to transfer the particular subject of gift to the donee. It seems to me that two considerations must amongst others be borne in mind in deciding this question: *first*, the nature of the subject of the gift or when the subject of the gift consists of rights in or over some object, then the nature of that object or thing as well as of the rights themselves and, *secondly*, whether the donee is in need of anything being done by the Court in order that he may derive that benefit which he alleges it to be the purpose of the gift that he should derive, if I understand the theory of the Muhammadan Law of gift correctly; then there is one almost unfailing test for determining whether or not the principle underlying the rules about possession is satisfied as those rules have been applied in British India, that test is whether at the time when the gift is alleged to have been completed the donee was placed in such a position that, without any further act on the part of donor or of those representing him or of the Court, the donee can have the benefit of that which he claims. In some cases this may not be a very easy test to apply. But wherever it can be applied there remains no necessity for determining in what manner possession must be transferred in the particular case: one result of applying the test is this, that if the donor has already effectuated a complete transfer to the donee, the gift is to that extent valid and complete: where, on the other hand, in making a declaration of gift or in giving effect to it, the donor also promises that he will at some future time enlarge the interest then given to the donee, in such cases, if the donor at the proper time does so enlarge the interest of the donee, there is a second gift on the second occasion, but if he does not so enlarge it, then the fact that at the time of the first gift he declared that he would do so cannot by itself give any rights to the donee.

It would, therefore, seem that as a rule there cannot be such a gift that the benefit derived from it is enlarged after the point of time when the gift is made, unless there is a second gift at the time when the benefit is to be so enlarged; and where the second gift (or other enlargement of the interest) is promised to be made after the death of the donor, the promise can operate, if at all, only as a bequest.

Does *Nawab Umjad Ally's* case (1) contravene this principle? I think not. In that case the Privy Council found, as a fact, that the complete ownership of the subject of gift, the Government promissory-notes, had been transferred to the donee; the donee in that case was entitled immediately on the gift to recover the interest accruing on the promissory-notes and to control it. It was only by fresh acts on the part of the donee that the donor received the interest accruing on the promissory-notes from year to year: each such act might either have been considered a new gift proceeding from the donee to the donor, or, as the Privy Council preferred to do, it might be considered to be done in performance of an agreement raising a trust and enforceable as such. However that might have been the donor in that case did not come to the Court seeking the assistance of the Court to enforce the payment to him of the interest on the promissory-notes and so the question of the validity or enforceability of that agreement was not before the Court. The donee was in complete possession and control of the notes; and his

possession was sought to be ousted by the heirs of the donor. It was not the donee who sought the assistance of the Court to effectuate what he alleged to be the purpose of the gift, but the heirs of the donor came to seek the assistance of the Court for that being undone which the donor had done.

In considering the effect of the caso in *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1) it must be borne in mind that the subject of the gift there consisted of Government promissory-notes and a complete transfer of the possession of such notes, even apart from the right to receive their income, can be made much more easily than is the case with immoveable property. Still the case is an authority for the proposition that there is nothing inherently impossible in possession being transferred of the *corpus* of the subject of the gift though there is a stipulation that the donee will give to the donor the income of the subject of the gift.

Coming to the facts of the present case, it had to be admitted by the learned Counsel who appeared for the respondent that the question as to whether there was any transfer of possession had not been considered in the judgment under appeal. The argument before us was that the fact that the donee in this case was a minor son of the donor raised the presumption that possession had been transferred: that the possession of the father after the declaration of gift must be presumed to be possession on behalf of the son, held by the father as the guardian of the property of his minor son. Now this presumption is one illustration of the general rule that where the donee is already in possession of the subject of the gift, no transfer of possession is necessary: the property of minor son would, in the ordinary course, be in the possession of his father and there would be, especially under the considerations in which the original texts of Muhammadan Law were wittten, nothing to indicate what portion of the property in the actual possession of the father belonged to him and what to the son. In such a case declaration by the father to the effect that certain specific property was the son's or had been transferred by him to the son, when such a declaration is made before the question in dispute was raised, and without any intention to defraud or defeat or delay his creditors, would naturally be taken as strong evidence of the son's ownership of the property. In the circumstances of the case, there could be no transfer of possession following the transfer of ownership; for the actual physical possession would be held by the father equally whether the owner were the father or the son. This, as I take it, is the principle of the presumption. The presumption cannot, it seems to me, be extended to cases where the property is of such a nature that the mere physical control over it is not the only indication as to the ownership of the property. Thus I apprehend that it would not be said that where the subject of a gift consists of promissory-notes—even were the gift to be governed entirely by Muhammadan Law—a mere declaration of the gift of the promissory-notes without any endorsement to the name of the minor son would complete the gift. Where, on the other hand, the subject of the gift consists say of an article of ornamental furniture which is kept in the house of the father, the declaration of the father may be all that can indicate who the owner of the property is. Thus in the Fatawa Alamgiri (Baillie's page 529) it is stated: "the gift of a father to his infant child is completed by the contract; and it makes no difference whether the subject of the gift be in his own hands or in deposit with another" (when that other holds it on behalf of the father and whose possession is the same as the possession of the father). "But if it be in the hands of an usurper, or of a pledgee or of a tenant who has hired it" (and whose control over the subject of the gift is on his own behalf, not on behalf of the father) "the gift is not lawful" (*i. e.*, by the mere "contract" or declaration of gift—"for want of possession")—unless it is completed by the tenants being asked to attorn to the donee: *Shaik Ibhram* v. *Shaik Suleman* (2), *Sharifa Bibi* v. *Gulam Mahomed Dastagir Khan* (3). The contract between the rules contained in the two sentences illustrates, it seems to me, the point under consideration. In the former case there is nothing else which the father can be expected to do, after the ownership of the property is transferred: in the latter case the tenants being in actual possession they can be made

(2) 9 B. 146.
(3) 16 M. 43 at p. 48; 3 M. L. J. 14.

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to attorn to the donee. It is true that the attornment by the tenant is not referred to in this connection in the Fatawa Alamgiri as a means of transferring possession: but the exercise of acts of ownership is elsewhere referred to as equivalent to holding possession. The particular acts of ownership must vary with the nature of the property and conditions of holding it in the society in question; in British India where the property transferred is in the occupation of tenants, the act consists of making the tenants attorn to the transferee. In the application of the rules to gifts of immoveable property in British India, the various means must be borne in mind by which the father can indicate that he has made a transfer of the ownership of the property so as to show that thenceforward it is the son's, such as mutation names in the Municipal and other records. Some of these steps are in the nature of an assertion of ownership; others are not very clearly distinguishable from it.

We have nothing in the present case to show whether the father did all that he had to do or could do for the purpose of making a complete transfer. There is nothing to show if anything at all was done beyond execution of the registered deeds. It has repeatedly been held that mere registration of the property in the names of the donee does not amount to a transfer of possession, *Vahazullah Sahib* v. *Boyapati Nagayya* (4) and, on the other hand it has been held that if the donor does everything that is in his power to do for transferring possession, that would be sufficient. See *Mahomed Buksh Khan* v. *Hosseni Bibi* (5).

For these reasons it seems to me that the argument of the respondent cannot be accepted, that the gifts (being in favour of a minor son) were completed by the mere declaration of the father.

On the other hand for the appellants it was suggested that the conditions of the gifts as appearing on the face of the deeds of gift were essentially such that the gifts could never be completed. It was urged in reply to this contention that this was a case where in effect a life-interest was reserved to the donor and that the decision in *Nawab Umjad Ally Khan* v *Mohumdee Begum* (1) lays down that a life-interest may be reserved without affecting the completion of the gift. The Privy Council decision, however, cannot, it seems to me, be construed as laying down that proposition in those broad terms. It certainly seems to me that that decision does not lessen the necessity of considering in every case the question whether, as a matter of fact, the gift has been completed by transfer of possession. I have already indicated some of the considerations which, in my view, ought to be borne in mind in deciding this point. The Courts will, no doubt, lean towards giving validity to such transactions. As the Privy Council point out "unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties:" *Nawab Umjad Ally Khan* v *Mohumdee Begum* (1). Still it seems to me that the transaction purported to be effected may be of such a nature as to be in itself nugatory as a gift *inter vivos* and impossible of effect being given to, as such. Though purporting to be a gift it may in effect be such that its validity must be tested by the rules applying to testamentary dispositions. *Sayad Kasum* v. *Shaista Bibi* (6) and *Khajoor-oonnissa* v. *Roushan Jehan* (7). This condition is alluded to by Mr. Justice Beaman in a very suggestive judgment reported as *Jainabai* v. *Sethna* (8) though some statements contained in that judgment seem to me to require further consideration.

The result appears to be, therefore, that, on the one hand, it would be wrong in the present case to proceed on the basis that there was no necessity for any kind of possession being transferred, there must be something to indicate that the transaction was not merely a nominal one and that its operation was not postponed till after the death of the donor. On the other hand, on the materials before us, without giving to the respondents an opportunity to prove that, as a matter of fact, the gifts were completed by transfer of possession, it seems to me that it would be unsafe to say at the

(4) 30 M. 519; 17 M. L. J. 562.
(5) 15 C. 684.
(6) 7 N. W. P. H. C. R. 313.
(7) 2 C. 184; 26 W. R. 36: 3 I. A. 291.
(8) 6 Ind. Cas. 513; 34 B. 615; 12 Bom. L. R. 341.

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present state that the gifts in their very terms were such that they could not have been completed at all; the respondents are entitled to place their case before the Court and if they wish to adduce any evidence in support of it, I think they ought to have an opportunity for doing so.

Mr. Justice Wallis has not considered whether (1) possession of the subject of the gifts in question was in any way purported to be actually transferred by the donor to the donee, and (2) if so in what way possession was purported to be transferred, nor (3) has he considered whether after the alleged gifts, acts of ownership were exercised over the subject of gift by the donor or the donee or by some person acting on behalf of the donee. It seems to me to be necessary that that question should be considered and I am of opinion that the case should be referred back to him with a request that he should record findings on these questions after taking such further evidence as the parties may desire to adduce.

Case returned.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 116 OF 1913.

March 9, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

BABU RAM DUBE—PETITIONER—APPLICANT

versus

RAMJAS DUBE—OPPOSITE PARTY—RESPONDENT.

U. P. Land Revenue Act (III of 1901), ss. 111, 112—Order of Assistant Collector referring parties to Civil Court—Not decree—No appeal.

An order of an Assistant Collector referring the parties to the Civil Court is not a decree within the meaning of sub-section 3 of section 111 of the U. P. Land Revenue Act, III of 1901, and hence no appeal lies to the District Judge from such an order.

Application for revision against the decision of the District Judge of Ghazipur, dated 9th April 1913.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Applicant.

Dr. *S. N. Sen*, for the Respondent.

JUDGMENT.—This application in revision arises out of a partition suit. An objection was filed raising a question of title, and the matter came before this Court in second appeal in consequence of a refusal by the District Judge to exercise appellate jurisdiction in respect of the order originally passed by the Assistant Collector. This Court directed the District Judge to dispose of the appeal before him on the merits and the District Judge returned the case to the Assistant Collector with orders to dispose of the objection before him on the merits. The Assistant Collector thereupon referred the parties to the Civil Court. This order was appealed to the District Judge and it has been reversed by him in appeal, on the ground that the Assistant Collector should not have referred the parties to the Civil Court after he had in the previous proceeding begun to inquire into the merits of the objection himself. The application in revision before us is based on the allegation that no appeal lay to the District Judge from the order of the Assistant Collector.

Without pronouncing any opinion as to the propriety of the Assistant Collector's order, we feel bound to say that it was not a decree under sub-section 3 of section 111 of the United Provinces Land Revenue Act, and we cannot see our way to holding that an appeal against it lay to the Court of the District Judge. We must, therefore, accept this application and set aside the order of the District Judge. The applicant will get his costs in this Court.

Application accepted.

LOUIS EDOUARD LANIER *v.* THE KING.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF SEYCHELLES.

November 5, 1913.

Present:—Lord Dunedin, Lord Shaw, Lord Moulton and Sir Samuel Griffith.

LOUIS EDOUARD LANIER—APPELLANT

versus

THE KING—RESPONDENT.

Seychelles Penal Code, s. 216—Embezzlement—Civil and Criminal liability—Distinction between invasion of liberty and just rights of citizen—Grave and injurious miscarriage of justice—Leave to appeal to Privy Council—Practice.

Section 216 of the Seychelles Penal Code does not refer alone to the failure to restore or replace goods, money, etc., in *forma specifica*, and, therefore, is not inapplicable to a position like that of the ordinary breach of agency or trust, in which money, in the sense of the actual notes, sovereigns, or the like, does not fall to be returned, but only its equivalent.

Upon the other hand, no countenance can be given to the view that the language of the Statute can be used to rank within the category of crime conduct or actions which do not essentially partake of the nature of embezzlement in the sense in which that term is ordinarily and properly understood. Although the term 'embezzle' is supplemented by the terms "squander away or destroy," the whole context and the view of the section show that the latter expressions are amplifications or exemplifications of the operations which are of the nature of embezzlement, in the sense that the conduct which is libelled has been a wilful appropriation by the accused of the property of another, or after possession of the same has been acquired, of the wilful squandering or destruction of it to his prejudice.

The mixture of the funds of another with one's own fund may be in many cases natural and proper and in another case convenient but irregular and in the third both irregular and criminal. The distinctions between these cases require to be treated with the greatestjudicial care,so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility, which may be imposed by Statute, a Court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind.

In criminal cases the Judicial Committee of the Privy Council does not lightly interfere, it only does so where justice has been gravely and injuriously miscarried even although the proceedings are taken to have been unobjectionable in form.

The appellant on being empowered by the guardian of a minor to act for the guardian in the ingathering and the investment of the property of the minor opened a regular account and received the minor's funds and made advances, sometimes far in excess of the receipts. In 1910, a large sum having become payable to the minor from a third person the latter credited the amount to the appellant's overdrawn account with the bankers. No concealment of any kind was practised, accounts were regularly kept and advances were made as before out of this money. In 1911 the appellant being called upon to show what cash he had in hand belonging to the minor, stated fully and exactly how the matter stood; and on being required by the friends of the minor to invest or pay the amount or to give a guarantee therefor, at once gave the requisite guarantee.

Upon this the appellant was prosecuted, convicted and sentenced to 18 months' imprisonment with hard labour for having wilfully, fraudulently and unlawfully embezzled the minor's money which had been delivered to him as agent or proxy of the minor's guardian:

Held, quashing the judgment and sentence appealed against, that the Court below had lost sight of the distinction between a civil and a criminal liability and that the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of just rights as a citizen that their Lordships felt called upon to interfere.

Messrs. *E. M. Pollock, K. C.* and *R. W. Lee*, for the Appellant.

Sir *Robert Finlay, K. C.*, and Mr. *O'Hagan*, for the Crown.

JUDGMENT.

LORD SHAW.—This is an appeal from a conviction and sentence of the Supreme Court of Seychelles. It was pronounced on the 5th July 1911 by the Acting Chief Justice, who tried the case without a Jury.

The appellant is a merchant in Mahe one of the Seychelles islands. He was at the time of the proceedings a member of the Legislative Council of the Colony and Consul for the French Republic, and he held various important commercial agencies. He was managing director of the firm of Lanier and Company.

It is for obvious reasons undesirable to comment upon various peculiarities of the case, and it is expedient to confine even the statement of the circumstances to the barest narrative. Such a narrative is, however, necessary.

There was in the colony a family of two minor children named Lablache. At a family council, duly held under the law of the colony (derived from the French Civil Code) Miss Lucie Lablache was appointed to the office of their guardian. On the 14th November 1908 she executed in favour of the appellant a Procuration or power-of-

attorney, and on the 2nd April 1909, on the eve of her leaving with the children for Europe, she confirmed the Procuration by what is called a Deed of Maintenance. Under these deeds the appellant had the amplest powers to act for the guardian in the ingathering and the investment, either with or without security, of the property of the minors.

Acting under these powers, certain funds were received and remittances of money were from time to time made by Messrs. Lanier and Company, the appellant's firm.

From beginning to end of these proceedings no suggestion has ever been made that either the minors personally, or Miss Lablache, their guardian, ever complained of, or are now or ever were dissatisfied with, the conduct of the appellant or his firm. Miss Lablache's anxiety appears to have been solely that a high rate of interest should be obtained, and this was done.

A circumstance of importance is that these payments were made by the firm of Lanier and Company. This firm's interposition (presumably at the instance of the appellant) appears to have been highly in the interest of the minors in past years. A regular account was opened, and from the year 1906, the minors' funds were received and advances made from time to time by the Company. The advances were sometimes far in excess of the receipts; and indeed in the end of 1908, whereas the receipts had been Rs. 6,119, the advances had been no less than Rs. 9,435.

In November 1910 a sum of Rs. 35,313 became payable to the minors by M. D'Emmerez de Charmoy. This gentleman proposed at first to pay by an order in favour of the appellant and drawn upon the appellant's bankers, Messrs. Said and Company, but the transaction took the shape of crediting the amount to Messrs. Lanier and Company in their account with their bankers, which account was overdrawn. This was an undoubted irregularity. Their Lordships incline to think that it occurred simply because the firm had been acting in the minors' interest and had had direct account with them for many years. No concealment of any kind was practised. The minors' account with Messrs. Lanier and Company was duly credited and all the entries throughout are openly and regularly made. After this date the firm continued to make advances as before out of this money which was lying with it at interest. The receipts for the last three remittances are produced they are dated in February, April and May 1911 and cover payments of 1,500 francs. So far as M. D'Emmerez de Charmoy was concerned, he also saw no objection to his payment being thus dealt with. Instead of making it to Mr. Lanier and getting that gentleman's receipt, he was aware that the bankers had simply credited their customers Lanier and Company with the amount. He was undoubtedly also aware of the history of the family, of the standing of the firm, and of its previous relations with the minors. That there was anything criminal being done does not at that time seem to have entered into any person's mind.

On the 20th June 1911, however, a family council was held, which was presided over officially by Mr. Alexander Williamson, the Acting Chief Justice. A "Mr. Finlay Gemmel, friend," asked that Mr. Lanier "must show what cash he has in hand belonging to the minors." Thereupon the appellant stated fully and with almost complete exactness how the matter stood. Mr. Gemmel suggested that the amount be invested or paid or that a guarantee be given by Mr. Lanier. This was perfectly reasonable, and an adjournment was made till the 27th June to enable one of these courses to be taken. Mr. Lanier acquiesced and on the 27th June a guarantee for Rs. 34,000, with a mortgage over the properties, was offered by Mr. Lemarchand, and this offer was, of course, unanimously accepted. One would have thought that everything was now satisfactorily arranged and ended. The minors' interests were completely protected. Sharply as the appellant had been pulled up, he had answered the call: the council were satisfied and the guarantee and mortgage were put upon record. It seems incredible, but it is the fact, that it was after all this had been done that criminal proceedings were instituted against the appellant under the Seychelles Penal Code.

On the same day an information was

filed charging Mr. Lanier with having wilfully, fraudulently and feloniously embezzled the minors' money on the previous 31st of May. And on that day, *viz.*, 27th June, a warrant was issued for Mr. Lanier's arrest. On the next day, namely, the 28th June, the Chief Justice informed the family council that he had communicated with the Crown Prosecutor. The proceedings thus started were pursued with alacrity and vigour. The Prosecutor considered it desirable that a member of the Bar should conduct the case, and the family council, again presided over by the Chief Justice, appointed two, and arranged about their fees.

On the 1st November the Prosecutor moved the Chief Justice to be allowed to make drastic amendments to the information, including one which altered the *tempus delicti* to the 20th June 1911. These amendments were objected to; the objections were repelled and the trial was fixed for four days afterwards, namely, the 5th July.

On the 5th July an application was made for a week's adjournment to enable Counsel to be employed for the defence, and a telegram from Tamatavi, stating that Counsel's passage was booked, was produced. The application was refused. The evidence led was substantially in accord with the narrative already given. The books were produced with all the entries in order. No further facts suggesting criminality were proved. In short, Counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any Jury upon the evidence submitted would have convicted the appellant of crime. The Chief Justice, however, convicted Mr. Lanier and sentenced him to be imprisoned for eighteen months with hard labour and to pay the costs of the prosecution.

Application for leave to appeal to the Supreme Court of Mauritius was refused, on the ground that the case was not appealable. This was correct. Had the sentence been for two years an appeal would have lain. A request was made that the sentence be increased so as to make the case appealable. This was refused. An attempt was then made to bring the proceedings before the Supreme Court of Mauritius by *certiorari*, with a view to their being quashed. The learned Judges of that Colony not obscurely intimated that the affidavits before them disclosed a grave question, but they were constrained to decide that they had no jurisdiction to entertain such an application.

Application for leave to appeal to His Majesty in Council was then made and was granted by this Board.

Many grounds for a reversal of the judgment appealed from have been made, and in the affidavits which form part of the present Record others also of a grave character are suggested. It appears to their Lordships, however, that the matter may be disposed of by a consideration of the facts above mentioned, of the judgment itself and of the reasons stated therefor, the whole being viewed in the light of the Statute. The information, as amended, upon which trial proceeded, was as follows:—"That on or about the 20th day of June in the year of our Lord one thousand nine hundred and eleven, at Seychelles, at a place called Victoria, one Louis Edouard Lanier, Merchant, residing at Victoria, did wilfully, fraudulently, and unlawfully embezzle to the prejudice of the minors Lablache, the owners thereof, the sum of thirty-four thousand one hundred and ninety-one rupees and thirty-three cents, which sum had been delivered to the said Louis Edouard Lanier merely in pursuance of a deposit or trust whilst he was acting in his capacity as agent or proxy of the said minors' dative guardian, *viz.*, Lucie Lablache, and as sub-guardian of the said minors, with the condition that the same be returned or produced against the form of the Statute in such case made and provided and against the peace of our Lord the King, his Crown and Dignity."

The statutory ground of the information was not stated in its text. But on the 1st July when the motion for amendment of its terms was made, the Crown Prosecutor announced that he proceeded upon section 216 of the Seychelles Penal Code. That section is as follows:—

"Whoever embezzles, squanders away or destroys, or attempts to embezzle, squander away, or destroy, to the prejudice of the owner, possessor, or holder thereof, any goods, money, valuable security, bill, acquittance, or other document containing or creating an obli-

gation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (*pret a usage*) or for any work with or without a promise of remuneration with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment and a fine not exceeding three thousand rupees (Rs. 3,000)."

In the construction of this section placed before the Board by the learned Counsel for the appellant, an argument was presented that the section refers alone to the failure to restore or replace goods, money, &c., *in forma specifica*, and that the section was accordingly inapplicable to a position like that of the ordinary breach of agency or trust, in which money, in the sense of the actual notes, sovereigns, or the like, does not fall to be returned, but only its equivalent. And the argument proceeded substantially to exclude all such ordinary cases as embezzlement from the ambit of the Seychelles Code, as it was also maintained that that crime was not dealt with by any other or more nearly applicable section.

Against this argument, Counsel for the Crown protested, and, in their Lordships' opinion, the protest was well founded. The Statute does not appear to be limited in the sense contended for.

Upon the other hand, no countenance can be given to the view that the language of the Statute can be used to rank within the category of crime, conduct, or actions which do not essentially partake of the nature of embezzlement in the sense in which that term is ordinarily and properly understood. Although the term "embezzle" is supplemented by the terms "squander away or destroy," the whole context and view of the section show that the latter expressions are amplifications or exemplifications of the operations which are of the nature of embezzlement, in the sense that the conduct which is libelled has been a wilful appropriation by the accused of the property of another, or, after possession of the same had been acquired, of the wilful squandering or destruction of it to his prejudice. The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility which, of course, may be imposed by statute, a Court of Justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind. It is sufficient with regard to the judgment before the Board of the Acting Chief Justice to remark that such distinctions and, in particular, the distinction between criminal liability and civil liability to account, hardly seem to have been present to his mind.

Two observations may be quoted which make this clear:—

"The act is wilful and fraudulent if he ought to foresee that a prejudice can result. It is not sufficient for him to state that he did not wish to cause prejudice, nor can he defend himself by saying that he did not foresee the result. He ought to have foreseen it. It was his duty not only to himself, but to those for whom he acted, to take such precautions and to have exercised such foresight as would not have involved him in the possibility of causing prejudice."

In so far as this is a statement of law, it is a proposition of constructive crime, and does not appear to be warranted by any general principle of law or by any sound interpretation of the section.

The second passage applies the erroneous doctrine thus:—

"In this case the wilful and fraudulent intent resulted from the fact that the accused so used the moneys entrusted to him that he rendered himself unable to produce them when the demand was formally and legally made by the family council."

It is sufficient to say that, in the opinion of their Lordships, even though the legal doctrines proceeded upon were sound, the facts proved do not warrant, but negative, the conclusion drawn. The alleged date of

the crime is the 20th June. That is the very date on which the position was explained by the appellant, and it was arranged that full security should be given, and it was given as stipulated. It would be straining the Act to apply it to anything done on that date, or indeed to the facts as a whole which were proved in this case.

Their Lordships are of opinion that the rules thus laid down by the Judge are in no respect safe guides in a matter of criminal responsibility. If they were, all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment could be held criminally liable for errors in investment, or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest. These propositions are not made in order to mitigate the rigour of that civil responsibility which must attach to all dealings with the property of others; but they are so elementary as grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit, that their Lordships regret that they appear on this occasion to have been left out of judicial view.

This omission would in any case be serious, but in the present case the point is not merely formal, and the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere.

In criminal cases this Board does not lightly interfere. To use the language of Lord Watson in the case of *In re Dillet* (1):—

"Such appeals are of rare occurrence, because the rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The appeal will be allowed, but not on any matter of form. Having carefully examined all the evidence, their Lordships are of opinion that the facts did not, on any just or legal view of them, warrant a conviction. It is unnecessary to consider arguments as to the rushing of the procedure or the harshness of the sentence, for, in their Lordships' view, even although the proceedings are taken to have been unobjectionable in form, justice has gravely and injuriously miscarried.

Their Lordships will humbly advise His Majesty that the appeal be allowed, that the judgment and sentence appealed from be quashed, and that the appellant be declared not guilty of the offence charged. Looking to the exceptional nature of the case the Crown will pay to the appellant the costs of the appeal. There will also be restored to him the amount of the costs of prosecution paid under the judgment of the Court below.

Appeal allowed.

Solicitors for the Appellants:—Messrs. *Loughborough, Gedge, Nisbet* and *Drew.*

Solicitors for the Respondent:—Messrs. *Sutton, Ommanney* and *Rendall.*

(1) (1887) 12 A. C. 459 at p. 467; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241.

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

April 7, 1914.

Present:—Lord Shaw, Lord Sumner, Lord Parmoor, Sir John Edge, and Mr. Ameer Ali.

CHANNING ARNOLD—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 499, 52—Criminal Procedure Code (Act V of 1898), ss. 297, 342, 497—Evidence Act (I of 1872), s. 105—Good faith—Freedom of Press—Privilege of Journalist—Privilege of other subjects—Privilege of Judge—Criticism—Fair comment—Truth—Reasonable grounds—Defamation—Gross libel—False imputations—Justification—Absence of due care and attention—Bail—Charge to Jury—Misdirection—Privy Council practice—Criminal appeal—Royal prerogative—Constitutional and administrative reason—Court of Criminal Appeal in England, rules and procedure of, how far binding on Privy Council.

The distinction between the first and the second exception to section 499, Indian Penal Code, is that the former deals with an expression of opinion, while the latter deals with allegations of fact.

No privilege attaches to the profession of the Press as distinguished from the members of the Public. The freedom of a journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. In other words, the range of a journalist's assertions, criticisms, or comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

On the other hand, no privilege or protection attaches to a Judge, which exempts his public acts from free and adverse comments. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comments.

A declaration or an opinion expressed in his judgment by a Magistrate or Judge is open to searching and severe observations, and may be freely criticised and commented upon by the Editor of a newspaper. But where the criticism is converted into an attack upon the Judge or Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who has manœuvered his procedure so as to defeat truth and protect an associate, it is for the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believes them to be true, and that on reasonable grounds.

One McCormick, a planter, was charged with having abducted and committed rape upon a girl of about 11 years of age. Mr. Buchanan, the Sub-Divisional Magistrate, thought that there was a case for committal. But Mr. Andrew, the District Magistrate, released McCormick on bail and after holding an enquiry into the matter discharged the accused.

The appellant Mr. Arnold, the Editor of a newspaper, published two articles which contained a series of libels of the grossest character against Mr. Andrew. These libels were at least seven in number. *First*, of conspiracy with a Police Officer, Captain Finnie, to prostitute justice by saving McCormick. *Secondly*, of having, apparently knowingly and as part of the partisanship, bailed out McCormick for a non-bailable offence. *Thirdly*, of having misled the girl, her parents and friends, by leaving them without professional advocacy. *Fourthly*, of having perverted the course of truth by employing an interpreter who was a paid parasite of the accused. *Fifthly*, of having tried the case *in camera*. *Sixthly*, of not having called certain witnesses in the enquiry. *Seventhly*, of having heard the case knowing that certain people objected to his doing so.

The appellant when charged with defamation of Mr. Andrew pleaded that although the imputations made by him were false, yet his case fell under exception 9 to section 499, Indian Penal Code, because he believed those imputations *bona fide* and had given due care and attention to their truth. In support of his defence, the appellant put forward three points: *first*, a letter containing a long narrative incriminating McCormick and also Mr. Andrew and others, had appeared in another newspaper some months before the appellant's articles were published; *secondly*, Mr. Buchanan, the Sub-Divisional Magistrate thought that there was a case for committal; *thirdly*, the admitted conduct of McCormick himself towards the girl; and justification of his belief in the truth of the libels was also claimed on the ground that Mr. Andrew had released McCormick on bail, though the offence was a non-bailable one.

Against the said defence the prosecution maintained (1) that to the appellant's knowledge the Government had found on enquiry that the allegations made in the letter on which he relied were without foundation.

(2) That the appellant re-opened the old incident after some months without receiving any fresh information and without discovering any fresh facts.

(3) That the appellant neither defended the article as true nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs, nor upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

(4) That when the appellant was asked by the Magistrate whether he wished to make any explanation of his position in the case as to his *bona fides*, etc., he simply answered that he had nothing to say.

(5) That in the course of his trial when the appellant discovered the truth that far from refusing to provide an Advocate to prosecute McCormick, Mr. Andrew had done his very best to secure one and that he had also anxiously endeavoured to employ an "interpreter trusted by all parties," that is to say, when the appellant had discovered his gross mistake, he should not have adhered to the libel but should have acknowledged his mistake and tendered an apology:

Held, (1) that although the appellant had made a fair and statable case in support of his defence, yet the answer with which he was met gave a severe shock to his plea of *bona fides* and established that in publishing the libels, which he admitted to be false, he did not act in good faith believing those libels to be true, after giving due care and attention to seeing that they were so;

(2) that it was no valid excuse for a belief in gross slander that an incriminating letter had already appeared in another newspaper;

(3) that Mr. Andrew had exercised a proper discretion in releasing McCormick on bail, at any rate this point could not be viewed as a substantial element weighing with the appellant as a reasonable writer in justification of his belief in the truth of the libel;

(4) that it was the duty of the appellant to have explained his position, when questioned by the Magistrate, as to his good faith after due care and attention.

Reg. v. *Newman*, 1 E. and B. 558; 22 L. J. Q. B. 156; 93 R. R. 275; 17 Jur. 617; 118 E. R. 544, referred to.

A charge to a Jury must be read as a whole. If there are salient propositions of law in it, these should be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the Jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual

CHANNING ARNOLD *v.* EMPEROR.

or good practice to treat such cases as cases of misdirection, if upon the general view taken, the case has been fairly left within the Jury's province.

The power of His Majesty under his Royal Prerogative to review proceedings of a criminal nature, unless such power has been parted with by Statute, is undoubted, but this power, for reasons both constitutional and administrative, should not be lightly exercised.

The Judicial Committee is not a Court of Criminal Appeal. It is not guided by its own doubts of an appellant's innocence or suspicion of his guilt. It will not interfere with the course of Criminal Law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, *first*, that the result arrived at was opposite to the result which their Lordships would themselves have reached and, *secondly*, that the same opposite result would have been reached by the local tribunal if the alleged defect or misdirection had been avoided.

In re Dillet, 12 A. C. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241, explained.

Queen v. *Joykissen Mookerjee*, 1 Moore P. C. (N. S.) 272; 15 E. R 704; 138 R. R. 522; *Falkland Island Co.* v. *Reg.*, 1 Moore P. C. (N. S.) 299 at p. 312; 15 E. R. 713 at p. 718; 10 Jur. (N. S.) 807; 9 L. T. (N. S.) 103; 12 W. R. 220; 9 Cox C. C. 351; 138 R. R. 535; *Makin* v. *Attorney-General for New South Wales*, (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148; *Vaithinatha Pillai* v. *Emperor*, 21 Ind. Cas. 369; 17 C. W. N. 1110; 14 M. L. T. 263; (1913) M. W. N. 806; 15 Bom. L. R. 910; 25 M. L. J. 518; 11 A. L. J. 881; 18 C. L. J. 365; 14 Cr. L. J. 577; 40 I. A. 193; 36 M. 501 (P. C.) and *Louis Edouard Lanier* v. *Emperor*, 23 Ind. Cas. 657; (1914) A. C. 221; 26 M. L. J. 1; 18 C. W. N. 98 (P. C.); 83 L. J. P. C. 116, referred to.

The Judicial Committee would not advise the interposition of His Majesty, the King, with the course of Criminal Justice in the Colonies or dependencies, except in the extreme case where it is established demonstrably that justice itself in its very foundation has been subverted, and that it is, therefore, a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

The Privy Council will not interfere in the region of fact unless something amounting to a complete misdescription of the whole bearing of the evidence has occurred. Therefore, a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the Jury's mind, would not justify a miscarriage of justice to be affirmed or assumed and thus convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Even if upon a *meticulous* examination of a Judge's charge or conduct of a case certain flaws can be discovered, it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases, as the advisers of the King.

The authority of the decisions of the Court of Criminal Appeal in England, which apply to a different system, a different procedure and a different structure of principles, must stand out of the reckoning of any body of authority on the matter of the procedure of the Judicial Committee of the Privy Council in advising His Majesty.

Clifford v. *Emperor*, 22 Ind. Cas. 496; 40 I. A. 241; (1914) M. W. N. 11; 16 Bom. L. R. 1; 12 A. L. J. 75; 15 M. L. T. 84; 19 C. L. J. 107; 18 C. W. N. 374; 15 Cr. L. J. 144; 7 Bur. L. T. 37 (P. C.), referred to.

Appeal by special leave to appeal from a conviction and sentence by the Chief Court of Lower Burma in its original criminal jurisdiction dated October 19, 1912, whereby the appellant was to undergo a term of one year's imprisonment for defamation.

FACTS.—In March 1911, a girl named Aina, a Malay Muhammadan, aged eleven or less, was living in the house of one Mr. Clarke and McSone, his native wife. After her stay there for about three weeks she was carried away by one McCormick who was a rubber-planter at Victoria Point. He kept her in his bungalow for a day or two and examined her private parts and put her in charge of Ma Pe Yin giving her direction how to treat Aina for gonorrhea. She stayed there some three months and was repeatedly refused to be given over to her parents. Mr. Buchanan, the Sub-Divisional Magistrate, heard vague news of the scandal and wrote to Mr. Andrew, his official superior. The letter was posted on July 3rd, and would have reached its destination on the 5th, but Mr. Andrew said he received it on the 12th, a week later. On July 12th, Fatima the mother of Aina made a complaint before Mr. Buchanan of Aina being kidnapped and on 16th of being raped also. Inspector Sherard took possession of the child who was examined by Daulat Ram, Sub-Assistant Surgeon. Captain McCormick, who was an Australian, gave several accounts of how Aina came to be in his house. He also said that Aina was sold to him and that she was prostituting herself to coolies. McSone also made different statements, first saying that Aina was taken to McCormick's house by her mother and then that she herself went away with him. The mother throughout denied having sold or given McCormick permission to take her away. Mr. Buchanan issued a warrant on July 19th to Captain Finnie, who was sent by Mr. Andrew to investigate the charges, for

the arrest of McCormick, returnable to Mr. Andrew. Bail was granted on reference to Mr. Andrew who had received a wire from Finnie: Daulat Ram telegraphed to Dr. Evers, the Civil Surgeon, to bring with him the needful microscopic slides to test for gonorrhea. He saw Finnie, who told him that there was no need for such an examination but at the trial denied having ever seen Dr. Evers and afterwards pleaded bad memory. The complainant Aina and Fatima, her mother, and several witnesses sent a petition to Mr. Buchanan to the effect that Mr. Andrew was a friend of the accused and should not try the case. On August 4th, 1911, Mr. Andrew wrote a letter to the Commissioner based on Finnie's report and ignoring Mr. Buchanan's conclusions. Another petition signed by the same persons was sent to the Commissioner through Mr. Buchanan. On August 3rd, Andrew wired to Buchanan that he would engage a lawyer to prosecute the case, but on the 12th, telegraphed that the Commissioner declined to sanction it. The trial took place on August 21st, 22nd and 23rd, 1911, and McCormick was discharged. Arnold while the Editor of the *Rangoon Times* received a letter dated the 31st August 1911 from a correspondent signed "Vigilance" which was forwarded to the Local Government. To this the Government sent a reply on the 31st October 1911 stating that on inquiry the allegations were found to be without foundation. Arnold had in the meantime become the Editor of the *Burma Critic*. Mr. Stokes of the *Rangoon Times* forwarded a reply on the 2nd November 1911 to the Government that so far as his paper was concerned the incident was closed. Arnold wrote an article "A grave scandal at Tenasserim" which led to correspondence with the Local Government. Later he wrote two articles headed, "A Mockery of British Justice," against Andrew, McCormick and others. The article was marked by the facts: (1) Andrew was a personal friend of McCormick and had stayed with the latter while Aina was detained there; (2) Andrew turned out Fatima from his Court as she objected to the interpreter Musaji's interpreting; (3) there was no one conducting the prosecution; (4) the interpreter Musaji was a debtor and agent of McCormick; (5) important witnesses, like Dr. Evers, were not examined; and (6) two days after inquiry McCormick was entertained by Andrew. Arnold was then prosecuted by Andrew and tried under sections 499 and 500 of the Indian Penal Code and sentenced to one year's simple imprisonment. The defence was exceptions 2 and 9 of section 499 of good faith and publishing articles without malice. The Chief Judge refused to state a case on a point of law and the Attorney-General refused to give a certificate for review. The irregularities complained of at the trial of Arnold were the preliminary order passed by the Chief Judge excluding most of the evidence for the defence, admitting written medical report without allowing the Doctor to explain his report, reading out law from books on English Law, which was materially different from the Indian Law on libel, etc., etc. Arnold then applied to the Judicial Committee for special leave to appeal which was granted.

Sir *Robert Finlay, K. C.*, Messrs. *Wilson* and *Page*, instructed by Messrs. *Bramall* and *White*, appeared for Mr. Arnold, the Appellant.

Sir *E. Richards, K. C.*, and Mr. *Dunne*, instructed by the *Solicitor to the India Office*, appeared for the Respondent.

Dr. *Syed Abdul Majid*, instructed by Messrs. *Bramale* and *White*, watched the proceedings on behalf of the London Islamic Society.

Sir *R. Finlay, K.C.*, for the appellant, contended that the charge was under section 499 of the Indian Penal Code and that it was not defamation if it were done in good faith. The whole question was whether Arnold used due care and attention. If so, he was entitled to acquittal. The proceedings were most unsatisfactory and the sentence rather heavy. Let it be clearly understood that McCormick was not being charged with a crime. Arnold, it was not suggested, had any malice.

[SIR JOHN EDGE: Arnold does not say how he was informed of it.]

He wrote to the Lieutenant-Governor first. McCormick said he took the child for the purpose of treating her; but medical evidence was that she could not have suffered from gonorrhea. The Chief Justice hoodwinked the Jury as if the charge was against McCormick. The medical evidence was that the child was used in an abominable way and her hymen was ruptured.

[SIR JOHN EDGE: What was the charge?]

First abduction and then rape. Prior to

the trial complainant filed a petition before Mr. Buchanan to the effect that the case should be tried by himself and inquired into personally. This was confirmed by the Diary of Mr. Buchanan. Fatima, the mother, stated that she had not parted with the child and wanted her back from McCormick. She then applied that the child should be examined. On July 13, Sherard was sent to inquire, who saw McCormick on the next day. He stated that he brought the child. He made two different statements. The Diary appeared to be re-written. Arnold took due care as to what was to be said.

[LORD SHAW: What you are concerned with is the innocence of Arnold and not with the guilt of McCormick]

[SIR JOHN EDGE: Buchanan's view was that McCormick was a dangerous man. Shut him up.]

One could understand the English sentiment on such a state of affairs. Arnold was there a few years.

[SIR JOHN EDGE: One who had been there so long, would not have believed in it.]

Fatima wished to have her child, but McCormick would not give her back. On July 18.h, Finnie arrived. Daulat Ram's examination went to corroborate the statement of the girl that rape was committed.

[SIR JOHN EDGE: There was *prima facie* case of abduction. There is proof that she was with a dancing troupe.]

[MR. AMEER ALI: That would not mean that she had connection.]

Before the discharge ceased, Finnie told Daulat Ram that he need not take slides. One had a right to complain of the way in which the Judge had tried the case.

[MR. AMEER ALI: The letters are on the file.]

[SIR JOHN EDGE: These letters are confidential among the Civil Service]

Buchanan stated reasons for not agreeing as the defence was that the child was prostituted. The petition that Mr. Andrew should not try the case, was sent to him by the Commissioner. It was not right to file away petitions of that kind. Besides, objections against him trying the case were taken several times.

[SIR JOHN EDGE: Is a Magistrate to hold his hand because of a petition. No administration of criminal justice would be possible. I used to receive petitions against every Judge.]

It was unfortunate that the trial took place before Mr. Andrew. I had nothing to do with the officials. Persons in extreme poverty to be told that the petition was to be sent to Sessions Judge to be forwarded to the Chief Court! What I had to show was whether Arnold acted in good faith and with due care. The defendant was represented by a Pleader, but the Court called witnesses for the defence! It ought to have been left to McCormick. It looked curious.

[LORD SUMNER: Not examining Dr. Evers because discharge had ceased, was not an adequate reason.]

Several witnesses were never called. It was startling that Aina was suffering from venereal disease. The evidence was just the other way. She never had it. Andrew said she was suffering beyond doubt. Arnold honestly and reasonably believed that a miscarriage of justice had taken place.

[SIR JOHN EDGE: Arnold believed that Magistrate concocted these.]

It was too strong. What Arnold believed was miscarriage of justice.

[SIR JOHN EDGE: Natives are treated by Europeans. Do you mean to say that Arnold came to the conclusion on all these facts before him?]

Yes, that was the impression left on his mind.

[SIR JOHN EDGE: What does your client say against the order? You cannot charge Magistrate of corruption.]

I was not attacking. Andrew had been on friendly terms with McCormick. Two petitions were never forwarded to proper quarters. How would these act upon the mind of a person? After correspondence with the Government when Arnold found that no remedy was possible, he wrote the articles. The trial before the Chief Judge was rather unusual. He made a speech before the trial shutting out a deal of evidence for the defence.

[MR. AMEER ALI: Is it in accordance with practice to make a speech before trial?]

[SIR JOHN EDGE: He confined their attention to what he was going to try. To my mind there is nothing invidious in it.]

This must be complained of. In the summing up the Chief Judge forgot the difference between the English Law and the Indian Law.

[SIR JOHN EDGE: He was telling them what the English Law was.]

Allegation of fact and comment were two different things.

[SIR JOHN EDGE: You are not protected if you make a wanton charge.]

Allegation of fact could not fall under exception 9 of section 499 in India. The citation of the English Law put the Jury on a wrong track. The Chief Judge's stricture on Buchanan was not relevant. Arnold must have taken the same view as Buchanan. There was complete misdirection on the vital point in the case. The Chief Judge in effect said that the charge against McCormick was absurd. It showed a case of prejudice of the most substantial kind. He brought in the very things he excluded. Arnold thought the case fit to be inquired into as the whole of the Chief Judge's summing up was based upon complete misconception. Arnold was not engaged on legal proof, but was simply concerned with whether there was a strong case for thinking there had been improper conducting of the case. The Jury had no proper charge. He thought that Arnold could not have taken that view, but Buchanan did. It was on the Criminal Courts that the poor population must depend. Arnold was writing with a feeling which every one should share. The question was whether his trial was fairly conducted. It was not. Dr. Evers said prostitution of Aina was impossible, but Chief Judge said it was irrelevant and of no value. The effect was that the Jury were taken off the track.

[LORD SOMNER: Andrew might have said what was the good of calling witnesses? knowing what they had to say.]

Arrest was on warrant and bail on a non-bailable offence was granted to McCormick on his own recognizances! How would it strike an ordinary person? A conviction could not stand when it resulted from such summing up. There were five telegrams which had passed between Mr. Dawson, the Commissioner and Mr. Andrew which could not have been before Arnold. If Andrew had done his duty, it was possible for the complainant to get legal advice.

[SIR JOHN EDGE: Do you think Arnold would have drawn the same conclusion as the ignorant Malay woman.]

Arnold had also Mohamed Din. He was in the hands of his advocates who might have thought injurious to give up facts of the case. The real line of defence ought to have been whether Arnold acted in good faith and with due care, which the Chief Judge ignored. He did not plead justification on the ground of truth. There was not a word on the guilt of McCormick. The question was how it might have appeared to Arnold. The Chief Judge went into the charge of McCormick's guilt and said it was false. Even if there were excesses, proceedings were not justified.

[SIR JOHN EDGE: If Arnold knew nothing and did nothing, where would be good faith of Arnold?]

The question was of the mind of Arnold. Supposing he was misled. If the Chief Judge directly put the question of McCormick's guilt to the Jury and said, "You as reasonable persons should not believe in it," the point was made. It was very undesirable for Andrew to disregard the petition, being a boon companion of McCormick. There was evidence as to people being turned out of the Court. This was a fit case for the Board to interfere in the interests of justice as had been in the cases decided where misdirection went to the merits of the case and was of a serious nature.

Reference was made to *Makin* v. *Attorney-General of New South Wales* (1); *Reg.* v. *Gibson* (2); *Rex* v. *Dyson* (3); *George Bray* v. *John Rawlinson Ford* (4). *Cf. Rex.* v. *Stoddart* (5) which qualifies *Rex* v. *Dyson* (3).

Wilson following pleaded justification and tried to show that various irregularities must have been intentional.

Sir *E. Richards, K. C.*, with him Mr. *Dunne*, for the respondent contended that the appellant had not made out sufficient case for the interference of the Board. There were attacks on the Judge and the inference was really a wrong one. The test of summing up was not in taking isolated portions, but one must take it as a whole. There was the difficulty of summing up without the argument of Counsel. There was no case cited for allowing appeal on the grounds set forth. If the door was opened in all criminal appeals, there would

(1) (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox. C. C. 704; 58 J. P. 148.

(2) (1887) 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 267; 35 W. R. 411; 16 Cox. C. C. 181; 51 J. P. 742.

(3) (1908) 2 K. B. 454; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 21 Cox. C. C. 669; 24 T. L. R. 653.

(4) (1896) A. C. 44; 65 L. J. Q. B. 213; 73 L. T. 609.

(5) (1909) 25 T. L. R. 612; 73 J. P. 348; 53 S. J. 578.

be alteration in the grounds for appeal here. The practice of allowing appeals here was entirely different.

[Sir *Robert Finlay*: Leave to appeal was granted and Lord Chancellor was presiding.]

There were six specific instances in which the conspirators wished to burke justice, *viz.*, bail, advocate, interpreter, hearing *in camera*, not calling witnesses and the hearing of the case by Andrew himself. There were answers for all of them and they could be explained away. The appellant never pleaded justification.

Reference was made to *Queen-Empress* v. *Joykissen Mookerjee* (6) and section 537 of the Code of Criminal Procedure.

Sir *Robert Finlay*, in reply, referred to cases mentioned in their Lordships' judgment to show that it was a fit case for interference.

JUDGMENT.

LORD SHAW.—By leave granted by His Majesty in Council this appeal is brought from a conviction of and sentence upon the appellant by the Chief Court of Lower Burma, pronounced on the 19th October 1912. The charge was one of defamation or criminal libel, and the prosecution was laid under the 21st Chapter of the Indian Penal Code. In that Chapter section 499 gives a definition of defamation, and sets forth categorically no fewer than ten exceptions, any one of which forms a proper defence to the charge. By section 500 it is provided that the punishment of defamation shall be "simple imprisonment for a term which may extend to two years, or with fine, or with both."

The appellant was charged with having defamed Mr. G. P. Andrew, Deputy Commissioner and District Magistrate of Mergui, by the publication of two articles in the *Burma Critic*, a Rangoon newspaper, on the 23th April 1912. These articles were entitled "A Mockery of British Justice."

Mr. Arnold has had experience as a journalist; and it appears from the proceedings that he was at one time the Chief editor of the *Rangoon Times*. He ceased to be Editor of that journal in the end of September 1911, and in January 1912 he was registered as one of the proprietors and the editor of the *Burma Critic*. The articles bear witness to the writer's possession of great invective and declamatory power; and it ought to be said at once that his motives have not been challenged except in so far as that is necessarily involved in the contention that he published serious libels and did so otherwise than in good faith.

The proceedings against him were initiated on the 11th June 1912 by Mr. Andrew, the District Magistrate already mentioned. On the 3rd October 1912 the trial of the case began before Sir Charles Fox, the Chief Judge, with a Jury. It was protracted and lasted from the 3rd to the 19th October. On the latter date the Jury returned a unanimous verdict of guilty, and a sentence of one year's simple imprisonment was pronounced. The Board were informed that after undergoing four months' imprisonment the remainder of the sentence was remitted.

Their Lordships listened to a lengthy argument in support of this appeal, during which the entire history of three stages of proceedings or sets of circumstances was discussed. These were, *first*, the details of the conduct of one McCormick, a planter, who was charged with having abducted and committed rape upon a Malay girl of about eleven years of age; *secondly*, the conduct and proceedings of Mr. Andrew as District Magistrate at the investigation which was conducted before him into this charge and which ended in his declining to commit McCormick for trial; and *thirdly*, the proceedings at the trial in the present case.

From one point of view the discussion might have been greatly shortened by the exclusion of the consideration of the two first elements mentioned. But their Lordships were unwilling, in view of the importance which is said to attach to the appeal, to adopt any step which would appear to prevent the fullest statement by the appellant's Counsel of his entire position. And *secondly*, it has to be admitted that Sir Robert Finlay was justified in his observation that, although there was no justification of the libel pleaded, still the circumstances demanded a prolonged investigation on this other issue, namely, whether the appellant, from the materials placed before him when he wrote the libel, was acting in good

(6) 1 Moore P. C. (N. S.) 272; 15 E. R. 704; 138 R. R. 522.

faith. If he did so act he would stand within the exception under the Indian Penal Code, and the libel, otherwise unjustified, would be excused by Statute. In these circumstances the fullest investigation was permitted to take its course.

It is now important to see what are the provisions of the Penal Code which apply to the case.

"Whoever", says section 499 of the Indian Penal Code, "by words, either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." Of the ten exceptions under the section three were mentioned. The first exception is in these terms: "It is not defamation to impute anything which is true concerning any person if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact." It was admitted by the Counsel for the appellant at their Lordships' Bar that their client claimed no benefit under this exception: he did not suggest that the series of libels or any one of them was true; on the contrary, all of them in so far as they were assertions of fact were admitted to be false.

In point of form the same course was taken in the Court below. But while this was so and while the plea of veritas was not openly or plainy made, their Lordships regret to observe that surreptitiously it did appear and re-appear in the case by way of repeated innuendo. It may be as well to bring this matter to a point at once. In Sir Charles Fox's charge to the Jury this passage occurs: "You will observe that under the first exception the only question, apart from the question of the public good, that could arise was whether what had been said was true or not. Now it is noticeable that the defence does not rely on that exception, although up to the end we have had it reiterated that what was said was true." Upon being questioned the learned Counsel for the appellant frankly admitted that the exception was not in point of fact pleaded as a defence, and their Lordships do not understand that they disputed that the learned Chief Judge's statement of what occurred at the trial by reiterated innuendo was correct. It was open to the appellant to defend his utterances as true. But he declined to take that course. Their falsehood stood as an admission in the case, the words themselves being so plainly of a libellous character. This part of the case may accordingly be definitely dismissed.

The second exception is in these terms: "It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character appears in that conduct, and no further." The distinction between this and the first exception is that the former deals with allegations of fact, and this second exception deals with the expression of opinion. This also has nothing to do with the case as it now stands, because it was, as it must be, admitted that the articles did not confine themselves to expressing an opinion as to the conduct of Mr. Andrew, but in much detail made definite defamatory allegations of fact against him.

It is accordingly upon the ninth exception that the determination of the present appeal solely depends. That is in these terms:—"It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good." In connection with this exception it is necessary to take its language along with that of section 52 of the Code, which is to this effect: "Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

Notwithstanding the elaboration of the arguments and the introduction of much matter affecting the conduct of McCormick and the conduct of Mr. Andrew, it was accordingly this question, and this question only, which the Jury charged by Sir Charles Fox had to try, namely, whether in publishing the libels admitted to be false Mr. Arnold did so in good faith because he believed them to be true, having given due care and attention to seeing that they were

so. If the Jury were satisfied that he did give that due care and attention, and that he acted in good faith, then the exception formed a good defence, and the accused would be found not guilty. If, on the other hand, they were not so satisfied, then no course, according to the Indian Criminal Law and the Indian Evidence Act, was open to them but to negative the exception and to find the accused guilty. No question is made that each of these propositions is sound.

It is contended, however, by the appellant that in the course of the charge there was misdirection by the Judge, and that the Jury's minds were diverted from this, which it is admitted was the true and only issue, to other questions. What were these? They were the very things which the prisoner's Counsel had throughout the trial insisted on introducing, namely, the question of the conduct of McCormick and of Mr. Andrew, the narrative as to Mr. Andrew being accompanied by the suggestion that it was after all indefensible and corrupt. Their Lordships recognise that this mode of conducting the defence, which it appears to have been difficult to repress, was not unlikely to lead to confusion; but it is at least satisfactory to find that the learned Judge in charging the Jury made no mistake in stating what the true issue was. It is admitted by the appellant's Counsel that this is so. "What you will have to consider," said the learned Judge to the Jury, is "whether the imputations in these articles were published in good faith, after due care and attention had been exercised on the part of the writer of them. What is 'due care and attention' must depend on the circumstances of each particular case." It is also fair to the learned Judge to say that, while he felt constrained—a course which, in view of the conduct of the defence, is not to be wondered at—to go with some fulness into a narrative of fact, he concluded his charge to the Jury by bringing their minds directly back to the exact issue which they had to try. He did so in this language: "It is now for you to consider these matters, and to decide whether the accused has satisfied you that he used the reasonable care that he ought to have used. If you are satisfied that he did, and that he did not overstep the bounds of law, as I have explained the law to you, then you must acquit him, but if he has not satisfied you that he has exercised such due care and attention before he committed himself to paper in this way, then it is your bounden duty to convict him."

Before the exception and the alleged misdirection of the Jury are dealt with, it is expedient to state what the libel contained. Being headed "A Mockery of British Justice," after a considerable amount of inflammatory matter, it proceeds to "speak out against those officials who have forgotten their duty and have dared to trifle with the fair fame of England." Having made these very serious allegations the appellant added: "The facts before us indicate that he (Mr. Andrew) conspired with Mr. Finnie to burke the case; that he conducted it *in camera*; that he refused to hesd the protest of the complainants that the interpreter employed was a paid parasite of McCormick, and did, in fact, deliberately mistranslate; that of the witnesses for the prosecution only those called by the District Superintendent of Police, and not even all of them, were allowed to give evidence; that in a word the whole inquiry was an outrageous make-believe and a mockery of what he is nominally representative, the fair play and judicial honour associated with the name of England. By what looks like the meanest of tricks, the unfortunate complainants were unrepresented by any lawyer at this judicial farce."

It would serve no good purpose to cite further from the libels; they mention disgusting details and incriminate other officers besides Mr. Andrew, as engaged in a corrupt plot. They contain not one, but a series of libels of the grossest character. These libels were at least seven in number. *First*, of conspiracy with Finnie to prostitute justice by saving McCormick. *Secondly*, of having, apparently knowingly and as part of the partisanship, bailed out McCormick for a non-bailable offence. *Thirdly*, of having misled the Malay girl, her parents and friends by leaving them without professional advocacy, which they had been led to expect. *Fourthly*, of having perverted the course of truth by a partisan interpreter. *Fifthly*, of having tried the

case *in camera*. (Very little was made of this in argument.) *Sixthly*, of not having called certain witnesses in the inquiry; and *Seventhly*, of Mr. Andrew having heard the case knowing that certain people objected to his doing so.

Of these libels the first was the real basis of all. It imputed corruption. Several of the others might not appear but for their resting upon that basis of corruption to be of so serious a type. But in their Lordships' opinion this cannot be said of the third and fourth; for if it were true that the Magistrate had designedly deprived the complainants of legal assistance, and provided them with a false interpreter, then such wicked conduct would not only be itself indefensible but would colour all the rest. Upon the whole it cannot be denied that if any substantial part of this defamation was true, it meant ruin to the career of Mr. Andrew and any others engaged in conspiring with him as alleged.

The points put forward in the appellant's favour, as establishing that although the charges were false yet he was excused by Statute because he believed them *bona fide* and had given due care and attention to their truth, were substantially three. In the first place it was urged that he relied upon a letter published with the signature of "Vigilance," and addressed to the *Rangoon Times*. It is dated the 31st August 1911, and at that time the appellant was connected with that paper. It contains a long narrative incriminating McCormick and also Mr. Andrew and others.

The second element proponed in support of Mr. Arnold's good faith is of a different and an important character. It is this: In the district of Tenasserim referred to, the position of Sub-Divisional Magistrate was occupied by Mr. Buchanan. It is alleged that Mr. Buchanan had been on unfriendly terms with McCormick, but their Lordships do not think that there is anything substantial in this allegation, and they further think it right to put on record their opinion, which is in entire concurrence with that of the Chief Judge, that Mr. Buchanan in his investigations and conduct was actuated by entire good faith. Although his conclusions and suspicions may have been erroneous, their Lordships see no reason to think that from beginning to end he did not act in accordance with the best traditions of the service. He had been absent on leave from the middle of April to about the middle of May 1911, and on his return he heard rumours of misconduct by McCormick. Towards the end of June Mahomed Din, who had legal differences with McCormick, made allegations which amounted to a charge that the crimes of abduction and of rape had been committed. Mr. Buchanan himself made enquiries and came to the conclusion that McCormick should be put upon his trial. It is a point in the accused's favour that the Sub-Divisional Magistrate thought that there was a case for committal.

The third point in these protracted proceedings, which is more important than either of the foregoing in support of the contention that the writer of the libels believed them to be true, is the admitted conduct of McCormick himself. Their Lordships do not attach much weight to the question of abduction, because it appears to be the case that the child had formerly lived in McCormick's house for a short period, and the evidence is somewhat confused as to the conduct of the mother of the child in regard to her absence from the house. But the allegation made by McCormick was that he had been informed that this child was suffering from gonorrhoea, that he had taken her to his house, and himself (there being a hospital eight miles away) had personally examined her, and had then passed her on for treatment by the mistress of one of his male servants. But their Lordships find themselves in entire agreement with the learned Judge when he says: "It is not surprising that there should be indignation and hot feeling on the part of the sympathisers with the mother of the child Aina, and good reason for feeling of indignation at some of the conduct—the admitted conduct—of McCormick..... However strong his inclination for amateur doctoring may have been, there could have been no justification for that. It was a thing that no man with a proper sense of decency should have done."

Although accordingly it is no part of the submission of the Counsel for the appellant at their Lordships' Bar that McCormick was guilty, their Lordships think it is an

element relevant to the consideration of whether Mr. Arnold was acting in good faith in these libels to show that he believed that McCormick's own admissions would have justified his committal for trial.

The last matter which their Lordships reckon to be a perfectly relevant one in the category of elements in the case which bore upon the point of the accused's good faith was this. Importance is attached to a pronouncement by the Magistrate. After investigating the facts, and declining to commit, he went on to say that in his opinion McCormick's conduct was pure and philanthropic. Their Lordships cannot agree with such an opinion, and their views coincide with those of the Chief Judge upon that subject.

They are of opinion that there were thus several elements in the case which were all with perfect propriety submitted to the Jury in support of the defence. Their Lordships, however, do not attach so much importance to the other allegations. That as to bail having been granted to the accused rests on a slender foundation. It is held by the Judges on the spot, and it was proved to be also the opinion of the civil authorities, that the discretion of granting bail applied to this case. It was evidently a case, unless forbidden by Statute, for discretion being exercised, and it would rather appear to their Lordships looking to the great distance to be traversed before the authority claimed by the appellant as requisite for granting bail could be obtained, that much practical hardship would ensue to prisoners unless such a discretion existed. They are not prepared to say that the humane view which was taken of an accused's rights was mistaken. It is unnecessary in this case to decide or dwell upon the point, because their Lordships' opinion is very clear to the effect that this difficult and delicate point of law could never have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel. The same observation applies to the other elements in the case which need not be entered upon but all of which have been fully considered. Their Lordships are of opinion that a fair and statable case in support of the statutory defence and of the belief in the wickedness of Mr. Andrew was put forward on the points which have been already enumerated, but that no others were of any real weight. In putting forward, however, the points mentioned, their Lordships think that a case was made which demanded an answer.

Such an answer was given and it also was both fair and statable.

In the first place a serious and weighty reply was made on the subject of the letter signed "Vigilance." It was not confined to the remark that the letter was no valid excuse for a belief in gross slander. The points proved were these: When that letter was received by the *Rangoon Times* a most proper course was taken, and that with the appellant's knowledge. It was forwarded by Mr. Stokes, the Assistant Editor, to the Chief Secretary to the Government of Burma, so that there might be official confirmation of its allegations prior to its being published. These allegations were examined into, and on the 31st October the Chief Secretary wrote stating that the Lieutenant-Governor had caused inquiry to be made and had found that the allegations against the officers were without foundation. By this time the appellant had ceased to be Editor of the *Rangoon Times*, but on the 2nd November 1911 Mr. Stokes forwarded a reply to the Chief Secretary stating that the incident, so far as the *Rangoon Times* was concerned, was closed.

This was not so, however, with regard to the appellant, for in the following spring, namely, on the 7th March 1912, an article appeared in the *Burma Critic*, of which he was then Editor, entitled "Alleged Grave Scandals in Tenasserim." On inquiry being officially made of the appellant, asking for particulars, the answer given was that the case referred to was that inquired into and disposed of in the previous autumn. The appellant's attention was at the same time called to the fact that Mr. Stokes had accepted the reply of the Lieutenant-Governor. All this took place before the libels in question were published. Their Lordships cannot see their way to hold this part of the appellant's case to be satisfactory. An investigation in the department of a Lieutenant-Governor of great experience having resulted in

exonerating Mr. Andrew from blame, the appellant assumed the grave responsibility for re-opening the matter. He gave the authorities no inkling of any fresh information which had come to his hand, and in answer to their inquiry he simply stated that it was the old incident which he was reviving. Up to the present the appellant has not given at their Lordships' Bar or in any Court any statement of any fresh facts which he had discovered. This circumstance was, in their Lordships' opinion, well worthy of consideration by the Jury.

In the second place, both Judge and Jury had seriously to consider the attitude of Mr. Arnold himself. He neither defended the articles as true nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs nor finally upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

Thus, although the true issue in the case was as to his own *bona fides* and the care and attention which would verify that, Mr. Arnold's action when charged, gave no help to the Court and must to some extent have embarrassed even his own defence. Having admitted that he assumed responsibility for the articles, he was asked by the Magistrate as follows: "*Q.* Do you wish to make any explanation of your position in the case as to your *bona fides*, etc.? (I pointed out to the accused that, under section 105, the burden of proof lies upon him)." "*A.* No. I have nothing to say. Everyone, from the Lieutenant-Governor downwards, knows my character, and I leave it at that." But, of course, it was quite impossible to leave it at that, because the libels were there, in all their number and seriousness; the charge was made under the Statute, and the law had prescribed that the author of such libels could only be excused by showing good faith after due care and attention. It is not in accordance with the due or proper administration of justice for an accused to brush all the statutory regulations affecting his position aside in this manner. The attitude and absence of the accused may well have been considered by the Jury rather destructive than helpful to the defence set up.

In the third place, this has to be borne in mind. Every officer, judicial or administrative, who investigated this case, except Mr. Buchanan, had agreed with the conclusion at which Mr. Andrew had arrived, namely, that the charge should be dismissed. This circumstance was one peculiarly suited for the appraisement of a local Jury.

The next circumstance in the case is one to which their Lordships do not conceal that they attach serious importance. They were moved by the allegation that the prosecutors and those in that interest were alleged to have been led on to the trial by Mr. Andrew, and that Mr. Andrew had wickedly conspired suddenly to leave them in the lurch without an advocate, and to furnish them with a false interpreter. This allegation was, as it turned out, not only untrue, but was, as was made abundantly clear at the trial, particularly cruel. Letters were produced showing that instead of Mr. Andrew having taken up such an attitude, his desire, and indeed his endeavour and entreaty, throughout were that in the inquiry before him an advocate should not only be employed for the prosecution, but should, in fact, be paid by the Government. Letter after letter was written to this effect—to engage a Pleader. On the 3rd August 1911, Mr. Andrew had intimated to Mr. Buchanan that he would engage an Advocate to prosecute, and that his presence and the presence of Mr. Sherard, the investigating officer, would also be required. On the 4th he specially wrote to Mr. Buchanan, "Can you bring up interpreter trusted by all parties? Ask complainants to choose between" two Advocates named " to conduct their case." On the 7th, Mr. Buchanan, having been unable to get such an interpreter, but having stated that the complainant wished to consult a certain Vakil in Rangoon before choosing a lawyer to conduct the case, Mr. Andrew wrote to Mr. Buchanan, "Kindly do so, and name Advocate early. As regards interpreter, your Court interpreter must come along to assist at any rate." On the 10th sanction was asked to engage Mahomed Ayoob "on the terms he asks." It most clearly appears from the letters that the arrangement as to legal assistance broke

down, because upon the 12th August the Commissioner at Mergui declined to sanction the proposal to retain an Advocate, he having demanded of Mr. Andrew to state whether he thought the charges could be substantiated, and Mr. Andrew having stated in answer to this difficult question that he thought the abduction charge alone could be made out. In short the refusal to provide an Advocate was made neither by Mr. Andrew nor by connivance or consent of Mr. Andrew, but inspite of him. With regard to the interpreter it should also be added that Mr. Andrew's anxiety upon that subject was manifest, and it was entirely in the right direction. Mr. Buchanan objected to one Chean Gee and he recommended Musaji. As mentioned Mr. Andrew wanted an "interpreter trusted by all parties" and Musaji, Mr. Buchanan's nominee, was employed. Mr. Buchanan was present at Mergui during the investigation and he made no objection to this. There was, of course, no proof that a single word was interpreted falsely. In their Lordships' opinion these two parts of the libel were very gross, and they can see no justification for the proposition that the appellant had any reasonable ground for believing them to be true.

It does not appear that in any view of the case there could have been a defence under the Statute in regard to these substantial portions of the libellous matter, and the case of *Reg.* v. *Newman* (7) was founded upon to this effect. But their Lordships are very anxious, however, not to have the case disposed of on what may be considered a narrow ground. They take these points as included in the sum of the matter to be considered before the Jury as relevant to the general case of Mr. Arnold's justification on the ground of having, after due care and attention, and so in good faith, believed that these things were true.

One final matter has, however, to be kept in view. Some of the letters last cited were undoubtedly not before Mr. Arnold when he wrote the libels. But they were before him in the course of his trial. In their Lordships' opinion, when it was discovered that the truth with regard to Mr. Andrew had not been that in these particulars he wickedly conspired to defeat justice, but that he was, on the contrary, anxiously endeavouring to secure that justice should be furthered and guarded, then the duty of the accused, Mr. Arnold, was plain. Their Lordships make every allowance for the heat of advocacy which, as noted by the Chief Judge, seems to have been in this case great. But when a gross mistake of that kind on a matter of fact—the truth of which when exposed would have ruined any administrative or judicial officer's career—was discovered, the libel should not have been adhered to for a moment. The mistake should have been acknowledged and an apology tendered. This was not done, but upon the contrary the case was conducted to its close upon the footing that an unstated defence was the real and good defence, namely, that the libels and all the libels were true. Nobody is to be blamed in these circumstances for thinking that the plea of good faith on the part of Mr. Arnold had sustained a serious shock.

The speeches of the learned Counsel for the accused have not been printed, but their Lordships had the advantage of hearing Mr. Wilson, who had been in communication with those engaged in the case and who informed their Lordships that the views presented by the senior and junior Counsel for the appellant somewhat diverged. It is, however, unnecessary to labour this matter, because no doubt was thrown upon the narrative of the proceedings given by Sir Charles Fox in his charge. There is enough disclosed in the case to show that no light task was thrown upon the Judge in disentangling relevant from irrelevant topics and in presenting the true issue to the minds of the Jury. The real objection taken at their Lordships' Bar to this charge was that the Jury were misdirected in this sense, and that the narrative of the learned Judge must have left the impression upon the mind that Mr. Andrew had not acted wickedly as the libel alleged. But it was, looking to the advocacy, necessary for the learned Judge to state his own view, and their Lordships do not see anything in the charge to give countenance to the idea that he withdrew this question from the Jury or from their province. With a large portion even of the narrative their Lordships see no occasion to quarrel, Some

(7) 1 E. & B. 558; 22 L. J. Q. B. 156; 93 R. R. 275; 7 Jur. 617; 118 E. R. 544.

portions of it here and there might be the subject of difference of opinion.

A charge to a Jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the Jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the Jury's province. Their Lordships do not say that upon any particular in this case they would differ from the views laid down by Sir Charles Fox, but these observations are made in order to discountenance the idea that in the region of fact, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred, this Board will interfere. The separate and peculiar position of this Committee under the constitution will be afterwards dealt with.

Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

Upon the other side it would appear from certain observations of the learned Judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The present case affords a good illustration of what is meant. When the examination before Mr. Andrew concluded with his declaration that in his judgment the action of McCormick was pure and philanthropic, the whole trial would seem to have been laid open to searching and severe observations, and no blame could be attached to these. But when the criticism was converted into an attack upon the Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who had manœuvred his procedure so as to defeat truth and protect an associate, then, of course, it is for the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. On both of these matters last mentioned the learned Judge seems to have properly directed the Jury.

This also has to be said. A large part of the criticism directed against the charge of the learned Judge in this case was to the effect that the narrative of the proceedings led up to the conclusion inevitably that Mr. Andrew was innocent of the wicked dereliction of duty which was alleged. If it was so, the result upon the case is somewhat remarkable. For then the charge had in fact impressed the Jury's minds with the innocence of Mr. Andrew, and it is that very innocence which is in the foreground of the admissions made in this case. The foregoing narrative in this view might have been spared, because it is now seen that nearly all, if not all, of the items in the narrative which are said to constitute misdirection are parts of a narrative which leads to a conclusion that that is in accordance with fact which has all along been admitted to be true.

It is here that the peculiarity of the procedure becomes evident, for the narrative thus criticised was undoubtedly, as it appears to their Lordships, the narrative given by the learned Judge to the Jury

in order to counteract an improper use which was being made of the procedure. While the truth of the libels was not asserted formally, and while the admission of their falshehood was formally granted, an endeavour was repeatedly made to withdraw all this and to persuade the Jury to take all that was asserted as true. Such things may occur; but it is the duty of Judges to put what check they can upon them, and in the present case their Lordships see no occasion to think that the learned Judge failed to exercise that duty with propriety.

From what has been said it will, their Lordships think, clearly appear that there was material before the Jury on both sides of this case, and that the determination was on a subject peculiarly within the Jury's province. In their Lordships' opinion the case was not improperly withdrawn from the Jury's domain on fact, and they were not misdirected in law. But even if it were conceded that upon a meticulous examination of the Judge's charge or conduct of the case certain flaws could be discovered, it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases, as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the Empire as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case incline their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute, is undoubted. Upon the other hand, there are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The overruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in *Queen-Empress* v. *Joykissen Mukerji* (6), and Lord Kingsdown, in the case of *Falkland Islands Company* v. *Reg.* (8), stated the matter compendiously in these words: "It may be assumed that the Queen has authority, by virtue of Her Prerogative to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the Colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success". Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *In re Dillet* (9). It should be observed that while Dillet's case was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a Barrister and Solicitor against a verdict convicting him of perjury, but there had been a consequential order of the Court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential order. Lord Blackburn referred to Lord Kingsdown's judgment in the *Falkand Islands case* (8) as authoritative and binding. After citing that learned Judge, Lord Blackburn added: "In this statement of the general practice their Lordships agree. They are not prepared to advise Her Majesty to make this conviction for perjury

(8) 1 Moo. P. C. (N. S.) 299 at p. 312; 15 E. R. 713 at p. 718; 10 Jur. (N. S.) 807; 9 L. T. (N. S.) 103; 12 W. R. 220; 9 Cox. C. C. 351; 138 R. R. 535.

(9) 12 A. C. 459; 56 L. T 615; 36 W. R. 81; 16 Cox. C. C. 241.

an exception if it were not made the sole foundation for the subsequent order of the 27th March 1885," and liberty accordingly was granted "to appeal against the order of the 27th March 1885, striking him off the roll, and also to the extent above stated and no further, against conviction for perjury".

While accordingly the familiar sentences again about to be quoted from Lord Watson are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just alluded to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position that it occupied under the judgments of Dr. Lushington and Lord Kingsdown pronounced about a quarter of a century before. Lord Watson in *Dillet's* case (9) observed that "the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done".

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the Jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships *first*, that the result arrived at was opposite to the result which their Lordships would themselves have reached and *secondly*, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in *Dillet's* case (9) has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it the case of *Makin* v. *Attorney-General for New South Wales* (1) was cited. Makin's case in truth did not raise the question at issue in the present case. It depended upon the construction of section 423 of the Criminal Law Amendment Act of 1883 (a New South Wales Statute). That section set up the Judges of the Supreme Court as a tribunal to determine questions submitted to them in a case stated by the Judge at the trial, and there was a proviso that there should be no quashing "unless for some substantial wrong or other miscarriage of justice." It was stated by this Board that under that section the Judges have not been substituted for the Jury. As they said, "In their Lordships' opinion substantial wrong will be done to the accused if he were deprived of the Jury on the facts proved by legal evidence and there were substituted for it a verdict of the Court founded merely upon the perusal of the evidence."

The second case founded on is that of *Vaithinatha Pillai* v. *Emperor* (10) in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board imperatively to demand that it should interpose, because the very foundations of justice seemed to have been attacked in proceedings. A whole body of inadmissible evidence had been received in the case. The one witness, whose evidence was relevant and who remained in the case, was supporting

(10) 21 Ind. Cas. 369; 17 C. W. N. 1110; 14 M. L. T. 263; (1913) M. W. N. 806; 15 Bom. L. R. 910; 25 M. L. J. 518; 11 A. L. J. 881; 18 C. L. J. 355; 14 Cr. L. J. 577; 36 M. 501; 40 I. A. 193.

another witness who was a confessed perjurer. The remaining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the Magistrate and certain officials. "If true," observed Lord Atkinson, "they show that these officials, or at least the Sub-Inspector, induced the witness to forswear himself and found in him a pliant instrument ready to give false evidence upon oath to secure the conviction of his own father; and if false they show that the witness was ready to commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements. There is no alternative." The simple case accordingly confronting the Board was a case of a subject sentenced to death upon no evidence at all. In these circumstances, although the principle of *Dillet's* case (9) was again re-affirmed, their Lordships did not see their way to refrain from interfering.

The third case referred to is that of *Louis Edouard Lanier* v. *The King* (11) and, fortunately, it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the Judge himself. He, as narrated in the report, was a member of the family Council which instigated the proceedings and himself was a party to appointing two Barristers to conduct the prosecution and arranged about their fee. The facts need not be referred to. The indictment was altered by drastic amendments, the trial was hurried on; but the narrative need go no further, for, as the report states, "In short, Counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any Jury upon the evidence submitted would have convicted the appellant of crime." The Board were of opinion that the sentence pronounced against the appellant "formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere." But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's* case(9) was again cited. It was pointed out that the interference was not on any matter of form, but because of matters lying at the very foundation of justice (the Judge had been a Judge in his own cause), justice had "gravely and injuriously miscarried." Lanier stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the Colonies or dependencies. That extreme case is this, that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is, therefore, a matter of general imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford* v. *Emperor* (12) on the 17th November last, and their Lordships refer to the judgment of the Lord Chancellor in this and the other refusals referred to.

The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal it is hardly doubtful that the appeal would fail. *A fortiori* their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the appeal be dismissed. There will be no order as to costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Bramall & White.*

Solicitors for the Respondent: The *Solicitor to India Office.*

Solicitors for the London Islamic Society: Messrs. *Bramall & White.*

(11) 23 Ind. Cas. 657; (1914) A. C. 221; 18 C. W. N. 98; 26 M. L. J. 1; 15 Cr. L. J. 305.

(12) 22 Ind. Cas. 496; (1914) M. W. N. 11; 16 Bom. L. R. 1; 12 A. L. J. 75; 15 M. L. T. 84; 19 C. L. J. 107; 18 C. W. N. 374; 15 Cr. L. J. 144; 7 Bur. L. T. 37 (P. C.); 40 I. A. 241.

IBRAHIM v. EMPEROR.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT AT HONG KONG.

March 6, 1914.

Present:—Lord Chancellor, Lord Atkinson, Lord Shaw, Lord Moulton and Lord Sumner.

IBRAHIM—APPELLANT

versus

EMPEROR—RESPONDENT.

Foreign Jurisdiction Act, 1890, *s.* 4 (1)—*China and Corea Order in Council* 1904, *Arts. III, V, VI, XIX, XXII, XXXV, L--Supreme Court of Hong Kong—Jurisdiction—Foreigner*—Afghan *subject of the Ameer of Afghanistan enlisted in British Indian Regiment—Statement made by accused—Question asked by person in authority—Admissibility of statement—Relevancy—Weight—English Rules of evidence, how far binding on Supreme Court of Hong Kong—Privy Council criminal appeal—Grounds for interference—Consideration of evidence.*

The appellant, Ibrahim, an *Afghan*, was a natural born subject of the Ameer of Afghanistan. In 1911, he was enlisted and enrolled as a soldier in a British Indian Regiment and took the oath of allegiance to His Majesty. He also made a solemn declaration to go wherever ordered by land or sea. In 1912, while serving with the detachment of that regiment at Shameen, the appellant murdered the *Subadar* of the regiment and was taken into custody almost at once. Some ten or fifteen minutes after the occurrence the Officer Commanding the detachment came up and said to the appellant, "Why have you done such a senseless act?" To this the appellant replied, "Some three or four days he has been abusing me; without a doubt I killed him." The Judge of a Provincial Court having jurisdiction in the matter held the preliminary examination in the case and with the concurrence of the Commanding Officer sent it to the Supreme Court of Hong Kong for trial which resulted in the appellant's conviction and death sentence being passed upon him. The Judge of the Court as well as the Commanding Officer were examined as prosecution witnesses in the case. The latter deposed as to the conversation he had had with the appellant, while the former deposed that the place of the murder was entirely within his jurisdiction; that the jurisdiction exercised at Canton on Shameen is the same ex-territorial jurisdiction as is exercised throughout China by the Supreme Court; that it is still in force; that "the Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over them;" and that "Consular protection extends to trying persons and protecting them if they are improperly arrested."

By special leave an appeal *in forma pauperis* was preferred to the Privy Council on the grounds, *first*, that the Hong Kong Court had no jurisdiction to try the appellant, and, *second*, there was a grave miscarriage of justice by reason of the misreception of evidence:

Held, (1) that though there was no evidence of any treaty or other instrument by which the Ameer had agreed with the Crown for the exercise by His Majesty of power or authority over his subjects, yet it could be reasonably inferred from the practice of enlisting native *Afghans* in Indian Native Regiments—a practice which is matter of public knowledge—that thereby they were *de facto* brought under the authority of His Majesty and that the Amir did in fact consent to such enlistment with its consequences;

(2) that section 4 (1) of the Foreign Jurisdiction Act did not prevent the evidence of the Judge of the Provincial Court from being admissible upon the question of jurisdiction and that in the absence of contradiction and of any grounds of real doubt, that evidence by itself satisfied all the conditions of proof requisite to establish the jurisdiction of the Supreme Court at Hong Kong;

(3) that the evidence of the Judge of the Provincial Court shows: "that by 'usage, sufferance, or other lawful means,' His Majesty has jurisdiction at Canton; that it in fact extends to persons of the class to which the applicant belongs; that in the case of the appellant himself it was exercised, so far as the preliminary examination went; and that its exercise, both generally and in this particular case, was suffered by the Chinese authorities holding office *de facto*, and that they made no objection;"

(4) that even if a change in the constitution and form of Government in China took place or even if the Court could under the circumstances in any way take judicial notice of a political change in a neighbouring State, the evidence of the Judge was sufficient to show that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred;

(5) that as the appellant was a soldier of the Crown and subject to Military Law while stationed at Shameen and as he "enjoyed His Majesty's protection" in China, as of right he was subject to the jurisdiction of the Supreme Court of China;

(6) that the statement made by the appellant to his Commanding Officer was admissible in evidence.

When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country, where all are serving together in the armed forces of His Majesty.

The words "and not otherwise" in Article V (3) of the China and Corea Order in Council, 1904, do not import that, if a person is in fact a foreigner, he can only be brought under the jurisdiction set forth in the order "in the cases and according to the conditions specified therein." They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such, is to be brought within the jurisdiction he can be so dealt with only in the cases and according to the provisions specified, but when a person is brought under the jurisdiction as "a British protected person," and the fact that he is a foreigner is only accidental, the limitation contained in the words "and not otherwise" does not apply.

The China and Corea Order in Council does not modify or exclude the principles and practice of English Law on the admissibility of statements of accused persons. English Criminal Law and practice apply to the Supreme Court at Hong Kong but they are not binding on that Court in all respects and

particulars. Sometimes a distinction must be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of the law by European Judges, whose duty it is to have regard alike to the principles of British justice, and to the necessities of local order.

It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

The fact that a statement was made by an accused under circumstances of hope, fear, interest or otherwise, strictly speaking, goes only to its weight.

The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out or fear inspired by a person in authority, is a rule of policy.

If a Judge, after anxious consideration of the authorities, decides a legal point in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, his conduct does not amount to the violation of the principles of natural justice which has been said to be the ground for advising His Majesty's interference in criminal matters.

Leave to appeal to the Privy Council in criminal matters is not granted, except where some clear departure from the requirements of justice exists; nor unless, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

In re Dillet's case, 12 A. C. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241, followed.

The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.

Reg. v. *Bertrand*, 16 L. T. (N. S.) 752, 10 Cox C. C. 618; 36 L. J. P. C. 51; 1 P. C. 520; 16 W. R. 9; 4 Moore P. C. (N. S.) 460, followed.

The jurisdiction, which the Privy Council exercises in appeals in criminal matters, involves a general consideration of the evidence and of the circumstances of each particular case in order to place the irregularities complained of, if substantiated in their proper relation to the whole matter.

Where there is a great preponderance of unquestioned evidence on a point, the Privy Council cannot in any view conclude that there has been any miscarriage of justice, substantial, grave or otherwise.

Reg. v. *Thompson*, (1893) 2 Q. B. 12; 62 L. J. M. C. 93; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C.C. 641; 57 J. P. 312; *Rex.* v. *Warwickshall*, 1 Leach C. C. 263; 2 East P. C. 658; *Reg.* v. *Baldry*, (1852) 2 Den. C. C. R. 430; 21 L. J. M. C. 130; 16 Jur. 599; 5 Cox C. C. 523, *Reg.* v. *Thronton*, (1824) 1 M. C. C. 27; *Reg.* v. *Wilde*, (1835) 1 M. C. C. 452; *Reg.* v. *Kerr*, (1837) 8 Car. & P. 176; *Reg.* v. *Cheverton*, (1812) 2 F. & F. 833; *Reg.* v. *Reason*, (1872) 12 Cox C. C. 228, *Reg.* v. *Fennell*, (1880) 7 Q. B. D. 147 at p. 150; 50 L. J. M. C. 126; 44 L. T. 687; 29 W. R. 742; 14 Cox C. C. 607; 45 J. P. 666; *Reg.* v. *Brackenbury*, 17 Cox C. C. 628; *Reg.* v. *Pettit*, (1850), 4 Cox C. C. 164; *Reg.* v. *Berriman*, (1856) 6 Cox C. C. 388; *Reg.* v. *Gavin*, (1885) 16 Cox C. C. 656; *Reg.* v. *Male*, (1893) 17 Cox C. C. 689; *Reg.* v. *Goddard*, 60 J. P. 491; *Reg.* v. *Miller*, 18 Cox C. C. 54; *Reg.* v. *Histed*, 19 Cox C. C. 16; *Rogers* v. *Hawken*, 67 L. J. Q. B. 526; 78 L. T. 655; 62 J. P. 279; 19 Cox C. C. 122; *Reg.* v. *Best*, (1909) 1 K. B. 692; 78 L. J. K. B. 658; 100 L. T. 622; 25 T. L. R. 280; *Reg.* v. *Knight & Thayre*, (1905) 20 Cox C. C. 711; 69 J. P. 108; 21 T.L.R. 310; *Reg.* v. *Booth & Jones*, (1910) 5 Crl. App. Rep. 179; *Reg.* v. *Wong Chin Kwai*, 3 Hong Kong Law Report 89, on the question of admissibility of confession reviewed.

Clifford v. *Emperor*, 22 Ind. Cas. 496; (1914) M. W. N. 11; 16 Bom. L. R. 1; 12 A. L. J. 75; 15 M. L. T. 84; 19 C. L. J. 107; 18 C. W. N. 374; 15 Cr. L. J. 144; 7 Bur. L. T. 37; 40 I. A. 241; *Riel* v. *Reg.*, 10 A. C. 675; 55 L.J.P.C. 28; 54 L.T. 339; 16 Cox C.C. 48, *Dillet's* case, 12 A.C. 459; 56 L.T. 615; 36 W.R. 81; 16 Cox. C.C. 241 *Ex parte Deeming*, (1892) A.C. 422; *Ex parte MacCrea*, (1893) A. C. 346; 1 R. 375; 69 L. T. 734; 17 Cox C. C. 702; *Reg.* v. *Bertrand*, 16 L. T. (N. S.) 752; 10 Cox C. C. 618; 36 L. J. P. C. 51; 1 P. C. 520; 16 W. R. 9; 4 Moore P. C. (N. S.) 460; *Makin* v. *Attorney-General for New South Wales*, (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148, were reviewed on the question of the grounds on which the Judicial Committee will grant special leave to appeal and hear appeals in criminal matters.

Appeal in *forma pauperis* (by special leave of His Majesty in Council, dated June 13th, 1913) from a decision of the Supreme Court of Hong Kong, dated December 12th, 1912.

FACTS.—Ibrahim, a Shia Muhammadan, a subject of the Ameer of Afghanistan, resident of village Garmah in the District of Kandhar, of the Hazara Oraz Ghani tribe, enlisted in the 126th Baluchistan Infantry Regiment of the Indian Forces on June 12th, 1911, and was then sent to Shameen Canton in China. As usual he had taken an oath of allegiance to His Majesty the King. At Canton Ali Shafa, the *Subadar*, was found dead and the report of a gun-shot was heard by a number of persons. Ibrahim was found with his own gun in his hand and a few cartridges in his possession. He was accused of murdering Ali Shafa on account of the latter abusing the accused for playing at cards. On September 18th, 1912, Ibrahim was sent for trial to Hong Kong with the concurrence of Major Barrett under Article L of

the China and Corea Order in Council, 1904, and section 4 of the Foreign Jurisdiction Act, 1890. An indictment for the murder of Ali Shafa was preferred against him. He was tried before the Chief Justice and a Jury on October 21, 22, 23 and 24, 1912, but the Jury disagreed and were discharged. He was tried a second time on November 18, 19, 20, 21 and 22, 1912, and the Jury returned a verdict of guilty. During the trial certain points of law were raised, which were reserved for argument before the Full Court, the sentence being postponed till then. After argument on the legal points the Full Court decided against Ibrahim. Subsequently, a rule for a writ of *habeas corpus* was refused and so was a motion in arrest of judgment. On December 16, 1912, the Chief Justice sentenced Ibrahim to death; but the sentence was respited for a period of three months with the view of enabling him to apply to the Privy Council for leave to appeal. On December 17, 1912, the Full Court refused leave to appeal to His Majesty. On June 1913, special leave to appeal *in forma pauperis* was granted by the Board.

Mr. *A. Romer Macklin*, for the Appellant, contended that the appellant being a subject of the Ameer of Afghanistan, was not amenable to the jurisdiction of His Majesty's Supreme Court of Hong Kong in respect of the criminal offence alleged to have been committed by him at Canton, a place outside the dominions of His Britannic Majesty and within the dominions of the Emperor of China until the Empire of China was superseded by the Republic of China. By the Treaty of Tientsin 1858, the Emperor of China granted extra-territorial jurisdiction to His Majesty in respect of crimes committed by British subjects only and the appellant was not a British subject. The said treaty was not put in evidence. The Crown failed to prove how His Majesty acquired jurisdiction over subjects of the Ameer of Afghanistan for offences committed by them at Canton or elsewhere in China outside the dominions of His Britannic Majesty. The Full Court wrongly decided that by Articles III and L of the China and Corea Order in Council the appellant was a British subject. The Crown did not discharge the burden of proof imposed on the Crown by Articles V and VI of the said Order and that the lower Court wrongly hold that the burden was not on the Crown to prove affirmatively that the Crown had jurisdiction to try him. The Crown was bound to adduce evidence outside the said Order (as Order must be framed with reference to treaties and any excess of assumed jurisdiction was *ultra vires*), showing the acquisition of jurisdiction over the appellant in respect of the said charge, (1) from the Emperor or Republic of China, and (2) with the consent of the Ameer in accordance with Article V of the said Order, and the Crown failed to adduce any such evidence. The admission of an alleged confession to Major Barrett in answer to a question, when the appellant was tied up with rope and in the custody of a double quarter-guard, was wrongly received by the lower Court which did not reserve it for the consideration of the Full Court. The confession was inadmissible in law on the authority of *Rex* v. *Wong Chin Kwai* (1), a Full Bench decision, as was it inadmissible by the Common Law of England The Indian Army Act, 1911, or any Indian Law was not duly proved by the Crown.

Reference was made to *Rex* v. *Wong Chin Kwai* (1) and other cases referred to in their Lordships' judgment. Archibold's Criminal Practice, (1912).

Sir *Robert Finlay, K. C.*, and Mr. *Hansell*, appeared for the Respondent but were not called on.

JUDGMENT.

LORD SUMNER.—The appellant, Ibrahim, is a natural-born subject of the Ameer of Afghanistan, who was duly enlisted and enrolled on January 12th, 1911, in the 126th Regiment of Baluchistan Infantry at Quetta. He took the oath of allegiance to His Majesty and made a solemn declaration undertaking, among other things, to go wherever ordered by land or sea. On September 4th, 1912, he was a private serving with the detachment of that regiment which was encamped on Shamien or Shameen Island at Canton as guard of the Concession. On Shameen are situated the various European Settlements including the British. About 10-30 P. M. *Subadar* Ali Shafa, a native officer in the same regiment, was murdered. Ibrahim was charged with the crime, tried before the Supreme Court of Hong Kong, and convicted. He was sentenced to death, but sentence was respited pending the hearing of this appeal,

(1) (1908) 3 Hong Kong Law. Rep. 89.

which is brought by special leave *in forma pauperis*. His grounds are two: *first*, that the jurisdiction of the Court was not established, and, *second*, that there was a grave miscarriage of justice by reason of the misreception of evidence.

The jurisdiction of the Supreme Court of China and Corea is conferred by the Foreign Jurisdiction Act, 1890, and by the China and Corea Order in Council, 1904, and includes criminal jurisdiction. Article V provides that: "the jurisdiction conferred by this order extends to the persons and matters following, in so far as by Treaty, grant, usage, sufferance or other lawful means. His Majesty has jurisdiction in relation to such matters and things, that is to say:

"(1) British subjects, as herein defined, within the limits of this order . . .;

(3) foreigners, in the cases and according to the conditions specified in this Order and not otherwise;

(4) foreigners, with respect to whom any State, King, Chief or Government, whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to the exercise of power or authority by His Majesty."

By Article VI it is provided that "all His Majesty's jurisdiction, exerciseable in China or Corea for the hearing or determination of criminal or civil matters, . . . shall be exercised under and according to the provisions of this Order in Council and not otherwise".

The contention, therefore, is that the jurisdiction of the Supreme Court, conferred by and only exerciseable in accordance with the Order in Council, was not shown to extend, and, therefore, for the purposes of this case, did not extend to Ibrahim, who is admittedly an Afghan and a subject of the Ameer.

Article III of the Order defines a "British subject" thus: "British subject includes a British-protected person, that is to say, a person, who either (*a*) is a native of any Protectorate of His Majesty and is for the time being in China or Corea, or (*b*) by virtue of the Foreign Jurisdiction Act, 1890, or otherwise, enjoys His Majesty's protection in China or Corea."

There was no evidence of any treaty or other instrument by which the Ameer had agreed with the Crown for the exercise by His Majesty of power or authority over his subjects; but it may be reasonably inferred from the practice of enlisting native Afghans in Indian native regiments, whereby they are *de facto* brought under the authority of His Majesty, a practice which is matter of public knowledge, that the Ameer does in fact consent to such enlistment with its consequences. Whether or not this suffices to bring such enlisted Afghans within the terms of Article V (4) of the Order in Council, "foreigners, with respect to whom any State, King, Chief or Government whose subjects . . they are . . . consents to the exercise of power or authority by His Majesty," it is not necessary for their Lordships now to determine.

The British Vice-Consul, who in September 1912, was also acting Consul at Canton, is Judge of a Provincial Court, held at Canton under Article XIX of the Order, which is a Court of Record, and by Article XXII exercises "all His Majesty's jurisdiction, civil and criminal, not under this Order vested exclusively in the Supreme Court." He was called as a witness at Ibrahim's trial and deposed that the place of the murder was entirely within his jurisdiction; that the jurisdiction exercised at Canton on Shameen is the same ex-territorial jurisdiction as is exercised throughout China by the Supreme Court; that it is still in force; that "the Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over them"; and that "Consular protection extends to trying persons and protecting them if they are improperly arrested." This evidence was not modified under cross-examination or contradicted in any way by evidence for the defence. The witnsss went on to say that he conducted the preliminary examination in this case and considered it expedient that the case should be sent for trial to Hong Kong (an opinion in which Major Barrett, Commanding the detachment, concurred), thus satisfying the provisions of Article L. of the Order with regard to the transfer of the case from Shameen to Hong Kong.

Their Lordships are of opinion that section 4 (1) of the Foreign Jurisdiction Act, 1890, does not prevent this evidence from being admissible upon the question and that in the

absence of contradiction and of any grounds for real doubt, this evidence by itself satisfied all the conditions of proof requisite to establish the jurisdiction of the Supreme Court at Hong Kong. It shows that, by "usage, sufferance or other lawful means," His Majesty has jurisdiction at Canton; that it in fact extends to persons of the class to which Ibrahim belongs; that in the case of Ibrahim himself it was exercised, so far as the preliminary examination went; and that its exercise, both generally and in this particular case, was suffered by the Chinese authorities holding office *de facto*, and that they made no objection. Incidentally, it disposes of a point taken in argument, that whatever jurisdiction may have been ceded, agreed or suffered by the Imperial Government of China, it could not be deemed to persist by sufferance or otherwise since recent changes in the constitution and form of Government of China took place. Even if such change had been proved, as it was not, or even if the Court could under the circumstances in any way take judicial notice of a political change in a neighbouring State, this evidence was sufficient to show that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred. It was suggested that the Vice-Consul was not testifying to the exercise of jurisdiction and sufferance thereof in fact, but was only expressing his opinion that jurisdiction ought to extend to such a case as Ibrahim's, which he said was the first case committed to the Supreme Court from Canton. The Judges of the Supreme Court, on the hearing of the points reserved to the Full Court, did not so take it, neither do their Lordships, and were it not for the gravity and importance of the case they would not think it necessary to pursue this question or jurisdiction further.

Was Ibrahim a British-protected person because "by virtue of the Foreign Jurisdiction Act or otherwise he enjoys His Majesty's protection in China"? The words "or otherwise" must at least include the operation of other Statutes, Imperial or Indian, applicable to the person in question, and the various legislative provisions referred to in the elaborate and valuable judgments in the Court below amply establish that, after enrolment and during service in the Indian Army, Ibrahim was a soldier of the Crown and subject to military law while stationed at Shameen. That being so, their Lordships think that it needs no express provision to entitle him to His Majesty's protection. When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country, where all are serving together in the armed forces of His Majesty. Their Lordships are clearly of opinion that Ibrahim as of right "enjoyed His Majesty's protection" in China, and in virtue thereof was subject also to the jurisdiction of the Supreme Court of China.

Lastly, under this head reliance was placed on the words "and not otherwise" in Article V (3) of the Order. These words do not import that, if a person is in fact a foreigner, he can only be brought under the jurisdiction set forth in the Order "in the cases and according to the conditions specified therein." They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such, is to be brought within the jurisdiction, he can be so dealt with only in the cases and according to the provisions specified, but when a person is brought under the jurisdiction as "a British-protected person," and the fact that he is a foreigner is only accidental, the limitation contained in the words "and not otherwise" in Article V (3) does not apply.

Their Lordships think it unnecessary further to pursue the points argued as to the necessity for proof of the Treaty of Tientsin, 1858; the validity of the proof of the Indian Army Act, 1911, (which, for reasons hereinafter appearing, is so formal a matter as to be immaterial on the present appeal), the conditions under which the Crown may enlist aliens in its Indian Forces; and the effect of the preamble and recitals in the China and Corea Order in Council, 1904.

The second ground for this appeal is as follows:—Some 10 or 15 minutes after *Subadar* Ali Shafa was shot Major Barrett, the Officer commanding the detachment, who had been summoned from a little distance, arrived at the camp. He found Ibrahim in

custody and in bonds, sitting on the step of the guard-room. "When I got up to Ibrahim," says the Major. "I said, 'Why have you done such senseless act ?' I said nothing else. Did not threaten him in any way. I offered no inducement of any kind, nor did anybody else to my knowledge or in my presence . . . when I spoke to accused I was sorry for him because he had killed the *Subadar*." This last observation their Lordships treat only as evidence of the way in which the question was put, tending to show that it did not convey a command or inducement to Ibrahim of any kind. In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service. To this Ibrahim replied in Hindustani, "Some three or four days he has been abusing me; without a doubt I killed him."

It is argued that Ibrahim's statement was inadmissible, (*a*) as not being a voluntary statement but obtained by pressure of authority and fear of consequences; and (*b*) in any case as being the answer of a man in custody to a question put by a person having authority over him as his Commanding Officer and having custody of him through the subordinates who had made him prisoner.

On this it becomes incumbent on their Lordships to consider the rule of English Criminal Law applicable to such circumstances. This somewhat exceptional duty arises because, by Article XXXV (2) of the China and Corea Order in Council, it is provided that " subject to the provisions of this order criminal jurisdiction under this order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English Law for the time being." There are no provisions in the order material on this point as modifying or excluding the principles and practice of English Law, and their Lordships think that the matter may be justly treated as if English Criminal Law and practice applied to the criminal jurisdiction of the Supreme Court at Hong Kong. At the same time they are not to be understood to decide that such law and practice are in all respects and particulars binding on that Court, nor do they overlook in any way the necessary distinction that must, sometimes, be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a British possession in the Far East where a mixed and fluctuating population is subject to the administration of the law by European Judges, whose duty it is to have regard alike to the principles of British justice, and to the necessities of local order. Nor do their Lordships fail to observe that the words, "so far as circumstances admit," may well be applicable to such circumstances in the present case as the facts, that the facilities for formal proof of statutes passed and administrative orders made in various parts of His Majesty's dominions cannot be as copious in Hong Kong as they are in this country, and further that when, as in the present case, a force detailed for the protection of Europeans resident beyond His Majesty's dominions in the midst of a population, often turbulent and at the particular time disturbed, is itself disturbed by such a crime as the murder of a *Subadar* by a native private in the ranks, such words may well cover and be designed to cover some necessary departure from the formalities only as distinguished from the essentials of English justice.

It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg.* v. *Thompson* (2), a case which, it is important to observe, was considered by the trial Judge before he admitted the evidence. There was, in the present case, Major Barrett's affirmative evidence that the prisoner was not sub-

(2) (1893) 2 Q. B. 12; 62 L. J. M. C. 93; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox. C. C. 641; 57 J. P. 312.

jected to the pressure of either fear or hope in the sense mentioned. There was no evidence to the contrary. With *Reg.* v. *Thompson* (2) before him, the learned Judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule.

The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a Police force of the modern type, the point has frequently arisen, whether, if a Policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.

It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it, is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. In an action of tort evidence of this kind could not be excluded when tendered against a tort-feasor, though a Jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired by a person in authority, is a rule of policy. "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it". [*Rex.* v. *Warwickshall* (3)]. It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice. [*Reg.* v. *Baldry* (4)]. Accordingly, when hope or fear were not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.

In the earlier part of the nineteenth century there was strong judicial authority for admitting a prisoner's statements, even though obtained by constables, who had him in custody, by considerable insistence in the way of interrogation [*Rex* v. *Thornton* (5), *Rex* v. *Wild* (6), *Reg.* v. *Kerr* (7)] and even so late as *Rex.* v. *Baldry* (4), a case decided on the rule as to hope and fear, Parke, B. observes at page 445, "By the Law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way: whether it would not have been better to have allowed the whole to go to the Jury it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence . . . justice and common sense have too frequently been sacrificed at the shrine of mercy". The law, however, was considered to be fairly settled [see *Reg.* v. *Cheverton* (8), *Reg.* v. *Reason* (9), *Reg.* v. *Fennell* (10), and the references collected in the note to *Reg.* v. *Brackenbury* (11)]. When Judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law [*e. g.*, *Reg.* v. *Pettit* (12), *Reg.* v. *Berriman* (13), a case

(3) (1783) 1 Leach C. C. 263; 2 East P. C. 658.

(4) (1852) 2 Den. C. C. R. 430; 21 L. J. M. C. 130; 16 Jur. 599; 5 Cox. C. C. 523.
(5) (1824) 1 M. C. C. 27.
(6) (1835) 1 M. C. C. 452.
(7) (1837) 8 Car. & P. 176.
(8) (1862) 2 F. & F. 833.
(9) (1872) 12 Cox. C. C. 228.
(10) (1880) 7 Q. B. D. 147 at p. 150; 50 L. J. M. C. 126; 44 L. T. 687; 29 W. R. 742; 14 Cox. C. C. 607; 45 J. P. 666.
(11) (1893) 17 Cox. C. C. 628.
(12) (1850) 4 Cox. C. C. 164.
(13) (1854) 6 Cox. C. C. 388.

when the accused was not yet in custody].

In 1885 *Reg.* v. *Gavin* (14) re-opened these questions. Then A. L. Smith, J., excluded a statement made to a constable, who questioned his prisoner in a way that amounted to cross examination. He laid it down that a constable has no right to ask questions without expressly saying that the answers cannot be relevant evidence. In 1893, Day, J. [*Reg.* v. *Brackenbury* (11)], declined to follow this decision, in a case when the question and answer preceded the arrest, and Cave, J., in *Reg.* v. *Male* (15), rejected a statement made by a prisoner in custody to a constable who had cross-examined him, saying merely that the Police have no right to manufacture evidence, though in 1896 [*Rex* v. *Goddard* (16)], he appears to have concurred in the admissibility of very similar matter. Two years later, Hawkins, J. [*Reg.* v. *Miller* (17)], allowed the accused's answers to be proved against him, when he had been cross-examined before arrest, saying that he did not expressly dissent from *Reg.* v. *Gavin* (14) but that "every case must be decided according to the whole of its circumstances," but in 1898 *Reg.* v. *Histed* (18), he excluded the answers of a prisoner in custody, on the authority of *Reg.* v. *Gavin* (14), saying that the constable was entrapping the prisoner and trying by a trick to set a broken-down case on its legs again. Since then the current of authority has run the other way. In *Rogers* v. *Hawken* (19), a case of questions before arrest, a Divisional Court, consisting of Russell, L. C. J., and Mathew, J., Judges not prone to lean against a prisoner, held that the statement was admissible and observed that *Reg.* v. *Male* (15) must not be "taken as laying down that a statement of the accused to a Police constable without threat or inducement is not admissible. There is no rule of law excluding statements made in such circumstances," and in *Rex* v. *Best* (20), the Court of Criminal Appeal (including Channell, J.,) held that "it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial," adding that *Reg.* v. *Gavin* (14) is not a good decision. Here, however, it is to be observed that the actual decision was that under the proviso of section 4 of the Criminal Appeal Act, 1907, the Court would not interfere in that case. It did not expressly declare that statements of an accused, when in custody, in reply to a policeman's questions, are always admissible evidence against him unless they are rendered involuntary by reason of hope or fear induced by a person in authority The point has been before the Court of Criminal Appeal more recently. In 1905 [*Rex* v. *Knight and Thayre* (21)], statements were rejected, because obtained from the accused before arrest by means of a long interrogation by a person in authority over him. Channell, J., adverted thus to the case of questions put by a constable after arresting—"when he has taken anyone into custody . . . he ought not to question the prisoner . . . I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the Judge at the trial may in his discretion refuse to allow the answers to be given in evidence." The same learned Judge in *Rex* v. *Booth and Jones* (22) in 1910 observes; "the moment you have decided to charge him and practically got him into custody, then, inasmuch as a Judge even cannot ask a question or a Magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question it is inadmissible; what happens is that the Judge says it is not advisable to press the matter;" and of this, Darling, J., delivering the judgment of the Court of Criminal Appeal, observes: "the principle was put very clearly by Channell, J."

The learned trial Judge in the present case, in addition to the argument of Counsel for the defence, had before him a case decided in 1903 by the Full Court at Hong Kong, *Rex* v. *Wong Chin Kwai* (1), in which the English authorities up to that time were very fully examined. Before admitting the

(14) (1885) 16 Cox. C. C. 656.
(15) (1893) 17 Cox. C. C. 689.
(16) (1896) 60 J. P. 491.
(17) 18 Cox. C. C. 54.
(18) (1898) 19 Cox. C. C. 16.
(19) (1898) 67 L. J. Q. B. 526 78 L. T. 655; 62 J. P. 279; 19 Cox. C. C. 122.
(20) (1909) 1 K. B. 692; 78 L J. K. B. 658; 100 L. T. 622; 25 T. L. R. 280.
(21) (1905) 20 Cox. C. C. 711; 69 J. P. 108; 21 T. L. R. 310.
(22) (1910) 5 Cr. App. Rep. 177, 179.

evidence of the appellant's statement he consulted Gompertz, J., who had been a party to that decision, and accordingly it is clear that he admitted the statement only after the fullest consideration. The English Law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred. If, then, a learned Judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the trial Judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shown to have been exercised improperly.

Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal [*Olifford* v. *Emperor* (23)]. Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists [*Riel* v. *Reg.* (24)]; nor unless, "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done" [*In re Dillet* (25).] It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing [*Riel's* case (24) *Ex prate Deeming* (26)]. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice *Ex parte MacOrea* (27). There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future [*Reg.* v. *Bertrand* (28)].

Their Lordships were strongly pressed in argument with the case of *Makin* v. *Attorney-General for New South Wales* (29) in which Lord Herschell, L. C., delivered an elaborate exposition of the principles on which a Court of Criminal Appeal should act. Although in that case these observations are technically *obiter dicta*, since the Board held that the evidence complained of at the trial had been righty admitted, they are most weighty in themselves, and they have since been adopted by the Court of Criminal Appeal in *Rex* v. *Dyson* (30) though with some later qualification. In *Makin's* case (29), however, their Lordships had to determine the true construction of section 423 of the New South Wales Act, 46 Victoria, No. 17, which in defining a strictly

(23) 22 Ind. Cas. 496; 40 I. A. 241; (1914) M. W. N. 11; 16 Bom. L. R. 1; 12 A. L. J. 75; 15 M. L. T. 84; 19 C. L. J. 107; 18 C. W. N. 374; 15 Cr. L. J. 144; 7 Bur. L. T. 37.

(24) (1885) 10 A. C. 675; 55 L. J. P. C. 28; 54 L. T. 339; 16 Cox. C. C. 48.

(25) (1887) 12 A. C. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox. C. C. 241.

(26) (1892) A. C. 422.

(27) (1893) A. C. 346; 1 R. 375; 69 L. T. 734; 17 Cox. C. C. 702.

(28) (1867) 16 L. T. (N. S.) 752; 10 Cox. C. C. 618; 36 L. J. P. C. 51; 1 P. C. 520; 16 W. R. 9; 4 Moore P. C. (N. S.) 460.

(29) (1894) A. C. 57; 36 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox. C. C. 704; 58 J. P. 148.

(30) (1908) 2 K. B. 454; 77 L. J. K. B. 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; 21 Cox. C. C. 669.

appellate jurisdiction in criminal matters provided "that no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated, unless for some substantial wrong or other miscarriage of justice." It was held there that to transfer the decision of the guilt of the accused, from a Jury acting on oral testimony, to an Appellate tribunal, possessing that testimony only in writing, cannot be said to involve no miscarriage of justice, and hence that a Court of Criminal Appeal is not entitled to dismiss the appeal by re-trying the case on shorthand-notes, or by holding that, if the trial Judge had excluded the evidence, which he wrongly received, the verdict would probably have been the same. In other words such a proviso is not to be construed as investing a statutory Court of Criminal Review with the functions of the original trial Judge and Jury. This is a very different matter from the duty of this Board in advising His Majesty as to the exercise of his prerogative in relation to facts as they are made to appear to this Board by admissible material. Even in *Makin's* case (29), however, reservation was made of cases "where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the Jury," and this reservation is not to be taken as exhaustive. In England, where the trial Judge has warned the Jury not to act upon the objectionable evidence, the Court of Criminal Appeal, under the similar words of the Criminal Appeal Act, 1907, section 4, may refuse to interfere, if it thinks that the Jury, giving heed to that warning, would have returned the same verdict [*Rex* v. *Lucas* (31); *Rex* v. *Stoddart* (32); *Rex* v. *Norton* (33); *Rex* v. *Loates* (34); *Rex* v. *Wilson* (35)], or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance [*Rex* v. *Westacott* (36) *Rex* v. *Mullins* (37)] or most unlikely to have affected the verdict [*Rex* v. *Solomon* (38)]. Where the objectionable evidence has been left for the consideration of the Jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the Jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction [*Rex* v. *Fisher* (39)]. The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute "highly improbable" for "impossible" in Lord Herschell's reservation above quoted.

Their Lordships think that the jurisdiction, which they exercise in appeals in criminal matters, involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter. The facts of the present case must, therefore, be stated. They are briefly as follows: —

During the hot weather of 1912 the sepoys of the 126th Baluchistan Regiment at Shameen lived and slept a great deal in the open air. The camp was near the Central Avenue, shaded by trees and lit by the electric light standards in the Avenue. On the night in question the native officers, including Subadar Ali Shafa, were sitting in chairs near the road. Ibrahim and three other sepoys were not far off in a group playing cards. The time was about 10-30 P.M. The Subadar went up to them, accused them of gambling, searched them, took away $3·80 of Ibrahim's money and ordered them to be confined to the lines. He abused Ibrahim with offensive language, against which Ibrahim protested, and then returned to his chair. A little time afterwards the sentry saw a man going into the camp itself to the place where the men's rifles were kept, and gave an alarm. A shot was fired, and the Subadar, after calling to the guard to turn out, and walking a few steps, fell dead, a bullet having passed through his body. Almost at once a man was seen a few paces from the sentry, standing behind a tree and pointing his

(31) 1 Cr. App. Rep. 234.
(32) (1909) 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612.
(33) (1910) 2 K. B. 496 at p. 501; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R. 550.
(34) (1910) 5 Cr. App. Rep. 193.
(35) (1911) 6 Cr. App. Rep. 207.
(36) 1 Cr. App. Rep. 248.
(37) (1910) 5 Cr. App. Rep. 13.
(38) (1909) 2 Cr. App. Rep. 80.
(39) (1910) 1 K. B. 149; 79 L J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122.

rifle in the direction of the place where the native officers were sitting. This last significant fact was elicited by the Jury themselves. He was immediately seized and proved to be Ibrahim. He had his own service rifle in his hand, identified by its number. Five rounds, enough to fill one clip, were missing from his bandolier. Four cartridges were in the magazine of his rifle, the bolt of which was open; one, empty and still hot, was found on the ground. The rifle was fouled from recent discharge. No one else with a rifle was seen outside the camp when Ibrahim was seized.

This story, which did not depend at any point on the evidence of one witness only, was amply corroborated in various ways. Beyond an indefinite suggestion that Ibrahim had been instigated to commit this crime, which came to nothing, the only attack on the witnesses was founded on discrepancies between them in matters of detail, or on the suggestion that they had amplified their evidence between the first trial, when the Jury disagreed, and the second. It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the Jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave or otherwise. They will humbly advise His Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Langlois, Harding, Warren & Tate.*

Solicitors for the Respondent: Messrs. *Sutton, Ommanney & Rendall.*

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 556 OF 1913.

October 30, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Chevis.

EMPEROR—APPELLANT

versus

SHIBBAN—RESPONDENT.

Excise Act (XII of 1896), ss. 44, 57—Police officer, invested with powers under section 44, whether Excise Officer for purposes of section 57.

A Police Officer invested with powers of an Excise Officer under section 44 of the Excise Act, is to be deemed an Excise Officer for the purpose of section 57 of that Act, because he is an Excise Officer for the purposes of sections 36, 37 and 38 of the Act.

Queen-Empress v. *Chet Singh*, 22 P. R. 1900 Cr.; 46 P. L. R. 1901; *Queen-Empress* v. *Sundar Singh*, 8 P. R. 1901 Cr.; 76 P. L. R. 1901; *Queen-Empress* v. *Makunda*, 20 A. 70; and *Emperor* v. *Lachmi Narain*, 30 A. 377, 8 Cr. L. J. 5; A. W. N. (1908) 157; 5 A. L. J. 444, followed.

Emperor v. *Nindar Singh*, 6 Ind. Cas. 717, 11 Cr. L. J. 394, 27 P. W. N. 1910 Cr., 181 P. L. R. 1910, 13 P. R. 1910 Cr.; and *Pirag* v. *Queen-Empress*, 9 P. R. 1897 Cr., distinguished.

Appeal from the order of the Magistrate, 2nd class, Delhi, dated the 15th May 1913, acquitting the respondent.

Mr. *O. Bevan Petman*, (Government Advocate), for the Appellant.

Mr. *S. M. Iftikhar Ali*, for the Respondent.

JUDGMENT.—This is an appeal by the Local Government under section 417, Criminal Procedure Code, from the order of the Magistrate, second class, Delhi, acquitting the respondent of the offence under section 48 of the Excise Act, 1896, with which he was charged.

The Magistrate was apparently satisfied that the respondent was actually in possession of cocaine contrary to the provisions of section 48 of the Act, but he acquitted him on the ground that under section 57, the Court could not take cognizance of the offence except on the complaint or report of the Collector or an Excise Officer. It appears that the respondent was arrested by a Sub-Inspector of Police and was taken in accordance with the provisions of section 41 of the Act to the Magistrate for trial. Under the notifications of the Local Government made under section 44 of the Act, the Sub-Inspector was an Excise Officer for all purposes connected with the excise powers conferred on Excise Officers by sections 36, 37 and 38

of the Act. Under section 37 the Sub-Inspector had power to arrest any person having in his possession any article liable to confiscation under the Act and under section 41 he was bound within 24 hours after such arrest to make a full report of all the particulars to his official superior and to take the person arrested with all convenient despatch to a Magistrate for trial. It has been held in a series of cases that under these circumstances a Police Officer, invested with powers of an Excise Officer under section 44, is to be deemed an Excise Officer for the purpose of section 57 [see *Queen-Empress* v. *Chet Singh* (1); *Queen-Empress* v. *Sundar Singh* (2); *Queen-Empress* v. *Makunda* (3) and *Emperor* v. *Lachmi Narain* (4).]

The learned Pleader for the respondent relies on *Emperor* v. *Niadar Singh* (5) and *Pirag* v. *Queen-Empress* (6), and argues that Police Officers, who are invested with powers under section 44, have merely the power of arrest of offenders and seizure of property conferred on Excise Officers by sections 36, 37 and 38. The authorities cited by him do not support this contention. In those cases it was held that the Court could not take cognizance of an offence in respect of which Police Officers, invested under section 44, had no power to act under sections 36, 37 or 38, and that consequently a complaint or report of a Collector or an Excise Officer was an essential condition precedent to the Court taking cognizance of such an offence.

The authorities cited by the learned Government Advocate are directly in point and following them, we must accept this appeal and set aside the order of acquittal. We direct that the record be returned to the Magistrate in order that he may dispose of the case upon the merits.

Appeal accepted.

(1) 22 P. R. 1900 Cr., 46 P. L. R. 1901.
(2) 8 P. R. 1901 Cr, 76 P. L. R. 1901.
(3) 20 A. 70.
(4) 30 A. 377; 8 Cr. L. J. 5; A. W. N. (1908) 157; 5 A. L. J. 444.
(5) 6 Ind. Cas. 717; 13 P. R. 1910 Cr., 11 Cr. L. J. 394; 27 P. W. R. 1910 Cr., 181 P. L. R. 1910.
(6) 9 P. R. 1897 Cr.

LOWER BURMA CHIEF COURT.

CRIMINAL REFERENCE No. 84 OF 1913.
February 2, 1914.

Present:—Mr. Justice Hartnoll, Offg. Chief Justice, and Mr. Justice Ormond.

SEENA M. HANIFF & CO. BY ITS MANAGING PARTNER S. C. GHOSH—APPLICANT

versus

LIPTONS LIMITED BY ITS DULY AUTHORISED AGENT W. CUFFE—RESPONDENT.

Penal Code (Act XLV of 1860*), ss.* 482, 486—*Merchandise Marks Act (IV of* 1889*), ss.* 6, 7—*Person—Limited Company—Liability of, to be convicted and punished—Words "he" and "whoever", meanings of—*Mens rea*—Innocence—Proof—Interpretation of Statutes—Ambiguous language—Penal act.*

A body corporate can be lawfully prosecuted and on conviction punished for an offence under section 482 or section 486 of the Indian Penal Code.

The word "he" in sections 6 and 7 of the Indian Merchandise Marks Act includes "she" and "it".

Per *Hartnoll, Offg. C. J.*—The word "whoever" in sections 482 and 486, Indian Penal Code, does not refer only to a definite individual or definite individuals and can apply to a corporate body.

Where the language of a Statute is not clear, to ascertain the real meaning the cause or necessity of the law being made should be considered.

Every clause of a Statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole Statute or series of Statutes relating to the subject-matter.

Under sections 482 and 486, Indian Penal Code, the prosecution has not to prove the *mens rea*; and, as the burden of proving innocence is thrown on the accused under those sections, when once a *prima facie* case has been established, a Limited Company, when accused, can prove its innocence by the evidence of its agents or servants or otherwise as it thinks fit.

Per *Ormond, J.*—The word "whoever" with which sections 482 and 486 begin means the same thing as "every person who" in section 2 (2) of the English Merchandize Marks Act and shows that the provisions of the sections apply to persons generally.

The scope of a penal section in an Act would (so far as the language is concerned) be the same whether it began with the words "every person who" or with the word "whoever" unless, the word "person" is defined so as to have a more restrictive or a more extended meaning than it in fact has. Limited Companies are not excluded from the operations of sections 482 and 486, Indian Penal Code, and there is nothing inherent in the nature of a Limited Company which would prevent it from proving its innocence either by showing that it acted without intent to defraud under section 482, or under section 486 in any of the ways prescribed in that section.

Starey v. *Chilworth Gunpowder Company* (1889) 24 Q. B. D. 90; 59 L. J. M. C. 13; 62 L. T. 73-38 W. R. 204; 17 Cox, C. C. 55; 54 J. P. 436; *Kirshenboim* v. *Salmon and Gluckstein Limited*, (1898)

SEENA M. HANIFF & CO. *v.* LIPTONS LIMITED.

2 Q. B. D. 19; 62 J. P. 439; 67 L. J. Q. B. 601; 78 L. T. 658; 14 T. L. R. 395; 46 W. R. 573; 19 Cox, C. C. 127; *Pearks, Gunston and Tee Ld.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Co., Ltd.*, (1902) 2 K.B. 1; 71 L. J. K. B. 656; 66 J. P. 774; 87 L. T. 51; 18 T. L. R. 538; 20 Cox, C. C. 279, considered and followed.

FACTS appear from the following reference, made by Mr. Justice Twomey, under section 11 of the Lower Burma Courts Act:—

The complaint was of an offence under section 482, Indian Penal Code, "using a false trade or property mark", but the Magistrate in his order of discharge refers to it as a complaint under section 486, "selling or possessing goods with a counterfeit trade or property mark." This discrepancy is, however, immaterial, for the same question of law arises in both cases, namely, whether a Limited Company is liable to prosecution for the offence. The District Magistrate decided that it is not.

No Indian cases bearing on the question have been cited. But there are many English cases showing that though a Corporation aggregate cannot be guilty in ordinary cases of a criminal offence, it may be indicted for libel or for nuisance, and wherever a duty is imposed by Statute in such a way that a breach of the duty amounts to disobedience of the law, then, if there is nothing in the Statute either expressly or impliedly to the contrary, a breach of the Statute is an offence for which a Corporation may be indicted. [Lord Halsbury's Laws of England, Vol. 8, page 391, See also Archbold's Criminal Pleading, 24th Edition, page 7]. It has also been held that it is impossible now to apply the maxim as to *mens rea* generally to all Statutes and it is necessary to look at the object and terms of each Act to see whether and how far knowledge or a particular intent is of the essence of the offence created. [Case given in Archbold on Pleading, 24th Ed., page 21]. As pointed out in Maxwell's work on the Interpretation of Statutes [4th Edition, page 153], there is now a large body of Municipal Law which has been framed in such terms as to make an act criminal without any *mens rea*.

Sections 482 and 486, Indian Penal Code, are based upon section 2 of the English Merchandize Marks Act, 1887, and section 486 follows closely the wording of section 2, sub-section 2. In neither case it is necessary for the prosecution to establish that *mens rea* is involved to the extent that the accused can rebut the charge against him by proving that he acted "without intent to defraud", (section 21, English Statute, and section 482, Penal Code), or that he acted "innocently", (section 2 (2), English Act, and section 486 of the Penal Code). With reference to the word "defraud" in the English Statute it has been held in *Starey* v. *Chilworth Powder Company* (1) that it is not used in the sense of putting off a bad article on a customer in order to get money unfairly. "The Act is directed against the abuse of trade-marks, and the putting off on a purchaser of, not a bad article, but an article different from that which he intends to purchase and believes that he is purchasing", also as regards the word "innocent" contemplated by the Act, is merely innocence of an intention to infringe that Act of Parliament. [Per Channell, J. in *Christie, Manson and Woods* v. *Cooper* (2)].

In *Starey* v. *Chilworth Gunpowder Company* (1), the Company was held guilty of the offence of applying a false trade description to certain gunpowder supplied by them under a contract and it was held that the Company acted with intent to defraud within the meaning of section 2 (1). It was not contended in that case that it would be impossible for a body corporate to prove such a defence as absence of fraudulent intent and the learned Judges Coleridge, L. C. J., and Mathew, J., apparently saw no such objection to the prosecution.

In another case of *Kirshenboim* v. *Salmon and Gluckstein Limited* (3), Salmon and Ghuckstein Ld. were found guilty of an offence under section 2 (2) in having sold goods under a false trade description.

They sold as "guaranteed hand made" cigarettes which were in fact machine made. The Court consisting of five Judges, Lord Russel, L. C. J., presiding, found that the Company had acted deliberately and not "innocently".

(1) (1889) 24 Q. B. D. 90; 59 L. J. M. C. 13; 62 L. T. 73; 38 W. R. 204; 17 Cox, C. C. 55; 54 J. P. 436.

(2) (1900) 2 Q. B. D. 522; 69 L. J. Q. B. 708; 64 J. P. 692; 49 W. R. 46; 83 L. T. 54; 16 T. L. R. 422.

(3) (1898) 2 Q. B. D. 19; 62 J. P. 439; 67 L. J. Q.B. 601; 78 L. T. 658; 14 T. L. R. 395; 46 W. R. 573; 19 Cox, C. C. 127.

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In the same year in the case of *Coppen* v. *Moore* (4) the construction of the Merchandize Marks Act was further considered as regards the criminal liability of a master for acts done by his servants in contravention of the Act when such acts were done by the servants within the scope or in the cause of their employment. A Bench of six Judges, Lord Russell, L. C. J. presiding, held that it was clearly the intention of the Legislature to make the master criminally liable for such acts unless he was able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the Act. The Lord Chief Justice said: "We conceive the effect of the Act to be to make the master or principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of the offences against the Act."

Reading the judgment in *Coppen* v. *Moore* (4) with the judgment in the case of *Kirshenboim* v. *Salmon and Gluckstein* (3) it appears to me that a Limited Liability Company is on the same footing as any other master or principal and can be held liable to the same extent for the acts of its agents and servants in contravention of the English Merchandize Marks Act. The decision in *Coppen* v. *Moore* (4) is based on the view that having regard to the language, scope and objects of the Act the Legislature intended to fix criminal responsibility upon the master for acts done by his servants in the course of their employment, though such acts were not authorized and might have been expressly forbidden. See Maxwell, page 159.

As *mens rea*, a particular intent or state of mind, is not of the essence of the offence, there is no reason why a Corporation should not be prosecuted like an individual master or principal. By way of defence, it is open to the Corporation, as it is to the individual master, to prove good faith, *i. e.*, the exercise of due care and attention, and that all possible steps have been taken by the Corporation to prevent breaches of the Act by its agents and servants.

For the respondents the later English cases *Christie Manson and Woods* v. *Cooper* (2) and *Pearks, Gunston and Tee Ld.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Company, Ltd.* (5), have also been referred to. But I can find nothing in these cases to impair the authority of *Salmon and Gluckstein's* case (3), although Mr. Justice Channell in an *obiter dictum* in *Pearks, Gunston and Tee, Ltd.* v. *Ward*; *Hennen* v. *Southern Counties Diaries Company, Ltd.* (5) expressed some hesitation as to the criminal liability of a body corporate under section 2 of the Merchandize Marks Act.

It is clear that a Limited Company could be prosecuted and punished in England for such an offence as that charged against the respondent Company in the present case.

The respondents, however, stand on much stronger ground in urging that the Indian Law at present differs in this respect from the law of England.

In the English Statute the penal provisions run:—"Every person who" etc., "shall be guilty of an offence against this Act" and the word "person" is expressly defined in section 3 so as to include "any body of persons, corporate or unincorporate." The word is similarly defined in section 11 of the Indian Penal Code, but in the penal provisions, sections 482 and 486, and indeed in the penal clauses throughout the Code the word "person" is not to be found. Each penal clause lays down that "whoever" commits the offence in question "shall be punished with" etc., etc., and though the Code defines "person," the word "whoever" is left to be interpreted according to ordinary usage. It is equivalant to "any" person "who" or "whatever person," but the person contemplated in the word "whoever" according to ordinary usage is, I think, a natural person, *i. e.*, an individual human being, and

(4) (1898) 2 Q. B. D. 306; 62 J. P. 453; 67 L. J. Q. B. 689; 78 L. T. 520; 14 T. L. R. 414; 46 W. R. 620.

(5) (1902) 2 K. B. D. 1 at p. 7; 71 L. J. K. B. 656; 66 J. P. 774; 87 L. T. 51; 18 T. L. R. 538; 20 Cox, C. C. 279.

it does not connote a Corporation which is a "person" only in an artificial, technical, judicial sense. It is by no means clear that the framers of the Code intended to exempt Corporations from punishment for offences under the Code. Indeed the use of the word "person" in section 268, definition of the public nuisance, seems to point the other way, for in that section I think the word "person" should be construed according to the definition in section 11. Moreover, the Chapter which begins with section 268 includes several offences for which Corporations can be prosecuted in England by virtue of the definition of "person" in special enactments and in the England Interpretation Act, 1889. But if the intention was to make Corporations liable for offences under the Indian Penal Code, I think it has been frustrated by the use of the form "whoever" instead of "any person who" or "every person who" in the penal clauses. It is true that section 11 of the Code lays down that *every person* shall be liable to punishment. But the learned Commentators on the Code agree in thinking that "person" in this section has not the extended meaning given by section 11 and this view appears to me to be correct.

It is suggested that in adopting the English Statute of 1887 to India the Legislature abstained from reproducing the form "every person who", merely because the form "whoever" was already the common form in the penal sections of the Indian Penal Code. But it might be argued with equal force that the Indian Legislature in avoiding the use of the word "person" in the new sections enacted in 1889, thus abandoning the English form, signified their intention to exempt bodies corporate from prosecution for offences relating to Merchandize Marks. If the form "every person who" had been used then these penal sections read with section 11 of the Code would have rendered bodies corporate liable to prosecution in India as they are in England.

I note that though the form "whoever" is used in the penal clauses throughout the Penal Code, this form is not universal in special and local laws. For examples of the use of the form "any person who", reference may be made to the Sea Customs Act, 1878, Schedule of Chapter XVI, Nos. 8, 9, etc., Arms Act, 1878, section 3, Excise Act, 1896, sections 46 to 52. By virtue of the definition of "person" in the General Clauses Act it appears that unless where a contrary intention appears expressly or impliedly, a Corporation could be prosecuted for offences against special and local laws where the form of the penal provision is "any person who", etc., or "every person who" etc. (Whitley Stokes' Anglo Indian Codes and Gour's Penal Law of India. Notes on section 2, Penal Code).

My opinion is, therefore, that the respondent company is not liable to prosecution for an offence under section 482 or section 486, Indian Penal Code. But as the question is one of some public importance and as the learned Counsel engaged on both sides have asked me to refrain from passing final orders and to refer the question to a Bench under section 11 of the Lower Burma Courts Act, I think it is expedient to take this course. I refer the question whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under section 482 or 486, Indian Penal Code.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The question referred to us is whether a body corporate can lawfully be prosecuted and on conviction punished for an offence under section 482 or section 486 of the Indian Penal Code. Mr. Justice Twomey has found that in England a Limited Company such as the respondent Company can be prosecuted and punished for similar offences under the English Merchandise Marks Act, 1887; and from the cases cited by him there can be no doubt as to the correctness of his finding; but on a consideration of the word "whoever" used in sections 482 and 486 of the Indian Penal Code, he has formed the opinion that in India the prosecution of a Company under those sections does not lie.

Sections 478 to 489 of the Indian Penal Code were enacted by section 3 of the Merchandise Marks Act, 1889, and in enacting the penal sections amongst them the word "whoever" is used and not the words "any person who." The word "whoever" is used throughout the Penal Code in its penal sections. Section 11 of the Penal Code defines the word "person" thus: "The word 'person' includes any Company or Association or body of persons whether incorporated or not."

If the words "any person who" were used in sections 482 and 486 of the Penal Code, there is no doubt that there would be much stronger ground for holding that a Company could be prosecuted under those sections; but it is argued that the word "whoever" can only refer to a definite individual or definite individuals, and cannot apply to a corporate body. It may possibly be said that the word "whoever" may be held to include a body of persons associated together in their collective capacity for the purpose of trade but, on the other hand, taking the word in its strict grammatical meaning it may be said that it cannot have any such meaning. Assuming that this is so, then it appears to me that there is an ambiguity in the Penal Code. Section 11 may be said to render a Company criminally liable in certain classes of cases, whereas the use of the word "whoever" in the penal sections relating to such cases renders it impossible to punish them. To take a concrete instance, section 268 of the Penal Code says: "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity." Taking the definition of the word "person" in section 11, it would certainly appear that a Company can be guilty of a public nuisance, but in the ensuing penal sections as the word "whoever" is invariably used, a Company cannot be punished. If the language of the Penal Code were clear and unambiguous as to whether a Company can be prosecuted or not, it should, beyond doubt, be obeyed; but where there is an ambiguity or the language is not clear it is a well-known principle that to ascertain the real meaning, the cause or necessity of the law being made should be considered. Again, it has been said that every clause of a Statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole Statute or series of Statutes relating to the subject-matter. [Per Lord Davey in *Canada Sugar Refining Co. Ltd.* v. *The Queen* (6)]. Now applying these principles to the present case Act IV of 1889 of the Indian Legislature is named. "An Act to amend the law relating to fraudulent marks on merchandise." It clearly has the object of protecting the public in its purchases so that they be not deceived by false trade descriptions, and another of its objects is clearly the protection of honest trade, for instance the prohibition of one trader using the mark of another or a similar mark with a view to selling his goods as those of such other firm. When Act IV of 1889 was enacted the General Clauses Act (I of 1868) was in force and "person" is defined in section 2 (3) of it as follows:—"Person" shall include any Company or Association or body of individuals whether incorporated or not. Act I of 1868 was repealed by the General Clauses Act, 1897, but section 4 (1) of this latter Act applies this definition, unless there is something repugnant in the subject or context, to all Acts of the Governor-General in Council made after the third day of January 1868. It, therefore, applies to the Indian Merchandise Marks Act, 1889, subject to the above proviso. Section 6 of hat Act says that, if a person applies a false trade description to goods he shall, subject to the provisions of the Act and unless he proves that he acted without intent to defraud, be punished according to law. The section is analogous to section 482 of the Penal Code, except that one deals with a false trade description and the other with a false trade or property mark. Similarly, section 7 of the Indian Merchandise Marks Act makes a person punishable who sells or exposes or has in his possession for sale or any purpose of trade or manufacture any goods or things to which a false trade description is applied, unless he proves certain facts. It is similar to section 486 of the Indian Penal Code except that that section refers to counterfeit trade or property marks. The facts by which an accused is allowed to prove his innocence are the same in section 486 of the Penal Code as in section 7 of the Indian Merchandise Marks Act. Now there is nothing, in my opinion, repugnant in the subject or context in sections 6 and 7 of the Indian Merchandise Marks Act to prevent a "person" including a Company. There are

(6) (1898) A. C. 735 at p. 741; 67 L. J. P. C. 126; 79 L. T. 146; 14 T. L. R. 545.

many Companies now-a-days and it is just as important to protect the public and other traders against their dealings as to protect them from the dealings of individuals. It may be argued that as the word "he" is used in referring to the word "person" in sections 6 and 7 of the Indian Merchandise Marks Act, and that as under section 13 of the General Clauses Act though the word "he" includes the word "she," it does not include the word "it", it is repugnant to the context to give the word "person" in these two sections the extended meaning given to it by the General Clauses Act. But, in my opinion, there is no substance in such an argument. The meaning to be attached to the word "he" in sections 6 and 7 of the Indian Merchandise Marks Act seems to be a question of grammar. Giving the word "person" in those sections the extended meaning enacted for it in the General Clauses Act, in subsequently referring to it by means of a pronoun the predominating pronoun "he" would be used and this would include "she" and "it." It would not be necessary to refer to the word "person" by the words "he, she and it" whenever it became necessary to use a pronoun. To take an analogous sentence, "If one feels tired, he cannot work". Here the word "one" may be either of the masculine or feminine gender, and yet in referring to it the pronoun "he" is used, not both "he and she". For the above reasons I can see no reason why a Company cannot be prosecuted and punished under sections 6 and 7 of the Indian Merchandise Marks Act, and if this is permissive it would be very incongruous to hold that a Company is liable to punishment in respect of dealings with false descriptions, whereas it is not so liable in dealings with false trade and property marks. It seems to me that the intention of the Legislature must have been to render a Company liable, or not liable, as the case may be, in respect of both classes of dealings, and as it has, in my opinion, clearly made a Company liable with respect to one class, the intention was, no doubt, to render them liable in respect of the other class. It must be remembered that sections 482 and 486 of the Penal Code are enacted in section 3 of the Indian Merchandise Marks Act just before sections 6 and 7 of it and that when the Indian Merchandise Marks Act was enacted the General Clauses Act I of 1868 was in force which defined the word "person" as set out by me above. But learned Counsel for the respondent Company argued that sections 482 and 486 of the Penal Code were not applicable to Companies as a Company, can have no *mens rea* and so is unable to prove absence of intent to defraud and those facts set out in section 486 establish innocence. Though the argument was not expressly raised in the cases of *Starey* v. *Chilworth Gunpoweder Co.* (1) and *Kirshenboim* v. *Salmon and Gluckstein Limited* (3), yet it is not mentioned by the learned and eminent Judges who decided those cases, and if there was any substance in it, it is not probable that it would have escaped attention. In the case of *Pearks, Gunston and Tee Ld.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Company, Ltd.* (5), Channell, J., considered the same argument in respect to sections 3 and 5 of the Sale of Food and Drugs Act, 1875, and though he did not decide the question definitely, in an *obiter dictum* he said that he was inclined to think that a Corporation would come under section 3 as well as under section 6. It is clear that the prosecution, has no *mens rea* to prove under sections 482 and 486 of the Indian Penal Code and as the burden of proving innocence is thrown on the accused under those sections when once a *prima facie* case has been established, I can see no good reason why it cannot do so by the evidence of its agents or servants or otherwise as it thinks fit.

I would answer the question referred in the affirmative.

ORMOND, J.—Section 6 of the Indian Merchandise Marks Act and section 2 (1) (*d*) of the English Act both make the applying of a false trade description by a "person" an offence unless he proves that he acted without intent to defraud. Both section 486, Indian Penal Code, and section 2 (2) of the English Merchandise Marks Act make it an offence to sell or to have in possession goods to which a counterfeit (or forged) trade mark is applied "unless he proves that otherwise he had acted innocently," but section 2 (2) of the English Act begins with the words "every person who" and section 486, Indian Penal Code, begins with the word "whoever."

The word "whoever" means the same

thing as "every person who" and shows that the provisions of the section apply to persons generally. The scope of a penal section in an Act would (so far as the language is concerned) be the same whether it began with the words "every person who" or with the word "whoever," unless the word "person" is defined so as to have a more restricted or a more extended meaning than it, in fact, has. In law, a Corporation (which includes a Limited Company) is a person, apart altogether from any General Clauses or Interpretation Acts, and if from the language of a section, its provisions apply to persons, generally a Limited Company, being a person, would be included, unless there was something to show that the section was not intended to apply to such a person. Moreover, there is, I think, a clear indication that the Indian Legislature intended that the word "whoever" in sections 482 and 486, Indian Penal Code, should have the same meaning and scope as the words "every person who," for these sections were inserted in the Indian Penal Code by section 3 of the Indian Merchandise Marks Act, and section 6 of that Act, which begins with the words "If a person", makes it an offence to apply a false trade description, it would be unreasonable to suppose that by the use of the word "whoever" a more restricted scope was intended in section 3 than was intended in section 6.

As to the possible argument that the language in both the English and Indian Acts shows that a Corporation was not intended to be included, because the word "he" is used and the fact that under the General Clauses Act and the English Interpretation Act, though "he" would include "she," the word "he" would not include "it," in my opinion it would be correct to say "a male, female or artificial person who," (not "who or which"), and it would be correct to say if a male, female or artificial person does so and so, "he shall" (not "he, she or it shall"). This point was not noticed, or probably was thought not worth considering, in the two cases of *Starey* v. *Chilworth Gunpowder Coy. Ltd.* (1) and *Kirshenboim* v. *Salmon and Gluckstein Ltd*, (3). In my opinion the language in sections 482 and 486, Indian Penal Code, does not exclude a Limited Company.

We come then to the question whether there is anything to show that a Limited Company was intended to be excluded from the operation of sections 482 and 486, by reason of the inherent nature of a Limited Company or of the object of the sections. The object of the sections is to prevent the use of a false trade-mark and the selling of goods marked with a false trade-mark. It is obvious that a Limited Company could do such things, and, therefore, it would *prima facie* come within the object of the sections. But it can act only through its agents. It is clear I think from the decision in *Coppen* v. *Moore* (4) that upon a true construction of these sections the master was intended to be made criminally responsible for acts done by his servants in contravention of these provisions, where such acts are done within the scope or in the course of their employment, unless he is able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the sections. It is contended that a Limited Company as such could not prove an absence of *mens rea* under sections 482 and 486 inasmuch as it has no mind. But because it can act only through its agents—if it proved that its agents acted without intent to defraud under section 482, or that its agents had fulfilled the conditions mentioned in clauses (*a*) and (*b*) or (*c*) of section 486, as the case might be, it would prove its own innocence. The two cases of *Starey* v. *Chilworth Gunpowder Company, Ltd.* (1) and of *Kirshenboim* v. *Salmon and Gluckstein Limited* (3) are instance of a Limited Company having been convicted under the English provisions which correspond to sections 482 and 486, Indian Penal Code. In the first case the Justices held that there was no false trade description within the meaning of the Statute, and that there had been no intent to defraud on the part of the Company, inasmuch as the gunpowder delivered was as good as the powder contracted for. It was held that the supplying of goods bearing a false trade description would be a "fraud" within the meaning of the Statute although there was no intention to cheat, and the case was remitted to the Justices to determine whether the Company had acted without intent to defraud or that having taken all reasonable precautions against committing an

offence they had no reason to suspect the genuineness of the trade description, or that they gave all information in their power with respect to the person from whom they obtained the goods. I observe from the dates given in the reports that *Salmon and Gluckstein's* case (3) was decided at a time when the case of *Coppen* v *Moore* (4) was pending for judgment. Lord Russell, C. J., and Wright, J., were two of the Judges in both cases, thus both those cases must have been present to their minds at the time.

In *Kirshenboim* v. *Salmon and Gluckstein, Ltd*, (3) it was held that the Company had sold goods under a false trade description, and that, because it had acted deliberately, it had not acted "innocently".

Being guided by the above English decisions, I am of opinion that Limited Companies are not excluded from the operation of sections 482 and 486, Indian Penal Code, and that there is nothing inherent in the nature of a Limited Company which would prevent it from proving its innocence, either by showing that it acted without intent to defraud under section 482, or under section 486 in any of the ways prescribed in that section. In the latter case of *Pearks, Gunston and Tee Ld.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Co., Ltd.*, (5) a case under section 6 of the Sale of Food and Drugs Act, which contained an absolute and unqualified prohibition, the Company was held liable and Lord Alverstone, C. J., expressed an *obiter dictum* that different considerations might apply in cases under sections 3 and 4 of the Act, inasmuch as absence of knowledge would be a good defence to charges under those sections. He did not say that in his opinion a Limited Company could not be liable under those sections and the above two cases against Limited Companies were not cited. Channell, J., thought that a Limited Company could be liable.

In my opinion a Limited Company can be prosecuted for offences under sections 482 and 486, Indian Penal Code.

The question of jurisdiction in this case and the question of what is the proper procedure to adopt in prosecuting a Limited Company are not before us.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 367 OF 1913.

July 15, 1913.

Present:—Mr. Justice Agnew.

FAZL AHMAD—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 196—Prosecution to exclude all explanation consistent with innocence of accused—No fabrication of false evidence, if evidence not admissible—Public document—Production of copy of false document—Attempt to use the original.

The prosecution must in a criminal case exclude all explanation of the facts which is reasonably consistent with the innocence of the accused.

The weight of authority is in favour of the view that there can be no fabrication of false evidence within the meaning of section 192, Indian Penal Code, if the evidence is not admissible in itself.

A report by a village *nikah khwan* to the *moharrir* in charge of the central office, in which entries in the village registers are copied into another register, informing him that on the day after the entry of the marriage of *A* and *B*, the former husband of the woman had come to the writer and stated that he had not divorced her and accordingly desiring the *moharrir* not to take action upon the writer's report of the marriage, is not a public document within the meaning of section 74, Indian Evidence Act, and no secondary evidence of its contents can be given under section 65 of the Evidence Act.

The production of the copy of a report (a forged document) is an attempt to use the original.

The word 'corruptly' in section 196, Indian Penal Code, is intended to connote a motive not necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence, and an intention to procure a false conviction is a corrupt intention.

Appeal from the order of the Sessions Judge, Attock Division, dated the 30th April 1913, convicting the appellant.

Mr. *Pestonji Dadabhai*, for the Appellant.

Mr. *B. Bevan Petman*, for the Respondent.

JUDGMENT.—The charge against the appellant Fazl Ahmad purported to be under section 196, Indian Penal Code, and is worded as follows:—"That you on 2nd November 1912, at Cambellpur, in the Court of....., produced a fabricated document, Exhibit P. C. 2, which exhibit is a false document in so far as it was not posted on 5th August 1908 as it purports to be, and knowing the same P. C. 2 to be fabricated evidence, and thereby committed an offence punishable under section 196, Indian Penal Code."

The facts are, briefly, that *Musammat* Mehr Bhari was married to Fazl Ahmad in 1905 and lived with him at *Mouza* Mari till the

year 1908. Fazl Ahmad contracted a second marriage and Mehr Bhari went to *Mouza* Dhok Sharfa where Fazl Ahmad's parents live, and there on 29th July 1908 she was married to Ahmad, brother of Fazl Ahmad. The "*nikah*" was performed by Abdullah Shah, now deceased, and an entry made in the marriage register. The entry states that she had been divorced 3½ months before by Fazl Ahmad appellant. Ahmad died two or three months after this marriage and then Mehr Bhari is said, though the point is not clear, to have lived with her father, Sultan, till the year 1912.

On 31st May 1912 Fazal Ahmad instituted a suit for recovery of Rs. 114, the value of ornaments said to have been taken away by Mehr Bhari. The chief defendant was the girl's father, Sultan. The latter on 28th July produced a receipt from Fazl Ahmad, but the latter denied that he had received the money. On 12th November 1912 Sultan produced a copy of the marriage register entry referred to above, in order to show that Mehr Bhari had been divorced by Fazl Ahmad previous to her marriage with Ahmad, his brother.

Before this, however, Fazl Ahmad had, on 26th September 1912, applied for a search warrant against *Musammat* Mehr Bhari. She appeared in Court on 28th September and it appeared that on 27th September she had been married to one Gaman.

Then on 5th October 1912 Fazl Ahmad lodged a complaint under section 494, Indian Penal Code (bigamy), against *Musammat* Mehr Bhari, Gaman, Sultan and another. On 2nd November 1912, he produced a copy, P. A. of the document P. C. 2, by way of proof that *Musammat* Mehr Bhari had not been divorced by him. This document purports to be a letter or report, dated 5th August 1908, written by one Karam Ilahi, appellant in the connected case, on behalf of Abdullah Shah the *nikah khwan* who read the marriage between Ahmad and Mehr Bhari on 29th July 1908. It is addressed to the *moharrir* in charge of the Central Marriage Register in the Deputy Commissioner's Office at Cambellpur, into which entries from the village registers are copied, and states that on the day after the Ahmad-Mehr Bhari marriage, Fazl Ahmad had come to the writer and had complained that he had never divorced *Musammat* Mehr Bhari; the writer asks that the *moharrir* at the Sadar shall take no action on the copy of the entry relating to the marriage already despatched

It has been proved beyond doubt that the Post Office marks showing receipt and delivery of Exhibit P. C. 2 are not those of 1908 but of 1912. The figures showing the year date are, in these stamps, removeable and what has happened is that some person has got hold of the Post Office stamps of 1912 and inserted the removeable figures '8 Au 8' in a 1912 stamp so as to show that Exhibit P. C. 2 was *posted* in 1908. The object of Fazl Ahmad appellant in the criminal proceedings against his wife, her father and Gaman was to shew that he had never divorced *Musammat* Mehr Bhari and, clearly, if it could be shewn that this protest, said by Fazl Ahmad to have been made by him immediately after the marriage of *Musammat* Mehr Bhari and his brother Ahmad, and embodied in P. C. 2 had been posted in August 1908, and had remanied since then in the office of the Deputy Commissioner, the assertion of Fazl Ahmad that he had never divorced *Musammat* Mehr Bhari would find strong confirmation.

The finding of the learned Sessions Judge, who concurred with the assessors is, that Fazl Ahmad did, as a fact, divorce his wife in 1908, previous to her marriage with Ahmad, his brother, that the document, Exhibit P. C. 2, is a forgery and that Fazl Ahmad produced the copy P. A. in Court knowing that the original P. C. 2 was a fabricated document. He also finds on the evidence that Karam Ilahi, the writer of P. C. 2, wrote the document in 1912, with a view to proving that Fazl Ahmad had not divorced *Musammat* Mehr Bhari in 1908 and so to establish the charge under section 494, Indian Penal Code, against *Musammat* Mehr Bhari and Gaman.

The first point of fact for decision is whether Fazl Ahmad did or did not divorce *Musammat* Mehr Bhari. The woman herself denies that there was any divorce. The entry in the marriage register of 27th July 1908 is, however, very strong evidence of the fact of divorce; it is further, as found by the Judge and assessors, extremely unlikely that Fazl Ahmad's own father and mother would

cause their elder son's wife to be married to their younger son unless there had been a divorce. For the defence certain stamps are produced purchased in 1903 and a second set in 1912 which go to show that it was intended in these years to execute a formal deed of divorce on Fazl Ahmad's part and on *Musammat* Mehr Bhari's part to settle the question of dower. But these only show necessarily that at the time the question of having a *written* deed of divorce was in the minds of the parties. They do not show that no verbal divorce had taken place before. As regards Exhibit P. C. 2 had it been in the possession of the *nikah khwan*, Abdullah Shah, in 1903 it is almost inconceivable that he should not have brought the facts to the notice of his Inspecting Girdawar, Muhammad Yusaf, who verified this entry on 1st September 1903 and if the document had, as Abdullah Shah says, been posted in 1908 and lain for four years in the Deputy Commissioner's office, it is very difficult to think that no action would have been taken upon it by way of correcting the entry regarding the Ahmad-Mehr Bhari marriage in the Central Register kept in the Deputy Commissioner's office. It is further shown that the writer of P. C. 2 Karam Ilahi has a relative, Dadu Khan, who sits in the room in which the *moharrir nikah khwan* keeps his papers and that the cupboard is often left open. It would not be difficult, then, to slip in a paper such as Exhibit P. C. 2 at any time. Again, the Post Office marks on the document are certainly not of the year of 1908, but of the year 1912 and a document of which some person desired to establish the authenticity by means of forged Post Office seals is clearly open to grave suspicion as regards the genuineness of its contents.

Lastly Sultan, the father of *Musammat* Mehr Bhari, got her married on 27th September 1912 to Gaman. It is hardly likely that he would have the boldness to expose himself and his daughter to a charge of bigamy when actually engaged in litigation with the husband Fazl Ahmad. If the story of the latter is to be believed, both his own father and the father of Mehr Bhari have on two separate occasions promoted two separate bigamous marriages among their own children. Surely such a state of things is inconceivable.

I concur, then, with the learned Sessions Judge and the assessors that it is proved that Fazl Ahmad did divorce *Musammat* Mehr Bhari.

The next finding of fact upon which a decision is necessary is that Karam Ilahi, appellant in the connected case, wrote the document Exhibit P. C. 2 in 1912, with a view to establishing the charge under section 494, Indian Penal Code, against Gaman, *Musammat* Mehr Bhari and Sultan. Karam Ilahi's own account of the matter is that he wrote P. C. 2 for Abdullah Shah on 5th August 1908 and made the document over to the latter; he had nothing to do with the posting. He also points out that, if he had intended to forge a document like this, he would hardly have been so foolish as to sign his name thereto. The account given by the *nikah khwan*, Abdullah Shah, is that Karam Ilahi wrote P. C. 2 for him on 5th August 1908 and that he posted it in an envelope five or six days afterwards. That the document was posted in an envelope is obviously false, as a glance at the paper will show. Abdullah Shah is dead, but he was alive on 2nd November 1912 and it must be remembered that in regard to the alleged bigamous marriage between Ahmad and *Musammat* Mehr Bhari he was in the position of a man who was blameable for having read the *nikah* between Ahmad and an undivorced woman. That at least was the allegation. It was to his interest to show that he was innocent of the knowledge that *Musammat* Mehr Bhari had *not* been divorced and to shew that he took steps to bring his mistake to the notice of the authorities as soon as he learnt the facts. It is *possible* then that Abdullah Shah may have had this document by him since 5th August 1908, and may have posted it in 1912, possibly in connivance with Fazl Ahmad or Karam Ilahi or both, in order to save himself from blame. The prosecution must in a criminal case exclude all explanation of the facts which is reasonably consistent with the innocence of the accused, and in this matter I must hold that it is *possible* that Exhibit P. C. 2 was really written in 1908 by Karam Ilahi and was kept by Abdullah Shah till 1912 when it was addressed and posted by some one who may not have been Karam Ilahi.

I hold it proved then that the person who

affixed the Post Office seals to Exhibit P. C. 2 fabricated false evidence within the meaning of section 192, Indian Penal Code. Fazl Ahmad must have known the evidence to be fabricated, since he knew that his wife had not been divorced and he was the person who stood to gain if Exhibit P. C. 2 were accepted as a genuine document. Moreover, Fazl Ahmad admits that he knew that the document Exhibit P. C. 2 had been sent a few days after it was written and yet, though in the civil suit regarding the ornaments, the defendant on 15th July 1912 set up the divorce as a defence, he did not apply for a copy of P. C. 2 till 25th October 1912. Taking all the facts into consideration it is, I think, a reasonable inference that Fazl Ahmad knew P. C. 2 to be a fabricated document.

The following questions remain for decision:

(1) Whether Fazl Ahmad used or attempted to use Exhibit P. C. 2 as true or genuine?

(2) Whether he did so "corruptly"?

The appellant did not produce Exhibit P. C. 2 in original but a copy thereof, Exhibit P. A. The weight of authority is in favour of the view that there can be no fabrication of false evidence within the meaning of section 192, Indian Penal Code, if the evidence is not admissible in itself. *Empress* v. *Gauri Shankar* (1), *Queen-Empress* v. *Zakir Husain* (2), *Emperor* v. *Chandra Kumar Missir* (3). The document, Exhibit P. C. 2, purports to be a report by a village *nikah khwan*, Abdullah Shah, to the *moharrir* in charge of the Central Office in Campbellpur in which entries in the village registers are copied into another register, informing him that on the day after the entry of the marriage of *Musammat* Mehr Bhari and Ahmad, Fazal Ahmad had come to the writer and stated that he had not divorced *Musammat* Mehr Bhari; accordingly the writer desires the *moharrir* not to take action upon his report of the marriage. I do not think that such a report was a public document within the meaning of section 74, Indian Evidence Act; and if so, under section 65, no secondary evidence of its contents could be given and the Exhibit P. A. should not have been received in evidence by the Magistrate who tried the bigamy case. In the present case, however, the document, Exhibit P. C. 2, itself was proved by the evidence of Abdullah Shah and, though the latter is dead, his evidence is admissible as against Fazl Ahmad. The, question, therefore, is whether the production of the copy P. A. is such an "use or attempt to use as true or genuine" as is contemplated by sectien 196. The rulings of *Queen-Empress* v. *Nujum Ali* (4) and *Emperor* v. *Mulai Singh* (5) are authorities for holding that the production of the copy was an attempt to use the original.

As regards the intention of the appellant the charge as framed does not include the word 'corruptly' as denoting the appellant's intention, neither does the learned Sessions Judge discuss the question of intention. According to Morgan and Macpherson's Indian Penal Code, page 164, the word "corruptly" is used in sections 196, 198, 200, 219 and 220, Indian Penal Code, to denote that those whose duty it is to submit evidence for the consideration of judicial and other functionaries on behalf of clients do not incur the penalties for using false evidence unless they use the evidence corruptly. In *Bhan Singh* v. *Jalan Singh* (6) it is said that the word is not used in the sense of 'dishonestly' or 'fraudulently.' See also *Empress* v. *Kherode Chunder Mozumdar* (7). On the other hand, convictions have been had under this section where the word was not confined to the restricted sense indicated above—*Queen* v. *Muddoo Soodan Shaw* (8) and *Lakshmaji* v. *Queen-Empress* (9). In the present case where the intention of the person who used the fabricated evidence was not technically 'dishonest' or 'fraudulent,' but rather wicked and immoral inasmuch as he desired to procure a false conviction, it is hard to see what word could be substituted for the word 'corruptly' as indicating a general felonious intent. I do not think that the word is intended to connote a motive necessarily connected with the passing of money as an inducement to

(1) 6 A. 42.
(2) 21 A. 159.
(3) 2 C. L. J. 46; 2 Cr. L. J. 383.
(4) 6 W. R. 41 Cr.
(5) 28 A. 402; A. W. N. (1906) 171: 3 A. L. J. 190; 3 Cr. L. J. 255.
(6) Cr. Rev. No. 26 of 1909.
(7) 5 C. 717; 6 C. L. R. 118.
(8) 7 W. R. 23 Cr.
(9) 7 M. 289; I Weir 177.

the person impugned to use or attempt to use the fabricated evidence and I hold that an intention to procure a false conviction is a corrupt intention.

I find then after a careful review of the evidence that the facts constituting the act imputed to the appellant in the charge upon which he was tried under section 196 have been proved and that the act was done "corruptly", within the meaning of the section.

The sentence is not too severe. I accordingly dismiss the appeal. As the appellant is not present he must surrender to his bail before the District Magistrate to whom orders will be issued. Counsel informed.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 1 OF 1914.

April 21, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

Rani ABHOYESWARI—COMPLAINANT—

versus

KISHORI MOHAN BANERJEE—ACCUSED.

Criminal Procedure Code (Act V of 1898), *ss.* 192, 200, 503—Pardanashin *lady, complaint by—Examination of complainant—Issue of process—If complainant is* pardanashin *lady, whether she may be examined by Commission—Complainant, whether witness.*

If a *pardanashin* lady makes a complaint to a Magistrate, he is entitled to take cognizance of it. But before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate, if really it is her own complaint.

The words "at once" in section 200 of the Criminal Procedure Code clearly indicate that ordinarily a complaint must be presented in person. A complaint should never be accepted which is not signed by the complainant and is not preferred by a person duly authorized to prefer that specific complaint.

Process cannot be issued against an accused person, either by the Magistrate first taking cognizance of an offence, or by the Magistrate to whom the case is transferred under the proviso to section 200, Criminal Procedure Code, unless and until the Magistrate issuing process has first examined the complainant. And this is perhaps more necessary in the case of a *pardanashin* lady than in other cases, to enable the Magistrate to satisfy himself that the complaint is really her own action.

A *pardanashin* complainant may be examined by Commission under section 503, Criminal Procedure Code. The terms of that section are very wide. They refer not only to an enquiry and a trial, but to any other proceeding. The section authorizes the examination of any witness, and a complainant is certainly a witness.

Criminal reference under section 438 of the Criminal Procedure Code by the Chief Presidency Magistrate of Calcutta.

FACTS.—The proceeding arose out of a complaint filed on behalf of the Rani of Bijni against the defendants, who are the proprietors and printer of a weekly newspaper, "The Indian Empire," charging them with defamation. The complaint was not signed by the Rani but by her agent, Bhuban Mohun Chatterjee. There was no power-of-attorney on record and there was no power authorising Bhuban Mohun Chatterjee to present the specific petition, though there was a general power authorising him to file civil and criminal cases on behalf of the Rani. After the petition of complainant was made, the Chief Presidency Magistrate issued process and transferred the case to the file of Mr. Keays, the Second Presidency Magistrate. The parties then moved the High Court and the case was transferred to the Central Court, that is the Court of the Chief Magistrate. The reference was for their Lordships' decision on the following point:—"Whether the Rani can institute a case of defamation through her agent Bhuban Mohun Chatterjee and whether by doing so the requirements of section 198, Criminal Procedure Code, have been met with"?

Mr. *J. N. Roy*, Counsel, and Babu *Manmatha Nath Mukherjee*, for the Complainant.

Mr. *H. N. Sen*, Counsel, and Babu *Tarakeswar Pal Chowdhury*, for the Accused.

JUDGMENT.

COXE, J.—This proceeding arises out of a complaint purporting to be made on the part of Rani Abhoyeswari Devi against the petitioners accusing them of committing defamation. The complaint is not signed by the Rani, but by one Bhuban Mohan Chatterjee on behalf of the Rani. We are informed that there is no power-of-attorney on the record and that there is no power-of-attorney authorising the presentation of this specific complaint, although there is a general power-of-attorney authorising the presentation of criminal complaints. The

document was presented to the Chief Presidency Magistrate, who issued process against the accused; and thereafter the case was transferred. The Magistrate, to whom it has ultimately come, has referred for our decision the following point: "Whether the Rani can institute the case of defamation through her agent Bhuban Mohun Chatterjee and whether by doing so the requirements of section 198, Criminal Procedure Code, have been met with.?"

If the Rani makes a complaint to a Magistrate, the Magistrate is entitled to take cognizance of it. But before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate, if really it is her own complaint.

But I hold that the Magistrate should be very loth to take cognizance of any complaint which is not presented in person. The words 'at once' in section 200 of the Code clearly indicate that ordinarily a complaint must be presented in person and I do not think that a complaint should ever be accepted which is not signed by the complainant and is not preferred by a person duly authorized to prefer that specific complaint.

It is perfectly clear to me that the Magistrate in the Court below had no right to issue process against the accused persons in this case. It has been argued that when a case is transferred under section 192, Criminal Procedure Code, before the complainant has been examined process can issue without the examination of the complainant. That argument really has no application to the present case, because as a matter of fact process had been issued before the case was transferred. But in any case it is perfectly well settled that process cannot be issued against an accused person, either by the Magistrate first taking cognizance of an offence, or by the Magistrate, to whom the case is transferred under the proviso to section 200, Criminal Procedure Code, unless and until the Magistrate issuing process has first examined the complainant. And this is perhaps more necessary in the case of a *pardahnashin* lady than in other cases to enable the Magistrate to satisfy himself that the complaint is really her own action. In the present case, if the complaint is ill-founded, it would be difficult, if not impossible, to fix the Rani with any responsibility for the proceeding.

I see no reason, however, why the complainant should not be examined under section 503, Criminal Procedure Code. The terms of that section are very wide. They refer not only to an enquiry and a trial but to any other proceeding. The section authorises the examination of any witness and a complainant is certainly, in my opinion, a witness. There is indeed less objection to the first examination of a complainant than to the examination of a witness under this section, inasmuch as in the examination of a complainant, before a process is issued, the accused is not entitled to be present or to cross-examine.

It seems to me, therefore, that the proper order to pass in this case is to say that if the complaint on the record is the complaint of the Rani, a point on which we have no materials for a decision, the requirements of section 198 have been satisfied. But the Magistrate was wrong in issuing process against the accused persons. In these circumstances the best course to adopt is to quash the whole proceedings giving liberty to the Rani to make such further complaint as she may be advised. If such complaint is made, the examination of the complainant under section 200 in Chapter XVI of the Code may be made by a commission, which should be directed to a Magistrate.

SHARFUDDIN, J.—I agree.

Proceedings quashed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 69 OF 1913.

August 5, 1913.

Present:—Mr. Kanhaiya Lal, A. J. C.

BALWANT SINGH—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 216—Harbouring proclaimed offender—Criminal Intelligence Gazette, publication in, whether sufficient notice—Offender adopting false name—Harbourer misdescribing offender as his relation—Knowledge.

BALWANT SINGH v. EMPEROR.

In order to establish an offence under section 216, Indian Penal Code, it must be proved that a public servant in the exercise of his lawful authority ordered a certain person to be apprehended for an offence and that the person charged with harbouring him did so, knowing of such order with the intention of preventing his apprehension.

Such knowledge cannot be presumed from the mere publication of the name of the offender in the Criminal Intelligence Gazette nor can it be inferred from the offender's adopting a false name and the harbourer's misdescribing him as his relation.

Application against the order of the Sessions Judge, Hardoi, dated 12th April 1913, modifying that of the Assistant Sessions Judge, Hardoi, dated 17th March 1913.

Mr. *St. George Jackson*, for the Appellant.

The *Government Pleader*, for the Crown.

JUDGMENT.—In this case the applicant, Balwant Singh, has been tried and convicted on a charge under section 216 of the Indian Penal Code of harbouring Durga *alias* Laltu Singh, who was wanted by the Police in connection with certain offences said to have been committed by him elsewhere under sections 302, 307 and 324 of the Indian Penal Code. The Police got information that Durga was living with Balwant Singh at Sakaha. A raid was organized but Durga was not found in that house. Durga was subsequently arrested in the Police circle Mallawan. It does not appear whether Durga was afterwards tried and convicted on the charges in connection with which he was originally wanted.

The charge against Balwant Singh is that he had harboured Durga knowing that his apprehension for an offence had been ordered by a public servant in the exercise of the lawful powers of such public servant. Evidence was produced to show that Durga was living in the house of Balwant Singh from *Aghan* to *Chait* last, that he was there known by the name of Laltu Singh and that Balwant Singh described him as his wife's cousin. A copy of the Criminal Intelligence Gazette of the 13th February 1912 was produced to show that Durga was proclaimed as an offender. But no evidence was given to prove that Balwant Singh had an opportunity of seeing that Gazette or of getting the information contained therein or that he otherwise knew that a warrant had been issued for his arrest. The learned Sessions Judge admits that the mere fact that the accused's name appeared as an offender in the Criminal Intelligence Gazette does not establish the accused's knowledge but he proceeds to argue, from the fact that Durga had adopted a false name and was misdescribed by the accused as his brother-in-law, that the accused knew that a warrant for the apprehension of Durga had been issued by the proper authority. Those facts, however, merely show that Durga was hiding himself. They do not establish that a warrant was issued for his arrest and that the accused, Balwant Singh, knew about it.

In order to establish an offence under section 216 of the Indian Penal Code, it is necessary to prove that a public servant in the exercise of his lawful authority had ordered a certain person to be apprehended for an offence and that the person charged with harbouring him had done so knowing of such order with the intention of preventing him from being apprehended. The warrant, which is said to have been issued for his arrest, has not been produced or proved. There is nothing to show that after the Police raid, which probably gave an opportunity to Balwant Singh to know that Durga was wanted by the Police, the latter continued to live in the house of Balwant Singh. At the time of the raid he was not found in the house and all that the witnesses for the prosecution state is that that evening Durga was seen going to the village. One witness states that he saw him at the Chaupal of Balwant Singh. But, as stated by the learned Sessions Judge, Durga had left the house before a complaint was filed by Jai Jai Ram against him and the present accused in March 1912 for assault, and was thereafter seen in the village only once.

If Durga was really an offender, the case might have come under section 212 of the Code, but it does not appear whether Durga had actually committed any offence. If Durga was a proclaimed offender, that is to say, a person against whom there was a reasonable suspicion that he had committed an offence, it was necessary for the prosecution to establish that the person, who harboured him, knew that an order for his apprehension had been issued. Mere hiding is not sufficient. The essence of the offence lies in harbouring a man with the object of preventing his apprehension in execution of a warrant of

which the harbourer had knowledge. The offence charged has not, therefore, been made out.

I allow the application and setting aside the conviction and sentence, hereby direct his release.

Application allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 159 OF 1912.

November 2, 1912.

Present:—Mr. Kanhaiya Lal, A. J. C.

JAGANNATH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860,*) s.* 451—*House-trespass with intent to commit adultery—Husband's possession of house essential—Connivance or consent of husband, effect of.*

If the entry in a house is made with the consent of the owner and possessor of the house, no offence under section 451, Indian Penal Code, can be deemed to have been committed.

Where in a case under section 451, Indian Penal Code, the husband appeared neither as a complainant nor as a witness, and there was nothing to show that the house was in his possession or that he had not consented to or connived at the entry of the accused:

Held, that the charge under section 451, Indian Penal Code, could not be sustained.

Brij Basi v. *Queen-Empress*, 19 A. 74, followed.

Queen-Empress v. *Kangla*, 23 A. 82 distinguished.

Application against an order of the Sessions Judge, Lucknow, dated 22nd August 1912.

Mr. *St. George Jackson*, for the Appellant.

The *Government Pleader*, for the Crown.

JUDGMENT.—The applicant Jagannath has been convicted on a charge of committing house-trespass with an intent to commit adultery.

It does not appear from the findings of the learned Magistrate whether the house belonged to Bhikha, the husband of the woman with whom adultery was said to have been committed or intended, or to his wife, and whether he was in possession of it. The defence of the accused was that he went into the woman's house and stayed there to smoke. He did not admit that the house belonged to her husband. In his ground of appeal to the learned Sessions Judge he similarly urged that the woman was the owner of the house and the alleged entry into the house was made with her consent. There is, moreover, nothing in the findings to indicate, as required by *Brij Basi* v. *Queen-Empress* (1), that there was no connivance or consent on the part of the husband of the woman, with whom adultery is said to have been committed or intended. The husband was not the complainant. He did not even eventually appear to give evidence as a witness. and in the absence of a finding that the house was in the possession of the husband and that he had not consented or connived at the entry, a charge under section 451 of the Indian Penal Code cannot be sustained.

The learned Government Pleader relies on the decision in *Queen-Empress* v. *Kangla* (2), but in that case the husband himself was the complainant. The report in the present case was originally made by the woman herself, charging the applicant with rape. The Police found that the charge of rape was not establishad and sent up the case under section 451 of the Indian Penal Code without taking any steps to find out whether the house belonged to the woman by inheritance from her parents and was in her possession independently of her husband or whether she was living in it by virtue of her being the wife of her husband. If the entry was made with the consent of the owner and possessor of the house no offence under section 451 of the Indian Penal Code can be deemed to have been committed. Possession may be presumed to follow ownership, but where a husband and wife live together, it is difficult to say that a house owned by the wife is in the possession of the husband and not of the wife in her own right. The findings recorded by the learned Magistrate are insufficient to justify a conviction. I, therefore, set aside the conviction and direct that the fine, if realised, be refunded.

Application allowed.

(1) 19 A. 74.
(2) 23 A. 82.

PUSU *v.* EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 196 OF 1913.

September 19, 1913.

Present:—Mr. Mitta, Offg. A. J. C.

PUSU—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code Act (XLV of 1860), *s.* 98—*Right of private defence of property—Owner entering upon tenant's land to remove fallen tree—Assault—Possession follows title.*

When a tree is blown down in the wind, the *malguzar* who is the owner of it becomes entitled to remove it and for this purpose he has a right of ingress over the tenant's land and a right of private defence of property in the fallen tree.

Possession is presumed to follow the title.

Criminal revision against the order of the District Magistrate, Mandla, dated the 27th May 1913, confirming the conviction and reducing the sentence passed by the Magistrate, 2nd class, Mandla, dated the 5th March 1913.

Mr. *C. S. Nayudu*, for the Petitioner.

JUDGMENT.—The learned District Magistrate has found that the *Ber* tree belonged to the *malguzar* Pusu Patel, the applicant before me. When the tree was blown down in the wind, he became entitled to remove it and for this purpose he had a right of ingress over the tenant's land. The tenant did not object to the entry on the land, but to the removal of the tree. But if something, which I am about to refer to, had not taken place, the *malguzar* would have had no right of private defence, and his duty would have been to resort to the authorities for redress. The tenant, however, had already cut the tree and stacked it, with a view to appropriating it to his own use. The land was in the possession of the tenant, but the tree, after its severance from the ground by the action of wind, must be deemed to be in the *malguzar's* possession, just as the minerals under the land are deemed to be in the possession of the Crown. Possession is presumed to follow the title. The act of the tenant was theft, though if put on his trial, he would have been acquitted on the ground that he had no dishonest intention, having acted under a *bona fide* claim of right. The tenant apparently believed on hearsay evidence that his deceased father had planted the tree, though the village papers do no support him. But under section 98 of the Indian Penal Code "when an act, which would otherwise be a certain offence, is not that offence, by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence". The cutting of the tree took place on that very day of the alleged offence. The *malguzar* had apparently no previous notice of any such intention on the part of the tenant, so as to have time to have recourse to the protection of the public authorities. In my opinion the *malguzar* had a right of private defence of property. It is no answer to say that even if the wood had been burnt or otherwise disposed of, the *malguzar* could have brought a civil action. He is not bound to do so, if the law gives him a right of private defence of property. The question remains for consideration—whether the *malguzar* exceeded this right. The force used was very trivial. The complainant's story has been found to be false in some particulars. The learned District Magistrate describes the incident as an assault. None of the *malguzar's* servants, according to the findings, took any part in the affray. There were two men on the tenant's side struggling with the *malguzar*. P. W. No. 2 says: "The *malguzar* Pusu Patel beat me and I beat him." In my opinion the force used was not more than what is justified by the law. The Tahsildar was wrong in referring to the previous convictions, as they were irrelevant. I set aside the conviction and sentence passed by the lower Courts and acquit the applicant. The fine must be refunded to him.

Applicant acquitted.

RAM SINGH *v.* RAO GIRRAJ SINGH.

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL No. 456 OF 1913.

April 28, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

RAM SINGH—DEFENDANT—APPELLANT

versus

RAO GIRRAJ SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901*)*, *ss.* 58, 95, 167—*Civil Procedure Code* (*Act V of* 1908*)*, *s.* 11—*Specific Relief Act (I of* 1877*)*, *s.* 42—*Suit for declaration by landholder that lease granted by his Agent was without authority—Jurisdiction of Civil or Revenue Court*—Res judicata.

The defendant was a non-occupancy tenant under the plaintiff. In 1908 the defendant executed a *kabuliat* and the plaintiff's *mokhtear-i-am* a lease for 10 years, the former was, while the latter was not, registered.

In 1909 the plaintiff sued, under section 58 of Act II of 1901, to eject the defendant. The defendant resisted the suit by setting up the said lease and *kabuliat*, the execution of both of which the plaintiff did not challenge, but said that those documents were executed without his knowledge and consent and that his *mokhtear-i-am* had no authority to grant a lease or accept a *kabuliat* for ten years. The Assistant Collector rejected the lease as unregistered, but acting on the *kabuliat* dismissed the plaintiff's suit on the ground that the term of the lease had not expired. This decision was upheld by the Commissioner on appeal. In 1912 the plaintiff sued in the Civil Court for declaration that the said lease and *kabuliat* were null and void as having been granted by his *mukhtear-i-am* without the plaintiff's knowledge, consent or authority. In bar of the plaintiff's suit the defendant relied on sections 95, 167 of Act II of 1901, section 11 of the Civil Procedure Code and section 42 of the Specific Relief Act:

Held, per *Rafique*, *J.* (*Piggott*, *J.*, dissenting):—

(1) that as the relief now claimed by the plaintiff could not be sought in a Revenue Court under section 58 or 95 of the Tenancy Act, it could not be said that the plaintiff's present suit was of such a nature as to be exclusively within the jurisdiction of a Revenue Court;

(2) that the question of the authority of the *mukhtear-i-am* to grant a ten years' lease could not be decided and was not directly decided by the Revenue Court;

Rai Kishen Chand v. *Mahadeo*, A. W. N. (1901) 49 and *Salig Dube* v. *Deoki Dube*, 2 A. L. J. 334, followed.

(3) that as the authority of the *mukhtear-i-am* was neither in issue in the Revenue Court nor was that Court competent to try that question, any incidental expression of opinion on the point would not operate as *res judicata* and that the suit was, therefore, maintainable.

Second appeal from the decision of the Additional Judge of Aligarh, dated 14th April 1913.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.

RAFIQUE, J.—The main question raised in this appeal is one of jurisdiction and is by no means free from difficulty. The difficulty arises by reason of the provision of section 167 of the North-Western Provinces Tenancy Act (II of 1901) which excludes the jurisdiction of the Civil Courts in certain cases. But in order to appreciate the merits of the contention advanced on behalf of the defendant-appellant, it is necessary to recite the circumstances which have led to the present litigation between the parties.

It appears that the plaintiffs-respondents are the *zemindars* and co-sharers of the villages of Baroli, Basdeopur, Mahal Umraogarh in the District of Bulandshahr and the defendant-appellant and one Himanchal Singh hold 80 *bighas* 2 *biswas* in the said Mahal as tenants. They held the land as non-occupancy tenants at an annual rent of Rs. 182. On July 23rd, 1908, they executed a *kabuliat* at an annual rent of Rs. 250 in respect of the said land in favour of the plaintiffs-respondents and got it registered. The *kabuliat* was made over to and accepted by one Dalip Singh who was the *mukhtear i-am* of the plaintiffs-respondents under a general power-of-attorney. Dalip Singh in his turn executed a lease on July 30th, 1908, in respect of the same land in favour of the defendant-appellant presumably on behalf of his masters, but the lease was not registered. Dalip Singh was dismissed some time in 1908, but after the execution of the *kabuliat* and the lease. In 1909 the plaintiffs-respondents sued in the Revenue Court to eject the defendant-appellant and Himanchal Singh from their holding stating them to be non-occupancy tenants. The suit was brought under section 58 of Act II of 1901. The defendant-appellant and Himanchal resisted the suit by setting up the lease and the *kabuliat* of 1908. They said that they were holding under a lease the term of which had not expired and had, by reason of that lease, become occupancy tenants. The execution of the lease and the *kabuliat* was not challenged by the plaintiffs-respondents. They said that the said two documents were executed without their knowledge and consent and that their *karinda* Dalip Singh had no power to grant a lease or accept a *kabuliat* for ten years. The Assistant Collector, u

whose Court the suit was brought, dismissed it on the ground that the term of the lease had not expired. He, however, based his decision on the *kabuliat* holding that the lease was inadmissible in evidence for want of registratian. On appeal the decree of the Assistant Collector was upheld by the Commissioner.

On May 17, 1912, the plaintiffs-respondents instituted the suit, out of which this appeal has arisen, in the Court of the Munsif of Bulandshahr against the defendant-appellant, Himanchal Singh, and Dalip Singh for a declaration that the lease and *kabuliat* of 1908 were null and void against them. They sought the declaration on the grounds that Dalip Singh had no authority to grant the lease or to accept the *kabuliat* in question, both of which were executed without their knowledge and consent and in collusion between Dalip Singh, Ram Singh and Himanchal Singh, and that they came to know of the execution of the said two documents for the first time on January 14, 1910, when they were set up in defence in the ejectment suit in the Court of the Assistant Collector. Ram Singh alone defended the suit and put in a written statement in the Court of the Munsif. Himanchal Singh and Dalip Singh did not resist the claim. Ram Singh urged several pleas in defence. He upheld the authority of Dalip Singh to grant the lease and accept the *kabuliat* of 1908 and said that both the documents were given with the knowledge and to the information of the plaintiffs-respondents. He further said that in effect the suit of the plaintiffs-respondents was to obtain a cancellation of the decree of the Revenue Court. The provisions of section 167 of Act II of 1901, section 11 of the Code of Civil Procedure and section 42 of the Specific Relief Act were urged in bar of the suit of the plaintiffs-respondents. The Court of first instance decreed the claim deciding the pleas in defence both of fact and of law against the defendants. On appeal the learned Judge agreed with the first Court and upheld its decree. Ram Singh, one of the defendants, has come up in second appeal to this Court. He challenges the decree of the lower Court on three grounds. He says that the suit of the plaintiffs-respondents was not cognizable by a Civil Court, that it is barred by *res judicata* and that Dalip Singh had authority to grant the lease and accept the *kabuliat* in question. In support of the first objection the argument is that in certain matters arising between a landlord and a tenant Revenue Courts alone have jurisdiction and their decision is final. The landlord or tenant cannot seek his remedy in such matters either by going in the first instance to a Civil Court or after the decision of a Revenue Court be allowed to get round it by instituting a suit in a Civil Court raising the same or similar issues. In the present case the dispute between the parties relates to one of the matters the disposal of which is solely within the jurisdiction of the Revenue Courts.

The plaintiffs-respondents sued the defendant-appellant and Himanchal Singh for ejectment under section 58 of Act II of 1901 stating the latter to be non-occupancy tenants. Ram Singh and Himanchal Singh set up the lease and the *kabuliat* and pleaded that as the term for which the holding was given to them had not expired they could not be ejected. The Assistant Collector upheld the *kabuliat* and dismissed the suit of the plaintiffs-respondents. They now seek by their suit in the Civil Court to get rid of the decree of the Assistant Collector. They cannot be allowed to do so, as the matter decided by the Assistant Collector was solely within his jurisdiction. He alone could take cognizance of and decide the nature and duration of the tenancy of Ram Singh and Himanchal Singh. The learned Counsel for the defendant-appellant relies upon the provisions of sections 95 and 167 and clauses 29 and 34 Schedule (4) of the North-Western Provinces Tenancy Act in support of his argument. He has also cited some cases which will be mentioned and discussed later on.

The proposition that in certain cases the Revenue Courts have sole jurisdiction and that of the Civil Courts in those cases is precluded admits of no doubt. They have also the option of deciding or referring the dispute to a Civil Court where a tenant in a suit or application made by the landlord sets up a proprietary title. And if they elect to decide the question of title, their competency to do so could not be called in question except by way of appeal. What we have to see in the present case is whether

the issue raised and the relief sought by the plaintiffs-respondents are such as could only be raised in and granted by a Revenue Court. The answer to the question depends on the nature of the present suit which we must examine carefully.

The plaintiffs-respondents by their present suit challenge the validity of the lease and the *kabuliat* of 1908 and ask for a declaration that the said two documents are null and void as having been given by a person who had no authority to give them. In other words, the authority of Dalip Singh to grant a lease of long duration is disputed and called in question in the present suit: that is the main and in fact the sole issue in the case. Is the decision of such a question solely within the jurisdiction of a Revenue Court? I do not think so. The alleged incompetency of Dalip Singh to grant a long term lease has nothing to do with the nature of the tenancy of the defendant-appellant or the class of tenants to which he belongs. For, even if the lease and the *kabuliat* be valid, he would still be a non-occupancy tenant. The law that invests the Revenue Courts with exclusive jurisdiction is embodied in section 167 of Act II of 1901. It is to the following effect:—"All suits and applications of the nature specified in the fourth Schedule shall be heard and determined by the Revenue Courts; and except in the way of appeal, as hereinafter provided, no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made." Under this provision of the law all suits and applications of the nature specified in the fourth schedule of the Act are to be entertained by a Revenue Court only. Now there is no clause in the fourth Schedule under which the present suit of the plaintiffs-respondents could be brought. The learned Counsel for the appellant has referred to clauses 29 and 34 of the fourth Schedule as the clauses under one or other of which the relief now sought could be claimed. Clause 29 is as follows:—"For the ejectment of a non-occupancy tenant on the grounds specified in section 58" of the Act. There are three grounds given in section 58 on the bases of which a non-occupancy tenant can be ejected, *viz.*, that he holds from year to year, that the term of his lease has expired or that he has refused to accept a lease. The invalidity of a lease or *kabuliat* is not one of the grounds mentioned in section 58. Clause 34 is as follows:—"For a declaration as to any matter specified in section 95." According to section 95, "at any time during the continuance of a tenancy either the landholder or the tenant may sue for a declaration as to certain matters detailed in the section. For the appellant reliance is placed on clauses (*a*) and (*b*) of the section which relate to the name and description of the tenant of the holding or the class to which the tenant belongs. There is no question in the present case of the name and description of the tenants, both of which are known. The class to which Ram Singh and Himanchal Singh belong is not in dispute either. They are non-occupancy tenants even if the lease and the *kabaliat* in suit be valid. Besides, as remarked by the learned Counsel for the appellant in his book on the Tenancy Act, "the object of clause (*b*), section 95, is to enable the Court to ascertain the existing arrangements between a landholder and his tenant and not to make a new contract for parties *between whom no contract was in existence at or before the date of the suit.*" It is thus evident that the relief now claimed by the plaintiffs-respondents could not be sought in a suit under section 58 or under section 95 of the Tenancy Act. It cannot, therefore, be said that their present suit is of a nature that is exclusively within the jurisdiction of a Revenue Court. Nor does the examination of the former suit between the parties in the Court of the Assistant Collector disclose the fact that the plaintiffs-respondents asked for the invalidity of the lease and the *kabuliat* or that the invalidity of the said two documents was in issue in that case. The plaintiffs-respondents' suit for ejectment was met with the production of the lease and the *kabuliat*, the execution of which was admitted but the validity of which was denied. The learned Assistant Collector, rightly thinking that the validity or invalidity of the documents not being within the scope of section 58, under which the suit was brought, framed no issue about it. The issue he framed was:—"Does Ram Singh hold on a lease the period of which has not expired?" The issue was quite proper and justified on the admission of the plaintiffs-respondents as to the execution and genuineness of the

two documents. It is true that the learned Assistant Collector discussed the validity of the lease and the *kabuliat* in his judgment. But he did so incidentally and his doing so cannot invest him with exclusive jurisdiction over the matter or preclude the Civil Courts from entertaining a suit in which it is called in question. The cases relied upon by the learned Counsel for the appellant do not, in my opinion, bear out his contention. The cases cited by him are:—*Rai Krishen Chand* v. *Mahadeo* (1); *Salig Dube* v. *Deoki Dube* (2); *Lal Singh* v. *Khaliq Singh* (3); *Uman Shanker* v. *Bhagwan Din* (4); *Sri Mahant Bramha Khushal* v. *Sumera* (5) and *Ram Sarup* v. *Kishan Lal* (6).

In the case of *Rai Krishen Chand* v. *Mahdeo Singh* (1) the facts were these. Krishen Chand was a landholder and Mahadeo Singh was his non-occupancy tenant. Krishen Chand sued to eject Mahadeo Singh and in the ejectment suit before the Revenue Court the agent of Krishen Chand filed a compromise under which the ejectment suit was dismissed. Krishen Chand then brought a suit in the Civil Court to have the compromise set aside on two grounds. He said that his agent under the power-of-attorney had no authority to compromise and that he had colluded with the tenant and fraudulently entered into compromise with him. Rai Krishen Chand sought two reliefs, *viz.*, (1) a declaration that the compromise filed by the defendants (*i.e.*, the agent of the plaintiff, the tenant and two others) in the Revenue Court was executed fraudulently and collusively and without authority, and (2) a declaration that the decree of the Revenue Court is void, ineffectual and not binding on the plaintiff. It was found as a fact that no fraud had been proved by the plaintiff. The only ground left for the demand of the said two reliefs was the allegation that the compromise was executed by his agent without authority. It was held that the want of authority in an agent to compromise a suit, solely cognizable by a Revenue Court, was not a valid ground upon which a Civil Court could grant relief in respect of the decree of the Revenue Court.

In the present case the authority of Dalip Singh is not questioned in respect of anything done by him on behalf of his masters in the ejectment suit but prior to it. Moreover, the plaintiffs-respondents do not seek in their present suit for a declaration that the decree of 1909 in the ejectment suit is void, ineffectual and not binding on them. I do not think that the case of Rai Kishen Chand helps the defendant-appellant.

The case of *Salig Dube* v. *Deoki Dube* (2) is also not in point In that case in an ejectment suit under section 58 of the North-Western Provinces Tenancy Act one of the pleas in defence was that the persons sought to be ejected were proprietors. The Revenue Court took cognizance of the plea and decided it itself under section 199 of the Act. In a subsequent suit in Civil Court for a declaration that the unsuccessful party were the proprietors, it was held that the question was *res judicata* by reason of the decree of the Revenue Court. The Revenue Court has the option to decide the question of title if raised before it or refer it for decision to a Civil Court. If it elects to decide the question it is competent to do so. In the present case the question of the authority of Dalip Singh to grant a long term lease could not be decided and was not directly decided by the Revenue Court.

The next case is that of *Lal Singh* v. *Khaliq Singh* (3). In that case the question was whether the omission by a tenant in a suit by the landlord of the recovery of arrears of rent, to plead proprietary title in respect of the land of which rent is claimed, precludes him from bringing a suit subsequently in a Civil Court for a declaration of his title as a proprietor of that land. It was decided that he could not do so as the principle of *res judicata* barred his subsequent suit. The decision in *Lal Singh's* case (3) turned on the provision of section 199 of the North-Western Provinces Tenancy Act read with section 13 of the old Code of Civil Procedure and has no bearing upon the present case.

In the case of *Uman Shanker* v. *Bhagwan Din* (4), the facts were that Bhagwan Din and others sued Uman Shanker who was a

(1) A. W. N. (1901) 49.
(2) 2 A. L. J. 334.
(3) 2 Ind. Cas. 218; 6 A. L. J. 259; 31 A. 323.
(4) 8 Ind. Cas. 568; 7 A. L. J. 1064.
(5) 18 Ind. Cas. 957; 11 A. L. J. 310; 35 A. 299.
(6) 29 A. 327; A. W. N. (1907), 76; 4 A. L. J. 306.

minor for arrears of rent. The plaintiffs asked for the appointment of one Kedar Nath as guardian of Uman Shanker, but in spite of the refusal of Kedar Nath the Revenue Court appointed him guardian *ad litem*. No one appeared to defend the suit and an *ex parte* decree in favour of the plaintiffs was passed. Uman Shanker then brought a suit in the Civil Court for a declaration that the *ex parte* decree passed against him was void and ineffectual inasmuch as in the suit for arrears of rent no one had been appointed his guardian according to law. The claim was resisted on the ground that it was not maintainable in a Civil Court. It was held that no irregularity in procedure in a case solely cognizable by a Revenue Court could form the basis of a subsequent suit in a Civil Court for vitiating the decree of the Revenue Court. The case of *Rai Krishen Chand* v. *Mahadeo* (1) was referred to and followed. I have already pointed out the reason why the case of Rai Krishen Chand is no authority for the contention of the defendant-appellant in this case. For the same reason I find that the case of Uman Shanker does not help the defendant-appellant.

The next case is that of *Sri Mahant Birham Khushal* v. *Sumera* (5). I was a party to the judgment in that case and, in my opinion, it is distinguishable from the present case. The facts of that case were that one Jhan was an occupancy tenant. On the death of Jhan one Sumera applied to the Revenue Court for mutation of names in his favour alleging himself to be the son of Jhan. The Zemindar resisted the application by denying the legitimacy of Sumera. The objection was allowed and Sumera's application for *dakhil kharij* was rejected. Sumera then brought a suit in the Revenue Court under section 95 of the North-Western Provinces Tenancy Act asking for a declaration that he was the occupancy tenant of the holding. The suit was brought against the Zemindar who defended it on the ground that Sumera was not the legitimate son of Jhan. The claim was dismissed on the ground that the tenancy was no longer in existence. About two years after the decision of the Revenue Court Sumera brought a suit in the Civil Court for a declaration that he was the legitimate son of Jhan and for possession of the occupancy holding. It was held that the suit was not maintainable in a Civil Court and that the proper remedy of Sumera was to have brought a suit under section 79 of the Tenancy Act for possession, and not for a declaration under section 95 of that Act that he was the occupancy tenant of the holding. The distinction between the present case and that of Sumera is obvious. The civil suit of the latter was virtually a suit against the Zemindar for possession of an occupancy holding as a tenant. Such a suit falls under section 79 of Act II of 1901 and is solely within the jurisdiction of a Revenue Court. In the present case the dispute between the parties relates to the authority of an agent to grant a long term lease which, as I have already shown, is not a matter over which the Revenue Courts have exclusive jurisdiction. The other relief in *Sumera's* case (5), *viz.*, that for a declaration that Sumera was the legitimate son of Jhan, could be granted by a Civil Court on proof of the facts alleged but under the circumstances of the case it was useless to grant it. For the same reason it is argued for the defendant-appellant that the grant of relief that Dalip Singh had no authority to give on behalf of his master a long term lease would be useless in the present case. For it is said that the grant of such a relief would not affect the decree passed against them in the ejectment suit by the Revenue Court. Nor can the question of ejectment of the defendant-appellant and Himanchal arise again between the latter and the plaintiffs respondents until the expiry of the period of the lease and the *kabuliat*. I do not think that the grant of the relief with regard to the authority of Dalip Singh to grant a long term lease would be useless. The decision on the point may be useful in similar disputes with other tenants. In fact another similar case is pending and the Commissioner of Meerut is withholding his judgment pending the decision of this Court. Moreover, if the decision be in favour of the plaintiffs-respondents they might seek and obtain a review of judgment from the Revenue Court in the ejectment suit of 1909 The rule enunciated in the case of *Bihari* v. *Sheo Balak* (7) is to the same effect as that laid down in the case of *Lal*

(7) 29 A. 601; A. W. N. (1907) 189; 4 A. L. J. 545.

RAM SINGH *v.* RAO GIRRAJ SINGH.

Singh v. *Khaliq Singh* (3), and need not be discussed.

None of the cases, therefore, relied upon for the defendant-appellant bears out his contention that the present suit is not maintainable in a Civil Court. Another feature that distinguishes them from the present case is that in the former the principal relief related to the setting aside of a Revenue Court decree or asked for a relief that could be granted by a Revenue Court only. In the present case the plaintiffs-respondents do not ask for the cancellation of the Revenue Court decree passed in the ejectment suit in 1909 or for a relief that could be granted by a Revenue Court only. I find that suits similar to the present one have been held to be cognizable by a Civil Court. For example it has been held that a suit for a declaration that a *lambardar* could not grant leases of co-parcenary land for a period longer than that required by the circumstances of the particular year or the particular season could be brought in a Civil Court, Vide *Bansidhar* v. *Dip Singh* (8) and *Chattray* v. *Nawala* (9). But the case of *Gumti Kunwar* v. *Gudri* (10) is directly in point. In that case the husband of *Musammat* Gumti Kuwar first sued Gudri in a Revenue Court for arrears of rent. In support of his claim he produced the counterpart of a lease which was alleged to have been executed by Gudri. The latter denied the document, but the Revenue Court held the document to be genuine, and decreed the claim. Gudri thereupon brought a suit in the Civil Court for a declaration that the counterpart was not executed by him and was not a genuine document. It was held that the decision of the Revenue Court could not operate as *res judicata* as it had no jurisdiction to try the subsequent suit. In other words the decision was that the genuineness of the document was a matter which could be called in question in a Civil Court in spite of the decision of the Revenue Court on the point; it may also be noted that it was conceded in that case that the Civil Court decree would be of no use to Gudri. The case of *Rani Kishori* v. *Raja Ram* (11) is also in point. It was held in that case that the decision by a Revenue Court of a question of title, though such decision was necessary for the disposal of the case before it, cannot prevent the same question being again litigated between the same parties in a Civil Court.

I would, therefore, hold that the suit of the plaintiffs-respondents is maintainable.

The second objection on behalf of the defendant-appellant is based on the plea of *res judicata*. I do not think that the objection is sound. The case of *Gumti Kuar* v. *Gudri* (10), just referred to, supports my opinion. The authority of Dalip Singh was not in issue in the ejectment suit, nor was the Revenue Court competent to try that question. Any expression of opinion incidentally on the point cannot operate as *res judicata*.

The last argument for the defendant-appellant is that Dalip Singh had authority to grant the lease and accept the *kabuliat* of 1908. The question whether he had such authority is one of fact and has been found by the lower Courts against the defendant-appellant. He cannot re-open it in second appeal. But it is said that "Dalip Singh, being a Manager and Tehsildar and admittedly a person who had been granting leases on behalf of the proprietors, must be deemed as between the lessees and the proprietors to possess the necessary authority." The North-Western Provinces Tenancy Act is also relied upon as indicating a policy of validating leases granted by the manager of an estate though they be for a period of ten years or more. No provision of the Tenancy Act has been referred to which could be construed to indicate the policy contended for by the defendant-appellant. The fact that Dalip Singh was Manager and Tehsildar of the estate would not necessarily confer on him the authority to grant leases for long periods. Besides, he was not a regularly appointed Manager or Tehsildar, but was allowed to do some of the work of a Manager and was known in the estate as a Tehsildar. He could not grant a lease for a longer period than the exigencies of the year or the season required and there is no proof that in the present case there was any necessity for the grant of a lease for ten years. Moreover, the admission, if any, that Dalip Singh had been granting leases does not amount to the admission that he could grant leases for long terms.

(8) 20 A. 438; A. W. N. (1898) 103.
(9) 29 A. 20; 3 A. L. J. 639; A. W. N. (1906) 257.
(10) 25 A. 138; A. W. N. (1902) 220..
(11) 26 A. 468.

No law or authority has been shown that the Manager or Tehsildar of an estate has, by virtue of his office, authority to grant leases for periods of ten years or more.

I would, therefore, hold that Dalip Singh had no power to grant the lease or accept the *kabuliat* in question. In view of my findings on the contentions for the defendant-appellant I would dismiss his appeal with costs.

PIGGOTT, J.—I have had the advantage of reading the very thoughtful and exhaustive judgment of my learned colleague, and have taken time to consider it. I arrive with some reluctance at the conclusion that I am unable to concur.

With regard to the merits of the case I have one point only to note. The first Court came to the finding that the rent reserved by the disputed lease was not an unreasonable or inadequate one: if this is correct, it would follow that the securing of substantial tenants for a long term of years at a reasonable rent was not an act detrimental to the interests of the plaintiffs. The learned District Judge, in so far as he has considered this point at all, seems to have been of opinion that the lease must be detrimental to the interests of the plaintiffs, because the result would be that under it the defendants would acquire occupancy rights in the land in suit. Such a result is precluded by the operation of the proviso to section 11 of the Tenancy Act, which the District Judge has apparently overlooked. Moreover, the Courts below do not seem to have considered the question whether the plaintiffs might not be bound by the acts of their ostensible agent by reason of the operation of the principle laid down in section 237 of the Indian Contract Act (IX of 1872). Had they, by their conduct in the past, induced the tenants of the village to believe that the granting of a lease of this sort was within the scope of Dalip Singh's authority?

If, however, these were the only points on which I felt any doubts, I should have contented myself with suggesting the advisibility of remitting some issue or issues to the Court below, and might not in any event have gone the length of dissenting from the order proposed by my Honourable colleague. My real ground of dissent is as to the application of section 167 of the Agra Tenancy Act (Local Act II of 1901) to the facts of the present case. I stand deeply committed, in more than one published ruling of this Court, to the view that this section should be given as wide an interpretation as is reasonably consistent with its terms. Its object I understand to be to maintain, for the benefit of the agricultural population generally, the comparatively cheap and speedy remedies provided by suits or applications under the Tenancy Act for the settlement of disputes between different members of that community regarding the possession, use or occupation of agricultural land. The section is divided into two distinct parts, of which the second has been drafted so as to provide, in the widest possible terms, against attempts at evading the provisions of the first. It does not merely lay down that all suits and applications of the nature specified in the fourth Schedule shall be heard and determined by the Revenue Courts; if this were all, I should accept the reasoning of my learned colleague as unanswerable. The section goes on to provide that, subject to certain exceptions which have no bearing on the facts of the present case, no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. These words are certainly susceptible of a wide interpretation. They are directed against the litigant (usually, as in the present case, the litigant with the long purse) who, while possessed of a cause of action in respect of which he can secure a complete adjudication by means of a suit or application in the Revenue Courts, is bent on evading the jurisdiction of those Courts and employing the slower, more cumbrous and more expensive machinery of the ordinary Civil Courts. More particularly should they be applied, in my opinion, to checkmate the pertinacious litigant who has already fought out in the Revenue Courts the essential question in dispute, but claims to be allowed to drag his adversary through a second course of litigation. Such a man will never have any difficulty about steering clear of the provisions of the first part of section 167 of the Tenancy Act. Very little ingenuity will suffice, in the majority of cases, to draft a plaint of which it cannot be said that it could have been presented as it stands, either as a

plaint in a suit, or as an application, falling under any of the Articles of the fourth Schedule of the Tenancy Act; and the simplest device of all is to ask for some sort of a declaration. In such cases as these I conceive that the Civil Court should keep a jealous watch over the provisions of the second part of section 167 of the Tenancy Act, and should ask itself:—"In admitting this plaint am I not, when all is said and done, taking cognizance of a dispute or matter in respect of which a suit has already been brought, or an application already been made, under the Tenancy Act, or in respect of which such suit might be brought or application made"? On the facts of the present case I would answer this question in the affirmative. The essential question in dispute has already been in issue between the parties in a suit brought under Article 29 of the fourth Schedule to the Tenancy Act. The plaintiffs said the defendants were liable to ejectment under clause (*a*) of section 58 of the Tenancy Act, as tenants holding only from year to year. The defendant replied that, even though non-occupancy tenants, they were protected from ejectment because they held under a lease the term of which had neither expired nor was about to expire at or before the end of the current agricultural year. The plaintiffs rejoined that no such lease had been granted by themselves, or by any one with authority to act in the matter on their behalf. The issue was fairly joined and was decided against the plaintiffs. They are asking the Civil Court to try that issue over again. I think it unnecessary to inquire whether the plaintiffs might not also, without seeking the actual ejectment of the defendants, have obtained the relief of a simple declaration from the Revenue Courts by a properly framed application under Article 34 of the fourth Schedule. They did actually desire the ejectment of the defendants, and that relief they sought.

In my opinion the suit is sufficiently barred by the provisions of section 167 of the Tenancy Act as they stand. I should be prepared to strengthen my position, if necessary, by calling in aid the provisions of section 42 of the Specific Relief Act (1 of 1877). Would any Civil Court, on the facts of the present case, have entertained a mere suit for a declaration, if there had been no doubt as to its jurisdiction to order ejectment as well? I conceive not. Yet in the present suit the prayer for ejectment has been dropped, simply in order to avoid putting forward a plaint in open and flagrant contravention of the provisions of section 167 of the Tenancy Act. I would hold that this should not be allowed. The case was one in which a declaration as to the invalidity of the lease should ordinarily have been followed by further relief, namely, the ejectment of the lessees. Either the plaintiffs were "able to seek" this further relief from the Munsif of Bulandshahr, or they were not. If they were not, it was because of the provisions of section 167 of the Agra Tenancy Act. To my mind this is a reason why the learned Munsif should have refused to entertain the suit altogether, and not a reason for his admitting a plaint which, as it stands and considered apart from the provisions of section 167 aforesaid, offends against the proviso to section 42 of Act I of 1877.

I have not thought it necessary to follow my learned colleague through his elaborate and valuable analysis of case-law. I doubt if this Court has always been perfectly consistent in its decisions on this most important question of jurisdiction. I would rule out as irrelevant all cases in which questions of proprietary title have been in issue: there are special provisions in the Tenancy Act for dealing with such cases, and the decisions must turn ultimately on those special provisions. The case of *Sri Mahanta Bramha Khushal* v. *Sumera* (5) is to my mind the one most nearly in point. I agree with my learned colleague that the facts are not quite the same; but the principle seems to me to govern the present case. In that case the plaintiff had allowed his appropriate remedy under the Tenancy Act to slip; in this case the plaintiffs have tried it and failed.

For these reasons I would accept this appeal and dismiss the plaintiffs' suit with costs in all Courts, including in this Court fees on the high scale.

BY THE COURT.—Order of the Court is that this appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

SRIMUTTY RANIMONI DASSI *v.* RADHAPRASAD MULLICK.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 30, 1914.

Present:—Lord Moulton, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

SRIMUTTY RANIMONI DASSI AND ANOTHER—APPELLANTS

versus

RADHAPRASAD MULLICK AND OTHERS —RESPONDENTS.

Hindu Law—Will—Construction—Survivorship—Succession.

In a Will in favour of two daughters with benefit of survivorship among themselves there was a provision that in the case of the death of either daughter leaving sons the share of such daughter would be paid to her sons:

Held, that on the death of one of the daughters her sons, who were born during the testator's life-time, would take the share of their mother in which she had got a life-interest.

The question of the rights of the sons born or adopted after the death of the testator was left open.

Appeal from a judgment and decree of the Calcutta High Court dated August 1st, 1910, reversing the order of the Calcutta High Court in its Ordinary Original Jurisdiction dated March 4th 1910.

FACTS are fully set out in the judgment appealed against and reported in 8 Ind. Cas. 1061. Briefly they are as follows:—

One Hari Das Dutt made a Will in October 30th, 1875, and died leaving him surviving his widow, Srinomoni Dasi, and two daughters, Ranimoni and Premoni Dasi. Srinomoni adopted a son, but the adoption was declared invalid and this declartion was confirmed by the Privy Council in 1900. On the death of the widow of the testator Ranimoni, whose husband had adopted one Jugul Kissen Sen, brought a suit for a declaration that she and her sister Premoni were entitled to one-half of the estate as absolute owners. In 1908 on appeal the Privy Council [*Radha Prasad Mullick* v. *Raneemani Dassee*(1) decided that the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons. Premoni Dasi died on May 8th, 1909, and one of her two sons Radha Prasad Mullick brought a suit for a declaration of his and Kasi Prosad Mullick's rights as the only sons born in the life-time of the testator, thereby excluding Peary Lal Mullick and Behary Lal Mullick who were born after the death of the testator, and that Ranimoni Dasi was not entitled to succeed to her deceased sister's share by survivorship. The application was dismissed. On appeal the judgment of the lower Court was reversed and held that there was no right of survivorship because the deceased left sons and that after referring to sections 100 and 102 of the Succession Act, it was further held that the share of the deceased daughter passed on to her sons who were in existence at the time of the testator's death. The appeal was then preferred by Ranimoni Dasi and her adopted son, Jugul Kissen Sen, to the Judicial Committee.

(1) 35 I. A. 118; 35 C. 896; 12 C. W. N. 729; 8 C. L. J. 48; 10 Bom. L. R. 604; 5 A. L. J. 460; 18 M. L. J. 287; 4 M. L. T. 23.

Sir *Robert Finlay*, K. C., and Mr. *Brown*, for the Appellants, contended that the moiety of the said estate enjoyed by Premoni Dasi for her life had passed by survivorship to the first appellant and that the Court was wrong in holding that no grandson of the testators born after the death of the testator could take under the Will

Reference was made to Mayne's Hindu Law, paragraph 559, page 762.

Messrs. *DeGruyther*, K. C., and *Dunne*, appeared for the Respondents but were not called on.

Messrs. *Ross*, K. C., and *O'Gorman*, watched the proceedings on behalf of Peary Lal and Behary Lal Mullicks.

JUDGMENT.

LORD MOULTON, J.—Their Lordships have had an opportunity of considering the judgment of the Court below on the question as to whether on the death of the younger daughter leaving male issue the estate passed over for life to the elder daughter, and they are of opinion that it is correct, and is based on correct reasons. They will, therefore, humbly advise His Majesty to dismiss this appeal.

With regard to the contention of the appellants that the Court was wrong in holding that no grandchildren of the testator born, or adopted, after the death of the testator on 30th October 1875 could take under his Will, their Lordships will not advise His Majesty to make any order except that the present advice is not to prejudice the position of the second appellant if and when such question comes before a Court for decision.

The costs of all parties as between solicitor and client will come out of the estate.

Solicitors for the Appellant: Mr. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Wathins & Hunt, Gush, Phillips, Walters & Williams.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 4, 1914.

Present:—Lord Moulton, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

CHIDAMBARAM CHETTIAR—APPELLANT

versus

SRINIVASA SASTRIAL AND OTHERS—RESPONDENTS.

Assignment—Transfer of decree to one creditor—Consideration—Arrangement—Absence of bona fides—*Validity—Practice.*

A, a decree-holder, who was indebted to various persons, assigned a decree for Rs. 14,000 to *B*, one of his creditors, and thus he paid off *B* and two other creditors and received himself Rs. 7,775 before the Sub-Registrar. This amount was admittedly returned to *B* and an arrangement was entered into by which *B* himself received Rs. 610 and Rs. 1,000 was given to one *C* and Rs. 5,838 to *D* and the rest to others. *C* and *D* were not found to be his creditors:

Held, that both the said transactions were fraudulent and void and no valid proceedings could be based on either of those transactions.

A deed is void against a creditor when his debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. It is not sufficient to render a deed valid that it should be made upon good consideration, for "a good consideration does not suffice if it be not also *bona fide*."

Their Lordships pronounced no opinion on the question whether any of the parties could establish rights based, not on the transactions, but on other grounds, such as the actual payment of debts, as the point was neither before the Courts below nor before them.

Consolidated appeals heard *ex parte* against the decretal orders of the High Court dated July 18th, 1906, affirming the judgments of the Subordinate Court of Kumbakonam, dated December 23rd, 1901, and September 27th, 1902.

FACTS.—For fuller facts see 16 M. L. J. 427; 1 M. L. T. 351 where the judgment appealed against is reported.

One Sami Iyer had a decree which he sold to Ramnathan Chettier for Rs. 15,000, arranging that Ramnathan's decree against Sami Iyer, *inter alia*, should be satisfied out of it. Subsequently Ramnathan Chettier sold this assignment to the appellant who presented a petition to the Subordinate Court of Kumbakonam for the execution of the said decree assigned. Other creditors of Sami Iyer opposed this petition on the ground of fraud and collusion to defeat and delay their claims. The Subordinate Court dismissed the petition. Thereupon the appellant brought a regular suit in the Subordinate Court for a declaration of his right to execute the said decree and for an injunction restraining the respondents from drawing out of Court the decretal moneys which stood then. This was dismissed on the ground that the proper remedy was to have appealed against the order dismissing the petition. Two appeals were then preferred at the High Court, one against the dismissal of the petition and the other against the dismissal of the regular suit. The High Court having dismissed the appeals, the appellant appealed to the Privy Council.

Mr. *DeGruyther, K. C.*, (with him Mr. *Kenworthy Brown*), for the Appellant, contended that the assignment was not made with intent to defeat or delay the creditors of Sami Iyer and that there was no evidence to that effect. The assignee took the consignment in good faith without notice of any such intent and for consideration—which right of the assignee was vested in the appellant. Even if there were any fraud in the contemplation of original parties, the appellant was not privy to it, nor had he any notice thereof. The assignment, therefore, could not be vitiated.

The respondents did not appear.

JUDGMENT.

LORD MOULTON.—Their Lordships are of opinion that the two decisions appealed against are correct; that the High Court acted rightly in setting aside the two assignments, the one to Annamalia and the other to Chidambaram, and that no valid proceedings can, therefore, be based on either of those assignments. The question whether any of the parties can establish rights based, not on the assignments, but on other grounds, such as the actual payment of debts, is a

point which was, in their Lordships' opinion, not before the Courts below, and is not before their Lordships, and on that point, therefore, they pronounce no opinion.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be dismissed.

Appeals dismissed.

Solicitors for the Appellant: Messrs. *Chapman Walkar & Shephard.*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

February 6, 1914.

Present:—Lord Shaw, Lord Moulton and Mr. Ameer Ali.

Lala BRIJ LAL—APPELLANT

versus

Musammat INDA KUNWAR AND OTHERS—RESPONDENTS.

Hindu Law—Alienation by widow—Legal necessity—Onus of proof—Nature of evidence—Recitals in deed, whether sufficient evidence of necessity—Evidence—Witnesses, statements of—Discrepancies on material point, effect of.

The onus of supporting a sale by a Hindu widow is on the purchaser and there must be evidence to prove legal necessity as would bind the husband's estate. Recitals in mortgages or deeds of sale with regard to the existence of necessity for alienation are not evidence by themselves of the fact and in order to substantiate the allegation there must be some evidence *aliunde.*

Discrepancies in the statements of witnesses on material points should not be lightly passed over, as they seriously affect the value of their testimony.

Appeal from a judgment and three decrees of the High Court, two dated December 23rd 1909, and the third dated March 8th, 1910, which partly affirmed and partly reversed those of the Court of the Subordinate Judge of Barielly, dated November 27th, and December 23rd, 1907.

FACTS.—One Kundan Lal had two sons, Sham Lal, who was married to Nimma, and Mihin Lal, whose son Lila Dhar had married Rukmin, and (it was alleged) a daughter, Bhauna, who was married to Hulas Rai, one of whose sons was Dhal Chand, husband of Bhauna in the suit. The plaintiff, *Musammat* Inda Kunwar, claimed the possession on redemption of 10 *biswas* of *Mauza* Khilchipur in the capacity of a representative of the reversionary heirs of Sham Lal, Lila Dhar and Dhal Chand, on the death of Nimma and Rukmin. Mihin Lal and Sham Lal having died in 1853 and 1859 were succeeded by their widows, Nimma and Rukmin. In 1862 half the share in 10 *biswas* was transferred to Dhal Chand and in 1871 the whole of 20 *biswas* of Khilchipur was mortgaged to Lala Ram for 12 years by way of usufructuary mortgage by Nimma, Rukmin and Dhal Chand. On the death of Dhal Chand his widow Bhauna effected several transfers and died in 1905. The question was that the transfers by the three widows, Nimma, Rukmin and Bhauna were without legal necessity and, therefore, could not bind the reversioners of their husbands' estate. On behalf of the defendants, it was contended that Kundan Lal had no daughter and that the plaintiff was not the reversionary heir of Mihin Lal and Sham Lal. The name of Dhal Chand was by mistake entered in the mortgage-deed of 1871 and that his wife Bhauna obtained possession of 10 *biswas* as a mere trespasser. The sale by her was made in lieu of lawful debt. Nimma and Rukmin also sold the property in dispute to pay off a lawful debt. Both Nimma and Rukmin having died more than 12 years before the institution of the suit, the right of the reversionary heir was barred by limitation.

The Subordinate Judge held that the plaintiff was the reversionary heir of Dhal Chand only and that the mortgage of 1871 was binding on her. He further held that the alienation by Dhal Chand's widow was for necessity and gave a decree for the redemption of 2 *biswas* only. On appeal to the High Court it was held that neither the alienation to Dhal Chand nor the mortgage of 1871 was for legal necessity nor was the suit for re-recovery of the property in question barred by limitation. The plaintiff was held entitled to the whole of 20 *biswas.* The defendants then appealed to the Privy Council.

Sir *E. Richards*, K. *C.* (with him Mr. *Dube*), for the Appellant, argued that the plaintiffs had not proved that they were the descendants of Kundan Lal's daughter. All the documents which related to family transactions, by way of sale and mortgages, were silent upon the point. The sale and mortgages were for legal necessity as was

evident from the deeds themselves. They were admissible under section 32 of the Indian Evidence Act. The documents might be sent for to see how the things were. Both Nimma and Rukmin must be presumed to have died more than 12 years ago and, therefore, the suit was barred by limitation.

[MR. AMEER ALI.—The whole thing turns upon the point whether there was legal necessity or not].

Reference was made to sections 32 and 108 of the Indian Evidence Act, and to Articles 140, 142, Schedule II of the Indian Limitation Act of 1877.

Mr. *DeGurytherr, K. C.*, (with him Mr. *Parikh*), for the Respondent, contended that there were documents which the Subordinate Judge ought not to have used.

[LORD MOULTON.—Documents came from proper custody: You must then show that you objected to their being admitted].

The original was never shown.

[MR. AMEER ALI.—A suit by a reversioner to redeem a mortgage 12 years after the death of the widow is not maintainable].

That was not the point, as a suit would be brought as long as there was a survivor. Execution decrees were not binding upon reversioners. The sale by a Hindu widow was invalid unless shown to have been actuated by necessity as understood in the Hindu Law. Mere borrowing money was no proof that necessity existed.

Reference was made to *Maheshar Bakhsh Singh* v. *Ratan Singh* (1) *Deputy Commissioner of Kheri* v. *Khanjan Singh* (2).

Sir *E. Richards* replied and referred to *Musammat Lal Kunwar* v. *Chiranji Lal* (3).

JUDGMENT.

MR. AMEER ALI.—The suits which have given rise to this consolidated appeal from three decrees of the High Court of Allahabad relate to a property called *Mouzah* Khilchipur lying in the District of Rae Bareilly in the United Provinces of India.

The *mouzah* is now in the possession of the defendant-appellant under a usufructuary mortgage executed in 1871 in favour of his ancestor Madhoram by two Hindu ladies, Rukmin and Nimma, and one Dhal Chand. Other titles were created subsequently in favour of Madhoram or his son Darbari Lal to some of which reference will be made in the course of this judgment. But the plaintiffs' claim to possession depends principally on their right to redeem the mortgage of 1871.

Mouzah Khilchipur belonged originally to one Kundan Lal; he died many years ago, leaving two sons Mihin Lal and Sham Lal who, it is not disputed, were joint in food and estate. Mihin Lal died in 1853, and Sham Lal in 1859, leaving his widow Nimma and a nephew named Lila Dhar, Mihin Lal's son. On Sham Lal's death the whole property devolved on Lila Dhar. Lila Dhar died in 1861 when Rukmin, his widow, became the owner, taking a widow's estate under Hindu Law. But although Rukmin as the widow of the last full owner was entitled to the entire property, it would appear that Sham Lal's widow claimed, or was acknowledged, to possess an equal interest with Rukmin. In 1862 the two widows jointly sold a half or 10 *biswas* share of the village to Dhal Chand who is said to have been Rukmin's manager. In 1871, the three, Dhal Chand, Rukmin, and Nimma executed the usufructuary mortgage referred to above for a period of twelve years in respect of the entire *mouzah* represented as 20 *biswas* in favour of Madhoram, the conditions being that at the end of the term the debt would become satisfied and the mortgagors would recover the property without payment of the "principal mortgage money" or interest. Dhal Chand died, it is said, in 1873, and in 1874, his widow, Bhauna, sold the equity of redemption in respect of eight *biswas* out of the 10 *biswas* he had acquired from Rukmin and Nimma to the son of Madhoram, Darbari Lal, and his widow, Chando, one of the defendants in the present suits. The equity of redemption in respect of the remaining two *biswas* was sold in execution of a decree against Bhauna, and passed ultimately into the hands of the Appellant.

(1) 23 I. A. 57; 23 C. 766.

(2) 34 I. A. 72; 29 A. 331; 5 C. L. J. 344; 9 Bom. L. R. 591; 4 A. L. J. 232; 17 M. L. J. 233, 11 C. W. N. 474; 2 M. L. T. 145; 10 O. C. 117 (P. C.).

(3) 5 Ind. Cas. 549; 37 I. A. 1; 7 M. L. T. 57; 14 C. W. N. 285; 11 C. L. J. 172; 12 Bom. L. R. 244; 32 A. 104; 20 M. L. J. 183 (P. C.); (1910) M. W. N. 81.

It is unnecessary for the determination of this appeal to refer to the subsequent transactions by which Madhoram's son acquired the equity of redemption in respect of the 10 *biswas* that had remained in the hands of Rukmin and Nimma after the sale of the moiety to Dhal Chand.

The Brahman plaintiffs claim to be the reversioners of both Lila Dhar and Dhal Chand. They allege that Bhauna, Dhal Chand's widow, died in 1905, Nimma in 1906, and Rukmin a few years ago, and that upon their respective deaths whatever rights they had purported to create in favour of Madhoram came to an end, and they are entitled to possession of the entire property. They have transferred a moiety of the *mouzah* with all the appurtenant rights to Inda Koer, who brings one suit in respect of the share purchased by her, whilst the Brahman plaintiffs have sued separately for the other share claimed by them.

With regard to the 10 *biswas* Dhal Chand had purchased from Rukmin and Nimma, they allege that the sale of the equity of redemption in respect of eight *biswas* by Bhauna was without legal necessity and that the execution sale of the two *biswas* was in respect of a personal decree against her, and that, consequently, neither transaction is binding against them.

The contesting defendants, the representatives of Madhoram, denied that the Brahman plaintiffs were the reversioners of either Lila Dhar or Dhal Chand; that their claim was barred by the Statute of Limitations, as Rukmin, the widow of the last full owner, died more than twelve years before suit, and that even if the Brahman plaintiffs were the reversioners of Lila Dhar or Dhal Chand, the transactions impugned by them were for legal necessity and consequently binding against them. The two suits were tried together, and although in consequence of the decree of the Subordinate Judge there were three separate appeals to the High Court, they were heard together; and subsequently on an application for leave to appeal to His Majesty in Council, all three appeals were consolidated. The case has thus come before their Lordships as a single consolidated appeal. Their Lordships propose, therefore, in order to avoid confusion, to deal with the two suits as one consolidated action from the outset. The Trial Judge was of opinion that the evidence produced to establish the relationship of the Brahman plaintiffs to Lila Dhar was wholly untrustworthy. He, therefore, did not consider it necessary to enter upon an inquiry as to the time of Rukmin's death.

He held, however, that the Brahman plaintiffs (save Lachman) were the reversioners of Dhal Chand, being his brother's sons; that the sale of the equity of redemption by Bhauna in respect of eight *biswas* was for legal necessity, but that there was no proof that the sale by auction of the two *biswas* in execution of the decree against her was "in satisfaction of a debt contracted by her for legal necessity." He accordingly made a decree in Inda Koer's suit for the redemption of the mortgage of 1871, in respect of two *biswas*, and dismissed the rest of her claim as well as the claim of the Brahman plaintiffs in their suit.

From these decrees there were, as already observed, three appeals to the High Court; one by the defendants in respect of the two *biswas*, and the two others by the two sets of plaintiffs, namely, Inda and the Brahmans respectively.

As regards the relationship of the Brahman plaintiffs to Lila Dhar, the learned Judges of the High Court have come to a diametrically opposite conclusion to the Trial Judge. They hold that it is satisfactorily established they are the descendents of one Bhauna, *alias* Mulo, a daughter of Kundan Lal, and, therefore, related as *bandhus* to Lila Dhar, Rukmin's husband. They have further held that the sale by Rukmin and Nimma in 1862 to Dhal Chand, the mortgage of 1871 by these three to Madhoram, and the sale of the equity of redemption by Bhauna, Dhal Chand's widow, in respect of eight *biswas*, were without legal necessity. They have also held that Rukmin was alive within twelve years from date of suit. They accordingly reversed the decree of the Trial Judge by which he had dismissed the plaintiff's claim in respect of eighteen *biswas*, and affirming his order in respect of the two *biswas*, made a decree in favour of the plaintiffs in both suits.

BRIJ LAL *v.* *Musammat* INDA KUNWAR.

In the present appeal the defendant Brij Lal, the grandson of Madhoram, challenges all the conclusions of the High Court. The case as presented at their Lordships' Bar is divisible into two parts, one relating to the reversionary right to Dhal Chand's estate, the other to Lila Dhar's. It is not disputed now that the Brahman plaintiffs, including Lachman, are the sons of Dhal Chand's brothers, and are, therefore, entitled to his estate on the death in 1905 of his widow Bhauna. The only question for determination on this part of the case is whether the sale by Bhauna of the equity of redemption in respect of the eight *biswas* was for legal necessity. The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the appellant has adduced no evidence to prove legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale-deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*.

In these circumstances their Lordships are of opinion that the conclusion of the High Court with regard to the sale by Bhauna of the equity of redemption in respect of the eight *biswas* is well founded.

Respecting the other two *biswas* which belonged to Dhal Chand, there is a concurrent finding of fact by the two Courts that the decretal debt in execution of which it was sold was not for legal necessity. In the result, therefore, as regards the share purchased by Dhal Chand from Rukmin and Nimma in 1862 and which he jointly with them mortgaged in 1871 to Madhoram, the Brahman plaintiffs, as reversioners of Dhal Chand, are entitled to the same.

The position respecting the other 10 *biswas* seems to their Lordships quite different. The right of the plaintiffs to that share rests on the allegation that they are the grandsons of one Bhauna *alias* Mulo, who was a daughter of Kundan Lal and the sister of Sham Lal and Mihin Lal. There is no documentary evidence in support of the statement that the wife of Hulas Rai, the grandfather of the plaintiffs, was a daughter of Kundan Lal. It was natural to expect that in 1862, when Rukmin and Nimma sold a moiety of the property to Dhal Chand, the uncle of the plaintiffs, on which occasion the relationship of Lila Dhar, Rukmin's husband, was stated, with some particularity, a reference should be made to the vendee's connection with the family. Other documents of a similar nature are equally silent. As observed already, the plaintiffs' allegatien rests entirely on oral testimony. Having regard to the divergence of opinion between the two Courts in India with respect to the credibility of the plaintiff's witnesses, their Lordships have closely examined the evidence, and they cannot help considering it to be of a very dubious character. The witnesses had to prove only one link in the chain of relationship; the discrepancies, therefore, in their statements on material points, which have been somewhat lightly passed over by the High Court, seriously affect, in their Lordships' opinion, the value of their testimony. Their Lordships agree with the Trial Judge in considering the evidence as to Mulo being a sister of Sham Lal and Mihin Lal as worthless. In this view of the case, it is hardly necessary to determine whether Rukmin was alive or not within twelve years from date of suit. Admittedly she left her home many years ago. The plaintiffs alleged she went on a pilgrimage, and was last heard of eight or nine years before the action. The defendant, on the other hand, says she had to leave her home a considerable time before owing to having been outcasted for unchastity. Most of the wtinesses who speak to her being recently alive state they obtained their information from Het Ram, one of the plaintiffs, who has not thought fit to enter the witness-box. On the other had, there are some corroborative circumstances which incline their Lordships to believe that Rukmin left the village in consequence of her lapse, and died many years ago in a distant relative's home.

On the whole it appears to their Lordships that the plaintiffs have failed to establish their right to recover possession of the remaining 10 *biswas*, as reversioners to Rukmin's husband. The decree of the High Court in the suit of Inda Koer omits, however, from consideration the covenant in

the deed of mortgage which provides that at the time of redemption the mortgagors:—

"shall be liable for the amount of arrears and the amount of *takavi* advances and the amount advanced on account of seed which may be due to the mortgagee by the tenants of the village according to the entries in the *patwaris'* papers."

Their Lordships are of opinion that the decrees of the Courts in India should be dischaged, that the claim of the Brahman plaintiffs in their suit should be dismissed, and in the suit of Inda Koer, who has acquired the 10 *biswas* which alone the Brahman plaintiffs had a right to sell, there should be a declaration that she is entitled to recover possession of the same from the defendant-appellant, with mesne profits as provided by law, less any sum that may be found due to the mortgagee defendant upon the taking of proper accounts on the basis of the above recited covenant within a time to be specified by the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Considering the result, they think the ends of justice will be served by making the parties bear their respective costs in the appeals to the High Court and to this Board.

Decrees discharged.

Solicitors for the Appellant: Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondents: Mr. *Edward Dalgado.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 34-B OF 1913.

October 27, 1913.

Present:—Mr. Mittra, Offg., A. J. C.

SHEO LAL—APPELLANT

versus

Musammat SHEORAJIA—RESPONDENT.

Prescription—Person claiming limited interest entering upon land—Prescription cannot confer better title—Hindu Law—Succession—Daughter-in-law.

When a person enters on land under a title as heir, which is necessarily a limited title, very cogent evidence is necessary to show that the said person afterwards asserted a title as absolute owner.

A person in the position of a Hindu widow may claim only a limited interest, and when she does so, the interest claimed is all that is acquired by prescription.

A Hindu daughter-in-law in Bombay does not succeed as an absolute owner nor does she in Berar.

Appeal against the decree of the District Judge, East Berar, dated the 23rd August 1912, confirming that of the Subordinate Judge, Ellichpur, dated the 7th March 1912.

Sir *Bepin Krishna Bose* and Mr. *J. C. Ghosh*, for the Appellant.

Mr. *P. S. Kotwal*, for the Respondent.

JUDGMENT.—The parties are Kanaoj Brahmins from the United Provinces and it is now admitted that they are governed by the Benares School of Hindu Law. They are settled in Berar where the Bombay School of Law prevails. It has been now found that the property in suit was acquired by Chuniabai, widow of Chandidin, and must be treated as her *stridhan.* Chuniabai died in 1889, leaving a daughter, the present defendant, and a daughter-in-law, *Musammat* Parwati, widow of her pre-deceased son, Sheobhajan. The plaintiffs are the brothers of Chandidin, husband of Chuniabai. There can be no doubt that the defendant was the sole heir to Chuniabai's estate on the latter's death, neither *Musammat* Parwati nor the plaintiffs having any title to it. Parwati, however, entered into possession and remained in possession till her death in 1908. The plaintiffs' case is that Parwati acquired an absolute estate by adverse possession, and that the plaintiffs are the heirs to her *stridhan* property, being the nearest *sapindas* of her husband. The defendant does not deny that the plaintiffs would be the heirs to any heritable estate acquired by Parwati. The Courts below have dismissed the plaintiffs' claim on the ground that Parwati's possession was not adverse to the defendant.

In my opinion the finding of the lower Courts as to the nature of Parwati's possession cannot be upheld. The reason which has mainly induced the lower Courts to adopt this view is that the defendant was a minor at the time of her mother's death, that she lived with *Musammat* Parwati even after her marriage and was maintained out of the estate. But Parwati appeared before the Revenue Court and claimed title as daughter-in-law of the deceased, ignoring

entirely the minor's existence. There is nothing on the record to bear out the suggestion that she entered as guardian or trustee on behalf of the defendant. She never relinquished possession on the defendant's marriage or even after the latter had attained majority. She leased out the property from year to year. She certainly regarded herself as an owner—whether an absolute owner or one with a limited interest will be discussed later. Under the law she had not a claim for even maintenance on the estate of her mother-in-law, and yet it was the defendant who was treated as a person having only a legal or moral claim for maintenance. I hold that Parwati's possession was in the character of an owner and not as trustee for the defendant. The possession was, therefore, adverse to the defendant.

The question to be discussed now is the nature of the estate acquired by *Musammat* Parwati. It is clear that the defendant succeeding to her mother's *stridhan* property would acquire a limited estate under the Benares School of Hindu Law [*Sheo Shankar Lal* v. *Debi Sahi* (1), *Sheo Partab Bahadur Singh* v. *Allahabad Bank Ld.* (2)]. By excluding the defendant, Parwati could not acquire an interest which would affect the rights of the reversioner, that is the defendant's son; but his right to possession will accrue under Article 141 of the Limitation Act on his mother's death. The suit for possession, however, will have to be decreed for the present, unless Parwati claimed merely a Hindu widow's estate. The judgment of their Lordships of the Privy Council in *Lachhan Kunwar* v. *Manorath Ram* (3) shows that a person in the position of a Hindu widow may claim only a limited interest and when she does so, the interest claimed is all that is acquired by prescription. If Parwati claimed a Hindu widow's limited interest, there is no question of succeeding to her estate. We shall in that case have to find out who are the heirs to the last full owner, Chuniabai, and admittedly the defendant is that heir.

The important and somewhat difficult question now to be determined is whether Parwati claimed an absolute or a limited estate. She did not enter on the land as a trespasser. She claimed title as daughter-in-law. Such a claim would be easily recognised in Berar where the Bombay law is followed. This, in my opinion, accounts for the report made by the Patel and the Patwari and the order passed by the Tahsildar. But the daughter-in-law in Bombay does not succeed as an absolute owner nor does she in Berar. She never attempted to sell or mortgage any portion of the estate. The leases given were either yearly leases or leases for short terms. She never attempted to make a gift of any portion of the property. It is true that on her death-bed she attempted to make a Will in favour of the defendant who would be equally heir without the Will. I cannot attach any importance to this as it was after all a recognition of the defendant's right to succession under the law. The Will or its draft is not on the record. The evidence on the point does not show that she believed that she could leave even legacies to others. When a person enters on land under a title as heir which is necessarily a limited title, as in the present case, very cogent evidence is necessary to show that she afterwards asserted a title as absolute owner. On the whole I think Parwati merely claimed a daughter-in-law's limited interest, and on her death, her estate came to an end. The view I have adopted is in accordance with my learned predecessor's judgment in *Ramprasad* v. *Dayaram* (4). I have already pointed out that if there is no question of succession to any estate acquired by Parwati, the defendant would come again as her mother's heir. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 25 A. 468; 5 Bom. L.R. 828; 13 M. L. J. 330; 7 C. W. N. 831; 30 I. A. 202 (P. C.).

(2) 25 A. 476; 13 M. L. J. 336; 5 Bom. L.R. 833; 7 C. W. N. 840; 30 I. A. 209 (P. C.).

(3) 22 C. 445; 22 I. A. 25.

(4) Second Appeal No. 365 of 1911.

KERAMUDDIN SARKAR *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1987 OF 1913.
January 23, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
KERAMUDDIN SARKAR—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 112, 113, 117—Good behaviour—Security—Warrant case—Opportunity to bring witnesses.

In a proceeding under section 110 of the Criminal Procedure Code, the accused person must have time to bring his witnesses and have their evidence recorded. Where the accused had not had this opportunity, the order against him must be set aside.

Rule against the order of the Sub-Divisional Magistrate of Thakurgaon, dated November 5th, 1913, directing under section 110, Criminal Procedure Code, the petitoner to execute a bond in his own recognizance in Rs. 500 with two sureties in Rs. 500 each, to be of good behaviour for one year, or in default to undergo rigorous imprisonment for one year, an appeal from which order was dismissed by the District Magistrate of Dinajpur on December 8th, 1913.

Mr. *C. R. Das*, Counsel, Dr. *Suhrwardy*, Counsel, and Babu *Atulya Charan Bose*, Vakil, for the Petitioner.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Dinajpur to show cause why the order under section 110, Criminal Procedure Code, passed against the petitioner should not be set aside, *firstly*, on the ground that the provisions of section 112 have not been complied with inasmuch as the substance of the information received from the Police has not been recorded and the accused person had no notice thereof; and, *secondly*, that the case is triable as a warrant case and the accused had a right to have the witnesses properly cross-examined and to have processes issued on any witnesses he desired to call in defence. The Rule could have been stated more shortly by saying that it had not been heard, *firstly*, with reference to the provisions of section 112 and, *secondly*, with reference to the provisions of section 117.

As regards the alleged breach of the provisions of section 112 the learned Magistrate points out in his explanation that he has followed the letter of sections 112 and 113. There was a proceeding drawn up. The person in respect of whom it was drawn up was present in Court and it was read over to him and the substance explained to him. But the conditions in which he was present in Court are rather different to what is the ordinary practice. He was only present in Court because he had been brought there by a Policeman after being locked up all night. He, therefore, certainly had no opportunity of producing his defence witnesses; and even if we were inclined to discharge the Rule as regards section 112, the disregard of the provisions of section 117 is quite fatal to the case. That section provides that in proceedings under section 110 the procedure for warrant cases shall, as far as possible, be adopted, and that means, as it obviously must mean, that a person who has such a serious charge alleged against him must have time to bring his witnesses and have their evidence recorded. In the present case it appears that the accused had no opportunity of choosing and producing his own evidence or having them produced by summons. He had no chance of choosing his own legal adviser, the learned Magistrate having come out from the station accompanied by a single *Mukhtear* who, as it happened, was able to appear on behalf of the accused, although, of course, he knew nothing about his case. The only witnesses he could have examined were the by-standers who happened to have gathered round the Cachery out of curiosity, and it cannot be said that those were the witnesses whom he voluntarily chose in his defence.

The proceedings clearly show that the man had not anything like a fair trial, and the order under section 110 must, therefore, be set aside, and if it is necessary to take further proceedings these proceedings must be taken with due regard to the spirit as well as to the letter of the law.

The petitioner will be discharged from the security bond.

Rule made absolute

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 127 OF 1914.

March 11, 1914.

Present:—Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

NANHUA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 208, 350, 528—Transfer of case from one Magistrate's Court to another—Commitment on evidence recorded by Magistrate from whose file case was transferred—Jurisdiction.

After the prosecution evidence in a case under section 324, Indian Penal Code, was recorded by a second class Magistrate, the District Magistrate transferred the case to a 1st class Magistrate who, acting on the evidence which had already been recorded by the 2nd class Magistrate, committed the accused to the Court of Session:

Held, that the order of commitment was not illegal.

Queen-Empress v. *Bashir Khan*, 15 A. 346, referred to.

Queen-Empress v. *Angnu*, A. W. N. (1889) 130, not followed.

Mohesh Chandra Saha v. *Emperor*, 35 C. 457; 12 C. W. N. 416; 7 Cr. L. J. 220; 7 C. L. J. 488 and *Palaniandy Goundan* v. *Emperor*, 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146, followed.

Reference submitted by the Sessions Judge, of Budaun, as per his letter No. 72/III dated 7th February 1914.

The *Assistant Government Advocate*, for the Crown.

OPINION.—This is a reference by the Sessions Judge of Budaun asking this Court to quash a commitment for trial to his Court by a first class Magistrate of that District. The learned Sessions Judge is of opinion that the order of commitment was made without jurisdiction and is consequently bad in law. It appears that the case was one in which action was first taken in respect of an alleged offence under section 324, Indian Penal Code. It was before a Bench of Magistrates exercising second class powers and not empowered to commit an accused person for trial to the Sessions. The District Magistrate, acting under section 528, Criminal Procedure Code, transferred the case to a Magistrate of the first class. The latter, acting on the evidence which had already been recorded by the Bench of Magistrates, framed a charge under section 326, Indian Penal Code, and passed an order committing the accused for trial to the Court of Session. It does not appear that the accused demanded to have the witnesses or any of them re-summoned and re-heard the presumption is that they did not. The order complained of is an order of commitment, and it seems to me at least open to question whether the Sessions Judge had any concern with the nature of the evidence on the strength of which the Committing Magistrate had seen fit to pass the order. It certainly could not be said that the order was without jurisdiction after the Committing Magistrate had become duly seized of the case in consequence of the order under section 528, Criminal Procedure Code. The Sessions Judge says that the provisions of section 350 would not override those of section 208, Criminal Procedure Code, but with this general proposition I am unable to agree. In any case section 350, Criminal Procedure Code, undoubtedly applies to a Magistrate succeeding, within the meaning of that section, who may act upon the evidence recorded by his predecessor, and his action may take the form of framing a charge and committing the accused for trial. It has, however, been doubted whether section 350, Criminal Procedure Code, applies at all to cases which have been transferred from one Court to another under section 528, Criminal Procedure Code. In *Queen-Empress* v. *Bashir Khan* (1) a Judge of this Court seems to have assumed that for a Magistrate to proceed after an order of transfer upon the evidence which he found already on the record was at least an irregularity. In that case, however, it was distinctly held that the accused had been prejudiced by the course adopted by the Magistrate to whom the case had been transferred. In the present case, assuming that the evidence on the record, if true, does disclose the commission of an offence punishable under section 326, Indian Penal Code, it does not seem to me that the accused can be said to have been in any way prejudiced. The evidence will have to be taken before the Court of Session and the accused will have every opportunity of cross-examining the witnesses for the prosecution before that Court pronounces upon his guilt or innocence. There is one case of this Court which has been referred to by the learned Sessions Judge, namely, *Queen-Empress* v. *Angnu* (2) in which the view was taken that the provisions of section 350, Criminal Procedure Code, would not apply at all to a case which

(1) 4 A. 346. (2) A. W. N. (1889) 130.

came before another Court under an order of transfer. This case, however, has recently been considered by a Bench of the Calcutta High Court in *Mohesh Chandra Saha* v. *Emperor* (3) where the Allahabad ruling was dissented from, and it was expressly laid down that section 350, Criminal Procedure Code, is not limited to cases in which Magistrates succeed each other in their offices, but applies also to all cases transferred from the file of one Magistrate to that of another under section 528, Criminal Procedure Code. This case has been followed in *Palaniandy Goundan* v. *Emperor* (4) where stress is laid upon the use of the word "*therein*" in section 350 aforesaid I am content to follow these rulings, more particularly in a case like the present where, as I have already pointed out, no possible question of prejudice to the accused person can be said to arise. I accordingly decline to accede to the reference of the learned Sessions Judge and order the record to be returned.

Reference not acceded to.

(3) 35 C. 457; 12 C. W. N. 416; 7 Cr. L. J. 220; 7 C. L. J. 488.

(4) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 2[illegible]8; 9 Cr. L. J. 146.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 933 OF 1913.

August 7, 1913.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

Mirza HASSAN MIRZA—ACCUSED—PETITIONER

versus

THE EMPEROR ON THE PROSECUTION OF *Musammat* MAHBUBAN—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 211—*Burden of proof—Duty of prosecution to establish charge—Failure of accused to examine witness, if implies guilt.*

The duty of the prosecution in a case under section 211 of the Indian Penal Code is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge.

It is for the prosecution to establish their case, and if they fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular person as a defence witness will not imply the guilt as having been proved.

Where the petitioner, on learning from his wife that the complainant who was living in the house had disappeared with valuables, lodged an information to the Police charging him with theft which was afterwards found to be false, it was *held* that he could not be convicted under section 211 of the Indian Penal Code unless the prosecution established that there was, as a matter of fact, no theft, or that the petitioner knew that there was no theft.

Dr. *Sarwardy* and Moulvi *A. K. Fazl-ul-Haq*, for the Petitioner.

Mr. *Sultan Ahmed*, for the Crown.

JUDGMENT.—The petitioner has been convicted of an offence under section 211, Indian Penal Code, the case against him being that he laid a false information before the Police charging his mother-in-law, *Musammat* Mahbuban, and *Musammat* Langri with stealing properties belonging to him from his house and that the false information was maliciously laid with intent to cause injury to the persons implicated in the case.

The relations between the parties may be shortly stated here. *Musammat* Ghafuran, daughter of *Musammat* Mahbuban, who died sometime before this alleged occurrence, was the widow of one Wajid Hossain. On the death of her husband, she married the petitioner, Mirza Hassan Mirza. *Musammat* Ghafuran, her son named Asgar by her former husband, her sister-in-law, that is a brother's wife *Musammat* Langri, and *Musammat* Mahbuban, all these people seem to have been living with the petitioner in a house in Patna city, the house being the property of Ghafuran. On the death of Ghafuran, her heirs, according to the Muhammadan Law, were entitled to their respective shares in the inheritance, the petitioner as husband being one of them.

The case propounded by *Musammat* Mahbuban was that the petitioner was not the husband of Ghafuran, but had an improper intimacy with her and was only her lover. This statement of Mahbuban has not been believed by the learned Sessions Judge who heard the appeal and the status of the petitioner as husband has been accepted by him. We thus have it that the prosecution in attempting to prove their case against the petitioner started by denying his status in relation to *Musammat* Ghafuran and so, on a very important and material part of the case, the prosecution have set up a false allegation.

The case against the petitioner being that no theft took place, the obligation of proving it rests on the prosecution. We are not satisfied that they have succeeded in establishing by evidence that there was no such theft. The motive alleged for the institution of a false case against Mahbuban and Langri is said to be that the petitioner, claiming the house left by Ghafuran as his own under a purchase made by him from her, attempted to propound two sale-deeds, and finding his difficulty in respect of propounding genuine title-deeds wanted to have evidence of their disappearance and thus falsely alleged against Mahbuban and Langri, that they had removed the sale-deeds along with other properties belonging to the petitioner.

We are not satisfied that the motive alleged against the petitioner is quite sound. According to the evidence in this case, the value of the house does not seem to be much more than Rs. 95. In the absence of a sale-deed, the petitioner would yet be entitled to a one-fourth share in the house as husband of Ghafuran. It seems to us that by laying this information against Mahbuban and Langri and stating therein that the sale-deeds had disappeared, the petitioner, instead of establishing any evidence of the existence of the deeds, was, as a matter of fact, weakening his position by urging that they had been lost or stolen. No doubt, that would have left him an opportunity of adducing secondary evidence as to their contents, but it is also to be borne in mind that they were never alleged to have been registered and, that being so, more than ordinary evidence would be required to prove their contents. In the circumstances, we are not impressed by the motive alleged by the prosecution for the institution of a false case.

The petitioner's case in the first information was that on a certain Eid day, he had been out visiting friends. When he came back to his house, he found his wife, whom he had married on the death of Ghafuran, crying and he learnt from her that Mahbuban, Langri and Asgar had disappeared from the house, that the box containing Government currency notes, jewelleries and the sale-deeds had been broken open and the contents thereof were missing. He then examined the box and found that the valuables contained therein were not there. Thereupon he informed some of his neighbours and started on a search to find out the three absconding persons, but in vain. He at last reported the incident to the Police at the *thana* in Patna city. From the prosecution case, it seems that Mahbuban, Langri and Asgar had been living in the same house with the petitioner and did, as a matter of fact, disappear on the day in question.

The only point that remains to be considered is whether on that day there was a theft or not. It is quite possible that there was no theft; but we require good evidence to satisfy us on the point. The duty of the prosecution in a case under section 211 is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge. That has not been done in this case. The prosecution have not established that there was, as a matter of fact, no theft; nor have they established that the petitioner knew that there was no theft. His case has been from the beginning that he heard from his wife that the three persons had disappeared and that the money, Government currency notes and ornaments in the box were missing. The prosecution have done nothing whatever to prove that there was no such statement by the wife to the petitioner. Had there been such proof, the petitioner would undoubtedly have been guilty of laying a false charge against the persons whom he intended to injure, but that important evidence is wanting in this case.

On behalf of the Crown, it has been contended that the petitioner having entered on his defence and examined the witnesses to prove his case was bound to examine his wife in order to prove his innocence. We may say here that it is for the prosecution to establish their case and if they fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular witness or witnesses will not imply the guilt as having been proved.

We, therefore, make this Rule absolute and set aside the conviction of the petitioner. He will be discharged from his bail.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 681 OF 1913.

CRIMINAL REVISION PETITION No. 552 OF 1913.

March 3, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

M. SUBROYA AIYAR—ACCUSED—PETITIONER

versus

Moulvi KADAR ROWTHAN ABDUL KADAR SAHIB—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499—Defamation—Statement contained in newspaper, when defamatory—"Aggrieved person" meaning of—Criminal Procedure Code (Act V of 1898), s. 198.

Where a statement in a newspaper is true as regards the complainant though untrue as regards others, the complainant is not an "aggrieved person" within the meaning of section 198 of the Code of Criminal Procedure.

An article in a newspaper which is a fair comment on public affairs and is merely an expression of opinion cannot be said to be defamatory, unless it is proved that it was the outcome of a dishonest or corrupt motive.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Chief Presidency Magistrate, Egmore, in Calendar Case No. 15126 of 1913, on the file of the Presidency Magistrate of Georgetown.

Mr. *J. C. Adam*, for the Petitioner.

Mr. *E. R. Osborne* (for Mr. *T. Rangachariar*), for the Respondent.

Mr. *Percy Grant*, for the Government.

ORDER.—The accused was entitled to discuss the qualifications of the complainant and others for Municipal Office, and so long as he abstained from aspersing their private character was entitled to considerable latitude. Read with the context the statement, "among them a single educated man" means no more than that there was none who could speak English or write his mother-tongue *Tamil* without a mistake. It is not disputed that this statement is true as regards the present complainant and in these circumstances we do not think he is a person aggrieved by the publication of these words within the meaning of the section.

The statements that "the Jamath itself is controlled by two or three very well-to-do men" and that "practically the whole of Vaniambady is led for any action against the Municipality by two or three men" are not defamatory at all, as there is no allegation that they were actuated by any dishonest or corrupt motive and, in any case, are fair criticism. The statement, "they knew full well that amongst them there is not a single man fit to be a chairman" must be read with the rest of the sentence, "and that only recently Government passed an order to the effect that the Revenue Divisional Officer only should be the Chairman of the Municipality."

This last statement is admittedly true and the former statement does not exceed the bounds of fair comment upon it. The last statement charged, "Finally I would challenge any one to point out a single non-Official fit to be the Chairman of this unique Municipality which requires a very strong man to guide" is only an expression of opinion on a public question which the writer was entitled to publish.

The conviction must be set aside and the fine if paid must be refunded as well as the Rs. 4-4-0 ordered to be paid to the complainant for costs.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No 1118 OF 1913.

January 20, 1914.

Present:—Justice Sir George Knox, Kt.

DARA—APPLICANT

versus

MUKAT AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 192—Transfer of cases—Practice.

A Magistrate can transfer only those cases under section 192 of the Criminal Procedure Code of which he has taken cognizance under section 190 of the Code, but not those which have been transferred to his Court.

Obiter:—The frequent orders of transfer are objectionable in view of the trouble which they give to witnesses and parties.

Criminal revision from an order of the Sub-Divisional Magistrate of Shahjahanpur.

JUDGMENT.—Cognizance of this case was taken by the Court of the Bench of Magistrates, Jalalabad, and it appears to have remained pending in that Court from

the 14th June 1913, until the 1st of September 1913, or thereabout. It was then transferred by the District Magistrate, as he says under section 17 of the Code of Criminal Procedure, to the Court of Mr. Abdul Halim. Owing to illness on the part of Mr. Abdul Halim the case was transferred to the Court of Babu Jhumak Lal. This order was passed on the 10th of September 1913. Babu Jhumak Lal was an officer in charge of a Sub-division, and he immediately on receipt of the case transferred it to the Court of the Tahsildar of Jalalabad. He professes to have acted under section 192 of the Code of Criminal Procedure. That section refers only to cases of which the transferring Magistrate has taken cognizance, *i.e.*, acted under section 190 of the same Code. It has no reference to cases which have been transferred. The order of transfer was *ultra vires* and the Tahsildar of Jalalabad was without jurisdiction in the case. As the case was compromised, I pass no further orders beyond pointing out that these frequent orders of transfer are objectionable in view of the trouble which they give to witnesses and parties Let the record be returned.

Records returned.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 928 OF 1913.

October 20, 1913.

Present:—Mr. Justice Rattigan and Mr. Justice Chevis.

MULA MAL—ACCUSED—PETITIONER

versus

CHURANJI LAL—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), ss. 193 and 471, offences under—Committed in proceedings before arbitrator appointed by Court—Sanction necessary for prosecution.

A complaint charging a person with offences under sections 193 and 471, Indian Penal Code, alleged to have been committed in proceedings before an arbitrator, under the order of reference made by a Court, cannot be entertained without the sanction of the Court according to section 195 of the Criminal Procedure Code.

Puttiah Chetty v. *P. Veerasamy Mudaly*, 17 M. L. J. 420; 6 Cr. L. J. 331, followed.

Saadut Ali Khan v. *Emperor*, 6 Cr. L. J. 160, 11 C. W. N. 909, referred to.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the District Magistrate, Jullundur, dated the 19th April 1913, affirming that of the Magistrate, 1st Class, Jullundur, dated the 12th March 1913, holding that the complaint can be lodged without the sanction of the Court and proceeding with the case.

Lala *Labhu Ram*, for the Petitioner.

Mr. *Sundar Das*, for the Respondent.

JUDGMENT.—This judgment will cover the connected case, Criminal Revision No. 929 of 1913.

The facts are that there was a civil suit between Mula Mal and Churanji Lal, which was decided after reference to arbitration. Churanji Lal then lodged a complaint, charging Mula Mal with offences under sections 193 and 471, Indian Penal Code, alleged to have been committed in the proceedings before the arbitrator. The objection raised on behalf of Mula Mal was that such charges required the sanction of the Court according to section 195 of the Criminal Procedure Code. These objections were overruled by the learned Magistrate, who held that no sanction was required. Mula Mal applies for revision.

There is a clear authority to the effect that sanction is required in such cases, *viz.*, *Puttiah Chetty* v. *P. Veerasamy Mudaly* (1). The learned Magistrate has distinguished this case on the ground that in this case the documents produced before the arbitrator were attached to the file, and became a part of the Court's file of the case. But the Civil Procedure Code, *vide* 2nd Schedule, paragraph 10, requires all depositions and documents taken and proved before an arbitrator to be filed in Court when an award has been made; so the arbitrator's record finally becomes a part of the Court's record. We fail, therefore, to see any distinction between this case and the Madras case.

The learned Magistrate quotes *Saadut Ali Khan* v. *Emperor* (2), but we fail to see how this case supports the view that no sanction is needed. There the offence was committed before a Commissioner, who happened to be a Magistrate. The High Court held, not that no sanction was required, but that the Court whose sanction was required was that of the Court in which the case was pending and not that of the Magistrate who had been appointed the Commissioner to take evidence on commis-

(1) 17 M. L. J. 420; 6 Cr. L. J. 331.

(2) 6 Cr. L. J. 160; 11 C. W. N. 909.

sion. This case seems to us to tell in favour of the view that sanction is requisite in such cases.

We have no hesitation in following the Madras ruling. We hold that sanction is necessary, and we accept this application and set aside the proceedings of the Magistrate and dismiss the complaint for want of sanction.

We may add that Mr. Sundar Das, who has appeared in this Court for Churanji Lal, has not opposed the application of Mula Mal, stating that his client has come to terms and does not want to carry the proceedings further.

Application accepted.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 99 OF 1913.
July 25, 1913.
Present:—Mr. Justice Imam and Mr. Justice Chapman.

LAKHAN CHANDRA ROY AND OTHERS—2ND PARTY—PETITIONERS

versus

YAKUB MANDAL AND OTHERS—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), Chap. XII, ss. 145, 435, 526, sub-s. (8)—Transfer of case—Case under section 145, Criminal Procedure Code—Whether section 526 applies to proceedings under Chapter XII of Criminal Procedure Code.

The provisions of section 526 have no application to proceedings under Chapter XII of the Criminal Procedure Code. Therefore, a party at a proceeding under section 145 is not entitled to an adjournment of the case under sub-section 8 of section 526.

Lolit Mohan Moitra v. *Surja Kanta Acharjee*, 28 C. 709; 5 C. W. N. 749; *In re Pandurang Govind Pujari*, 25 B. 179; 2 Bom. L. R. 755; *In re Arumuga Tegundan*, 26 M. 188; 12 M. L. J. 391; 2 Weir 678; *Gurudas Nag* v. *Gaganendra Nath Tagore*, 2 C. L. J. 614; 3 Cr. L. J. 83 and *Jaggu Ahir* v. *Murli Shukul*, 15 Ind. Cas. 84; 13 Cr. L. J. 452; 10 A. L. J. 27; 34 A. 533, considered.

Mr. *P. L. Roy* and Babu *Jogendra Nath Mukerjee*, for the Petitioners.

Mr. *B. Chakravarti*, Mr. *Z. R. Zahed* and Moulvi *Sowghat Ali*, for the Opposite Party.

JUDGMENT.—This Rule was issued to show cause why the order passed under section 145, Criminal Procedure Code, should not be set aside on the ground that the Magistrate had no jurisdiction to go on with the proceedings after an application under section 526, Criminal Procedure Code, had been made before him.

The only point that requires to be considered in this case is whether the provisions of section 526 have any application to proceedings under Chapter XII of the Code.

After carefully considering the cases *Lolit Mohan Moitra* v. *Surja Kanta Acharjee* (1), *In re Pandurang Govind Pujari* (2), *In re Arumuga* v. *Tegundan* (3), *Gurudas Nag* v. *Gaganendra Nath Tagore* (4) and *Jaggu Ahir* v. *Murli Shukul* (5) and on considering the effect of the provisions of section 435, Criminal Procedure Code, in respect of proceedings under Chapter XII of the Code, we are of opinion that a party to a proceeding under section 145 is not entitled to an adjournment of the case under sub-section 8 of section 526.

That being our view, the order of the Magistrate refusing to postpone the case to enable the petitioners to come up to this Court under section 526 was not improper and, therefore, the order made under section 145 is not without jurisdiction.

We, therefore, discharge this Rule.

Rule discharged.

(1) 28 C. 709; 5 C. W. N. 749.
(2) 25 B. 179; 2 Bom. L. R. 755.
(3) 26 M. 188; 12 M. L. J. 391; 2 Weir 678.
(4) 2 C. L. J. 614; 3 Cr. L. J. 83.
(5) 15 Ind. Cas. 84; 34 A 533; 13 Cr. L. J. 452; 10 A. L. J. 27.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS PETITION No. 2122 OF 1912.
February 20, 1914.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF TENNEVELLY—PETITIONER

versus

SANKARA PANDIAM PILLAI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195, cl. (6)—Penal Code (Act XLV of 1860), s. 193—Sanction to prosecute given—Complaint not filed within time owing to proceedings in appeal—Application for extension of time—High Court's power to grant—Practice.

MOHAMMAD FAKHRUDDIN v. BHIKHI RAM.

A High Court has power, under section 195, clause (6), Code of Criminal Procedure, to extend the time for the institution of a complaint of perjury when more than six months have elapsed from the date of the order according sanction.

In re Muthukudam Pillai, 26 M. 190; 2 Weir 200, *Karuppanna Servagaran* v. *Sinna Gounden*, 26 M. 480; 2 Weir 201, followed.

Ananta Panda v. *Bhagaban Ramanuja*, 11 Ind. Cas. 246; 12 Cr. L. J. 382, dissented from.

Where delay in instituting such a complaint is due to the act of the person against whom the complaint had to be made, it is not open to him to object to the extension of time, when applied for.

Obiter:—It is not advisable in such criminal matters to delay the disposal of the case simply to wait the return of one of the two Judges to duty who ordered notice to issue to respondent to show cause against extension.

Petition, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to extend the time for filing the complaint for an offence under section 193, Indian Penal Code, against the respondent, herein the appellant, in Civil Miscellaneous Appeal No. 88 of 1911 on the file of the High Court preferred against the order of the District Court of Tinnevelly in Original Petition No. 373 of 1909 (and Miscellaneous Petition No. 134 of 1909 in Original Suit No. 385 of 1907 on the file of the Additional District Munsif of Tinnevelly).

The *Government Pleader*, for the Petitioner.

Mr. *M. D. Devadoss*, for the Respondent.

ORDER.—The respondent's Counsel contends that the High Court has no power to extend the time for the institution of a complaint or sanction, if once the six months' period mentioned in section 195, clause (6), Criminal Procedure Code, has expired. He admits that the cases in *In re Muthukudam Pillai* (1) and *Karuppanna Servagaran* v. *Sinna Gounden* (2) are against his contention, but he relies on two Calcutta cases [the latter *Ananta Panda* v. *Mohant Bhagaban Ramanuja* (3) and the reasons given therein]. We prefer to follow the two decisions of this Court, one of which was decided by two very learned Judges of this Court and the other by the learned Chief Justice. (See also as to the probable intention of the Legislature section 148 of the new Civil Procedure Code).

The next contention is that the respondent has had this threat of prosecution hanging over him for more than four years now and it is inadvisable to extend the time under these circumstances. It is the step which the respondent himself took in preferring an appeal and again a second appeal which caused most of the delay. The office also was responsible for much of the delay which has taken place after the 6th December 1912.

In a criminal matter like the present, it is not advisable to delay the disposal of the case simply for the return to duty of one of the two Judges who ordered the issue of the notice to the respondent to show cause against the extension of time.

We think that an accused should not escape a prosecution for perjury merely by reason of the delay caused in the disposal of the sanction proceedings, and though the complainant need not have waited till the disposal of the second appeal to institute his complaint, his so having waited was not so unreasonable as to justify the refusal of the petition for extension of time to institute his complaint, this petition having been filed very shortly after the respondent's second appeal to the High Court was dismissed. In the cases of *In re Muthukudam Pillai* (1) *Karuppanna Servagaran* v. *Sinna Gounden* (2) also, the fact that no complaint was made before the final order of the highest Court was passed was not treated as disentitling the complainant to obtain an extension of time from the High Court.

In the result we extend the time for the institution of the complaint till the 20th March 1914.

Petition allowed.

(1) 26 M. 190; 2 Weir 200.
(2) 26 M. 480; 2 Weir 201.
(3) 11 Ind. Cas. 246; 12 Cr. L. J. 382.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 178 OF 1913.

February 10, 1914.

Present:—Mr. Justice Ryves and Mr. Justice Piggott.

MUHAMMAD FAKHRUDDIN—OPPOSITE PARTY—APPELLANT

versus

BHIKHI RAM—APPLICANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898) s. 195—Sanction—Jurisdiction—Penal Code (Act XLV of 1860), ss. 182, 211—Application in Judge's Court—False information—Prosecution sanctioned by Judge.

MUHAMMAD FAKHRUDDIN *v.* BHIKHI RAM.

The appellant pending an insolvency proceeding against him in the District Judge's Court applied to the District Judge that the respondent had misappropriated certain things belonging to him. The District Judge forwarded the petition to the Magistrate with the result that the respondent was arrested and his house searched. Eventually the District Magistrate discharged the respondent. The respondent then applied to the District Judge for sanction to prosecute the appellant under sections 182 and 211 of the Penal Code:

Held, that the District Judge was a public servant to whom the alleged false information was given and that he had before him materials sufficient to warrant his granting sanction for the institution of proceedings under section 182. With regard to section 211, the Court of the District Judge was not the Court in which the criminal proceedings were instituted and it could not be said that the offence of causing to be instituted criminal proceedings without just or lawful ground was committed in relation to a proceeding pending in the Court of the District Judge.

First appeal from an order of the District Judge of Cawnpore, dated 4th August 1911.

Mr. *C. C. Dillon*, (with him Mr. *D. R. Sawhny*) for the Appellant.

Mr. *Wallach*, for the Respondent.

JUDGMENT.—This proceeding, though registered as a first appeal from an order of a Civil Court, is in reality an application to this Court to exercise its powers under clause 6 of section 195 of the Code of Criminal Procedure to revoke a sanction which has been given by the District Judge of Cawnpore for the prosecution of one Haji Hafiz Muhammad Fakhruddin on charges under sections 182 and 211, Indian Penal Code. The said Haji Hafiz Muhammad Fakhruddin had been declared insolvent in the Court of the District Judge of Cawnpore and proceedings against him were pending. He presented on the 4th of June 1913 a written petition to the District Judge of Cawnpore in which he alleged, in effect, that one Bhikhi Ram had, under cover of proceedings which were being taken by the Receiver appointed under orders of the Court and in collusion with a Subordinate Agent of the Receiver and with another person, dishonestly taken possession of certain property, to wit, a large number of steel bars, and appropriated it to his own use, knowing that he had no right to do so. The petition asked the District Judge to take action in various ways, one of these ways being by procuring a Police search of Bhikhi Ram's premises. This petition was forwarded by the District Judge to the Magistrate with a request that immediate action might be taken by the Police. The result was that Bhikhi Ram was arrested, and his house was searched. He was placed before a Magistrate, but released on bail. Eventually the Investigating Police Officer reported that there was no sufficient evidence to warrant further proceedings being taken against Bhikhi Ram and the Magistrate discharged his security. It is under these circumstances that on the application of Bhikhi Ram the District Judge of Cawnpore has sanctioned the prosecution of Haji Hafiz Muhammad Fakhruddin for offences under sections 182 and 211 as aforesaid. The objection taken before us is that the sanction given is bad in law and not warranted by the circumstances of the case. So far as it concerns the alleged offence under section 182, Indian Penal Code, we are satisfied that Mr. Kendall, the District Judge of Cawnpore, was a public servant to whom the alleged false information was given and that he had before him materials sufficient to warrant his granting sanction to the institution of proceedings under that section. With regard to the alleged commission of an offence punishable under section 211, Indian Penal Code, our position is this:—We think that criminal proceedings were instituted against Bhikhi Ram within the meaning of that section; but looking to the words of section 195 of the Code of Criminal Procedure, we are quite clear that the Court of the District Judge of Cawnpore was not the Court in which these proceedings were instituted, and we are at any rate doubtful whether it could be said that his offence of causing to be instituted criminal proceedings without just or lawful ground was committed in relation to a proceeding pending in the Court of the District Judge. The record of the Police investigation and the orders of the Magistrate thereon have not been before us. Consequently we think it better that we should refrain from expressing any opinion one way or the other as to whether the sanction of the Magistrate who directed the release of Bhikhi Ram on bail, and eventually discharged his security, may not be required before proceedings under the section are taken against Haji Hafiz Muhammad Fakhruddin. At the same time,

however, to aviod the possibility of any technical objection that might be raised hereafter as to the necessity for the District Judge's sanction, we think it advisable to leave the Judge's order as it stands. The result is that we dismiss this appeal with costs including in this Court the fees paid by the respondent to the amount certified in this Court.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 95 OF 1913.

January 19, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

RAGHA JAGA—ACCUSED.

Practice—Deterrent sentence—Authorities desiring deterrent sentence, duty of.

Where it is desired by the authorities that an example should be made or that a specially deterrent sentence should be imposed, it is their duty to bring that desire to the notice of the trying Court and to inform the trying Court of the reasons for the suggestion.

Criminal reference made by the District Magistate of Kaira.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—A certain Police sepoy was convicted of the offence of over-staying his leave, or rather of not returning to duty on the expiration of his leave. He was prosecuted and convicted and sentenced to a fine of Rs. 3. The District Magistrate has submitted the papers to us for the purpose of enhancing the sentence.

We certainly think that a sentence of this kind for an offence of this nature is quite inappropriate if the offence is of the kind that appears in this case—the deliberate refusal to return to duty on the part of a Police Officer or a Police sepoy on the expiration of a short period of leave. At the same time it is now more than four months since this case was disposed of. It is not shown that there is any particular necessity to make an example of the offending sepoy. Consequently the particular circumstances of this case are not such as in our judgment would overcome the very proper and the very desirable reluctance of this Court months afterwards to send to Jail a man who has been tried and convicted and who has fulfilled the sentence that has been imposed upon him.

We should like to add this also that in cases of this kind, indeed in cases of any kind where it is desired by the authorities that an example should be made or that a specially deterrent sentence should be imposed, it is their duty to bring that desire to the notice of the trying Court and to inform the trying Court of the reasons which they put forward in support of the suggestion.

Therefore we decline to interfere in this case and return the record and proceedings.

Records returned.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 102 OF 1913.

February 4, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

KARUPPANA KOWNDEN—PETITIONER—APPELLANT

versus

KANDASAWMI KOWNDEN AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898) s. 147—Fence—Obstruction to public pathway—Jurisdiction.

A Magistrate has jurisdiction to pass an order under section 147 of the Code of Criminal Procedure if he considers that on the date of the order there is a likelihood of the breach of the peace.

Where what is constructed is a mere flimsy fence and not a strong one, a Magistrate has jurisdiction to deal with it under section 147 of the Code of Criminal Procedure and not to treat it as a public nuisance under section 133 of the the Code of Criminal Procedure.

In the matter of Alfred Lindsay, 4 M. 121; 2 Weir 113; *In re Lutchmiah Maistry*, 1 Weir 143 at p. 144, distinguished.

An order under section 147 of the Code of Criminal Procedure can be made even when the right claimed is a right to a private path.

Appeal, under clause 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Ayling, dated 26 h September 1913, in Criminal Revision Case No. 607 of 1913 presented against that of the Sub-

GOVIND SAHAI *v.* EMPEROR.

Divisional 1st class Magistrate of Karur, in Miscellaneous Case No 42 of 1912.

Mr. *T. V. Muthukrishna Aiyer*, for the Appellant.

Mr. *T. Natesa Aiyer*, for the Respondents.

ORDER.—The contention of the appellant (see the 3rd ground in the appeal memorandum) is that because on the 20th November 1912, an order had been passed by a 2nd class Magistrate under section 144 of the Criminal Procedure Code prohibiting the other party from going through the old pathway in the appellant's land there was no likelihood of a breach of the peace on 25th November 1912 and hence the proceedings of the Sub-Divisional Magistrate taken under section 147 (the proceedings having been begun on 25th November 1912) were without jurisdiction.

But if the Sub-Divisional Magistrate really thought that notwithstanding the order under section 144 of the Criminal Procedure Code, (passed within a week before his taking steps under section 147 of the Criminal Procedure Code) the likelihood of a breach of the peace still existed, we do not think that it could be argued that the Magistrate was legally incompetent to entertain such a thought and hence was legally incompetent to take action under section 147. No doubt, we, as a Court of revision, might interfere if we considered that his apprehension was quite unreasonable but we are not satisfied that it was so unreasonable.

The next contention is that as the appellant had obstructed the pathway by a fence the Magistrate had no jurisdiction under section 147 of the Criminal Procedure Code to order the appellant "not to obstruct" the pathway which order is tantamount to a direction that the appellant shall pull down the fence. The case of *In the matter of Alfred Lindsay* (1) and the case reported as *In re Lutchmiah Maistry* (2) are relied on for the above contention. In *In the matter of Alfred Lindsay* (1) it was held that where the obstruction to the path was a permanent one consisting of a wire fence, a trench and a wall and the order of the Magistrate was passed *ex parte* without due inquiry, such an order was not a proper order to be passed under the old section 532 (corresponding to section 147). The learned Judges held that the proper course was to take action under the sections relating to public nuisances (Chapter X of the present Code). That case might be distinguished on the ground that the obstruction in this case was a flimsy fence, but whether it is so distinguishable or not we are not prepared to follow it if it was intended to decide therein that the fact that section 133 of the Criminal Procedure Code expressly provides for an order by the Magistrate directing the removal of obstruction to pathways, necessarily implies that a similar order cannot be passed in proceedings taken under section 147 of the Criminal Procedure Code. The same remark applies to the similar *obiter dictum* in *In re Lutchmiah Maistry* (2).

We do not think that the doubts, entertained in some cases whether section 147 of the Criminal Procedure Code can be applied when the right of way claimed is a right to a public path and not a private path, have any substantial foundation. The terms of the section are wide enough to cover such disputes also.

Finally we might state that revision under sections 435 and 439 of the Criminal Procedure Code is a matter of discretion (that is this Court is not bound to interfere even if the Magistrate's order sought to be revised was an illegal order) and it would require a very strong case for a Letters Patent Appeal to succeed against the decision of a single Judge of this Court refusing to interfere in revision.

We, therefore, dismiss this appeal.

Appeal dismissed.

(1) 4 M. 121; 2 Weir 113.
(2) 1 Weir 143 at p. 144.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 274 OF 1913.

January 9, 1914.

Present:—Justice Sir George Knox, Kt.

GOVIND SAHAI AND ANOTHER—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 252, 526—Transfer—Weak Magistrate—Proceedings unduly prolonged—Witnesses—Magistrate's discretion, in summoning—Expenses of witnesses to be realised before summons—Practice.

GOVIND SAHAI *v.* EMPEROR.

Where on account of the weakness of a Magistrate it was apprehended that a case under section 110, Criminal Procedure Code, would take a very long time if it were allowed to remain in that Magistrate's Court, the High Court transferred the case to another Magistrate.

The Magistrate trying a case is bound by law to hear those witnesses whose list is sent up by the Police along with the case. As soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of persons likely to be acquainted with the facts of the case and shall summon to give evidence before himself only such of them as he thinks necessary. He is not bound by law to accept a list of witnesses which the Police or any one else may choose to produce from time to time.

Where the Magistrate is of opinion that the expenses for summoning witnesses should be charged from parties he should realize them before issuing the summons.

Mr. *S. C. Mukerji*, for the Applicant.

Mr. *Wallach*, for the Crown.

JUDGMENT.—This is an application for transfer. Two persons, Gobind Sahai and Babu Ram, have been sent up by the Police as persons to whom section 110, Criminal Procedure Code, is applicable. The case came before Babu Jai Narain, Magistrate of the 1st Class, on the 1st of November 1913. It remained with him until the 22nd of December 1913, and the case had proceeded only thus far that a large number of witnesses for the prosecution had been examined, and some of them cross-examined, and the witnesses for the defence still remained unheard. The application now is that these proceedings be transferred from the Court of Babu Jai Narain to the Court of any other competent Magistrate in the same District of Meerut or any other District. The contention is based upon section 526 (1), clauses (*a*) and (*e*), Criminal Procedure Code. It certainly has not been made to appear to me that a fair and impartial inquiry or trial cannot be had in the Court of Babu Jai Narain. Had this been the only matter hinted at, I would have refused the order of transfer. But the whole procedure adopted by Babu Jai Narain, as it appears from the order sheet shows, a deplorable weakness on the part of this Magistrate. It is much to be feared that if it remains in his hands, it will be some months before this case is brought to a close. It is never the intention of the Code that proceedings under Chapter VIII should be thus long drawn out. I do not know under what section the Police arreeted Gobind Sahai and Babu Ram in this case. But I am not concerned with that. The Police had every opportunity and should have carefully considered before they entered on proceedings under section 110, Criminal Procedure Code, that evidence was forthcoming against these two persons. Along with these two persons they sent up either in actuality or on paper no less than twenty witnesses. Now if Gobind Sahai and Babu Ram are persons who by habit commit the various offences mentioned in section 110, Criminal Procedure Code, or if they are so desperate and dangerous as to render their being at large without security hazardous to the community, this fact should undoubtedly appear from the evidence of twenty witnesses and indeed it seems to me that that number is too large. The question in issue is a question of habit and must be known and ought to be an issue on which ten or twelve respectable witnesses could give definite and clear evidence. I am not, of course, pronouncing either one way or the other as to the character of these men. But if they cannot be brought within the provisions of section 110 by the evidence of respectable witnesses to the number of ten or twelve, they will not be brought within the provisions of that section by the evidence of fifty witnesses, and I find from the order-sheet that no less than 51 witnesses have already been examined against these two persons. If the Magistrate had consulted his Code of Criminal Procedure and dealt with the case firmly, he should have stopped it as soon as the twenty witnesses mentioned by the Police had been heard. He is bound by law to hear those witnesses and cannot escape from it. But he is not bound by law to hear one witness beyond twenty or twenty-one. The law clearly lays down that after the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of persons likely to be acquainted with the facts of the case and shall summon to give evidence before himself only such of them as he, the Magistrate, thinks necessary. He is not bound by law to accept a list thrown to his head from time to time by the Police or by any one else, and it would be well if the Magistrates have this more clearly in mind. The length to which cases are spun out threatens to be a danger to the administration of justice,

EMPEROR *v.* SHAMJI RAMCHANDRA GUJAR.

The Magistrates having recorded the evidence of 51 witnesses in support of the one side, he has apparently no difficulty in granting summonses for two hundred witnesses on the opposite side. This shows to what length cases of this kind can be prolonged if the Magistrate is not firm enough to steer his bark close to the boundaries laid down by the law. I understand from the learned Counsel, who appears for Gobind Sahai and Babu Ram, that if this case goes to another Court his clients are prepared to accept the evidence as it stands subject to cross-examination of some of the witnesses. It is to be hoped that the Magistrate to whom the case will go will carefully study the law and be firm on the question of allowing cross examination. He must allow it within the limits of the law. He is not bound to, and should not, save in very exceptional cases, allow it beyond such limits. Witnesses have their rights and the Code does not intend them to be harrassed and inconvenienced as too often happens to be the case. I do not know how the Magistrate has come to the issuing of summonses before he need have considered that question at all. I gather from an order in the order-sheet that the Court has summoned witnesses without seeing that the expenses necessary for those witnesses have been deposited before the summonses have been issued. Where a Magistrate is of opinion that he ought to take expenses, it is only commons sense that he should realize those expenses before he issues the summonses. In the hope that this case will now find its way to a Magistrate who in the ends of justice will fix definite dates fixing his undivided attention to this case and not allow himself to be drawn to one side or the other by extraneous or irrelevant matters, I direct that this case be removed from the file of Babu Jai Narain, Magistrate of the first Class, to the file of the District Magistrate, Meerut, who will either try the case himself or see that it is made over to some other Magistrate in the District competent to try the case.

Case transferred.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 123 OF 1913.

January 29, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

SHAMJI RAMCHANDRA GUJAR—ACCUSED.

Practice—Sentence, enhancement of.

Enhancement of sentence is a very serious proceeding and where there is a proposal to that effect, it must be supported by Government Pleader with cogent reasons.

Criminal reference made by the Acting Sessions Judge of Khandesh.

Mr. *P. V. Nisure*, for the Accused.

JUDGMENT.—In this particular case the circumstances are such as to require elucidation by argument. There are two distinct theories, one of deliberate deceit and the other of carelessness or negligence. Seeing that there is no appearance on behalf of the Crown to support the recommendation for enhancement of sentence, we do not think that we are called upon in this particular case to interfere.

We should like to add this comment, somewhat similar to one I have made already to-day. Enhancement of sentence is a very serious proceeding and where there is a proposal to that effect it ought, in my judgment, if it is a sound proposal, to be supported by the Government Pleader under instructions which will enable him to put before us cogent reasons why there should be an enhancement of the sentence.

In re CHINNAVAN.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 82 OF 1914.

March 10, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

In re CHINNAVAN *alias* NALLANAYAKAN—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 347, —Chapter XVIII—Penal Code (Act XLV of 1860), ss. 354, 376 and 511—Trial under section 354, Penal Code—Prosecution and defence witnesses examined and cross-examined—Accused committed to Sessions —Commitment, whether illegal.

The special power to commit to a Sessions Court, conferred on a Magistrate by section 347 of the Code of Criminal Procedure, cannot be interpreted as depriving the accused of the benefit of the procedure prescribed in Chapter XVIII of that Code; but where the accused, when tried on a charge under section 354 of the Indian Penal Code, denies the charge *in toto* and enjoys the benefit of cross-examining the prosecution witnesses and of examining the witnesses for the defence, it cannot be said that he has been prejudiced, merely because the Magistrate, at the time of delivering his judgment, altered the charge into one under sections 376 and 511 of the Indian Penal Code, and committed him to the Sessions, because he was not himself competent to try the accused on the altered charge.

A committal order passed under such circumstances is not illegal, and should not be set aside.

Emperor v. *Channing Arnold*, 17 Ind. Cas. 813; 5 Bur. L. T. 239; 13 Cr. L. J. 877; 6 L. B. R. 129 (F. B.), followed.

Petition praying the High Court that in the circumstances stated therein, the High Court will be pleased to quash the order of commitment passed against the accused by the second class Magistrate of Atur, in Petition Revision No. 6 of 1914, and to direct stay of proceedings in Sessions Case No. 15 of 1914 on the file of the Sessions Judge of Salem pending the disposal of this criminal miscellaneous petition.

Mr. *C. Madhavan Nair*, for the Petitioner.

The *Public Prosecutor*, for the Crown.

ORDER.—This is an application to quash the commitment of the accused for trial by the Sessions Court on a charge of attempted rape under sections 376 and 511 of the Indian Penal Code. The case for the petitioner is that the 2nd Class Stationary Magistrate took cognizance of the case and after hearing the evidence for the prosecution, framed a charge of indecent assault under section 354 of the Indian Penal Code, took the accused's plea, allowed the prosecution witnesses to be cross examined and heard the evidence for the defence according to the procedure prescribed in Chapter XXI of the Criminal Procedure Code for the trial of warrant cases and reserved judgment, but that instead of delivering judgment on the charge under section 354, the Magistrate framed a charge against the accused under sections 376 and 511 and committed the accused for trial by the Sessions Court. It is not disputed that under section 227 of the Criminal Procedure Code the Magistrate even at the late stage was empowered to alter the charge into one under sections 376 and 511 of the Indian Penal Code or that, as this charge was not cognizable by the Magistrate, it became his duty under section 347 to commit the case to the Sessions as one that "ought to be tried by the Court of Session." It is said, however, that section 347 only authorizes the Magistrate to commit the accused for trial by the Sessions Court "under the provisions hereinbefore contained" and that this means after observing the procedure prescribed in Chapter XVIII before commitment to the Court of Session. We agree entirely with the decision of the Full Bench of the Burma Chief Court [*Emperor* v. *Channing Arnold* (1)] that it was not intended by section 347 to enable the Magistrate to deprive the accused of any of the rights conferred on him by Chapter XVIII, though as observed by one of the learned Judges, when an order has been made under section 347, proceedings under Chapter XVIII need not necessarily be commenced *de novo*. In the present case we do not think that the accused has in fact been deprived of any such rights. Under Chapter XVIII the accused had the right to cross-examine the witnesses for the prosecution and to adduce evidence for the defence before the framing of the charge on which he was to be committed to the Court of Session. The accused has enjoyed these rights in the present case subject only to this that the Magistrate, treating the case as a warrant case under Chapter XXI, framed a charge under section 354 of the Indian Penal Code against the accused before calling on him to cross-examine the prosecution witnesses and call evidence for the defence. It may, therefore, be said that the accused was led to confine

(1) 17 Ind. Cas. 813; 5 Bur. L. T. 239; 13 Cr. L. J. 877; 6 L. B. R. 129 (F. B.).

his cross-examination and the defence evidence exclusively to the charge under section 354. In some cases this might be a very real prejudice, but in the present case the defence is that the prosecution story is an entire concoction and the defence witnesses who speak to this before the Magistrate are the witnesses whom the accused has caused to be summoned for the trial to meet the charge of attempted rape. In these circumstances we do not think the accused has been in any way prejudiced and we decline to quash the committal.

Petition dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 30 OF 1914.

March 11, 1914.

Present:—Justice Sir George Knox, Kt.

RAM SEWAK AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526 --Transfer, grounds for.

An appeal was preferred to the Sessions Judge from a conviction under sections 323 and 325 of the Penal Code. The Sessions Judge after hearing arguments came to the conclusion that, if an offence was committed at all, it was one under sections 394 and 397, Indian Penal Code, and that the convicting Magistrate had no jurisdiction to try a case of so grave a nature. He accordingly set aside the convictions and sentences under sections 323 and 325 and directed the accused to be committed for trial on charges under sections 395, 394, 397 and 325 of the Code.

Held, that the circumstances did not justify a transfer of the case from the Court of the Sessions Judge who had directed the commitment and re-trial.

Mr. *Satya Chandra Mukerji*, for the Applicants.

ORDER.—It has not been made apparent to me that a fair and impartial trial cannot be had in the Court of the Sessions Judge of Gorakhpur or that an order of transfer would be expedient to the ends of justice.

All that has been disclosed is that the learned Sessions Judge in the ordinary course of his duties had to deal with the appeals presented by these applicants from a conviction under sections 325 and 323 of the Indian Penal Code.

The learned Sessions Judge, after hearing arguments, came to the conclusion that, if any offence had been committed, it was an offence under sections 394 and 397, Indian Penal Code, and that the Magistrate who had convicted had no jurisdiction to try a case of so grave a nature. He accordingly set aside the convictions and sentences under sections 325 and 323 and directed that the applicants should be committed for trial on charges under sections 395, 394, 397 and 325 of the Indian Penal Code.

All this procedure was proper procedure and in order. The learned Sessions Judge was simply performing the duties which fall to his office as Sessions Judge. There is nothing to show that he deflected by a hair's breadth from the proper performance of such duties and I cannot find anything in the affidavit to lead me to the conclusion that the learned Sessions Judge will not give the accused before him a full, careful and impartial trial. I see no reason for passing an extraordinary order like that of transfer. The application is rejected and the stay order removed.

Application rejected.

BOMBAY HIGH COURT.

CRIMINAL REFERENCES NOS. 103 AND 107 OF 1913.

February 19, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

SHINVAR BIRSHA—ACCUSED

AND

EMPEROR—PROSECUTOR

versus

LORIA ZARDIA—ACCUSED.

Practice—Deterrent sentence—Prosecuting authorities, duty of.

It is very undesirable to trust to the High Court's power of correcting sentences of the lower Courts where the sentences ought to be deterrent.

Where the prosecuting authorities want that a sentence ought to be deterrent, they ought to put before the trying Court those circumstances on which they rely and they ought to ask the trying Court to impose a sentence which will serve the purpose that they think should be served.

GHANSHIAM DAS *v.* EMPEROR.

Criminal references made by the District Magistrate of Thana.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—We can deal with these two references together. In each case the penalty is a fine of Rs. 100 and in each case the District Magistrate thinks that the penalty is insufficient for the offence.

We quite agree that the penalty does appear to be insufficient. The offence is represented to be one that is frequently committed and seldom discovered, or rather it is seldom that a conviction can be obtained against the offender. In one case, however, of the same kind (Reference No. 102 of 1913), we have made an example of the convicted person by sentencing him to a substantial term of imprisonment. In that case the fine was only Rs. 30, as against Rs. 100 in each of the present cases. Bearing that in mind and in the hope that the one case in which we have made an example will serve as a warning, we refrain from enhancing sentences in these two cases.

We must again call attention to a matter which in other cases we have mentioned already and it is this. It is very undesirable to trust exclusively to our powers of correcting sentences of the lower Courts where the sentences ought to be deterrent. In a case of that kind where the prosecuting authorities think that a sentence ought to be deterrent, they ought to put before the trying Court those circumstances on which they rely and they ought to ask the trying Court to impose a sentence which will serve the purpose that they think should be served. If this is done, as it ought to be done, there will be fewer of these references to us for enhancing sentences.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CRIMINAL No. 41 OF 1914.

March 17, 1914.

Present:—Justice Sir George Knox, Kt.

GHANSHIAM DAS AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Fair and impartial trial not expected.

Where it has not been shown that a fair and impartial trial cannot be had or that an order of transfer is expedient in the interests of justice, a case cannot be transferred from one Court to another.

Sumeswar v. *Emperor*, 21 Ind. Cas. 906; 14 Cr. L. J. 656; 12 A. L. J. 33; *Emperor* v. *Abdul Latif*, 26 A. 536; A. W. N. (1904) 94; 1 Cr. L. J. 338, referred to.

Mr. *S. K. Dar*, for the Applicant.

Mr. *Alston*, for the Opposite Party.

ORDER.—Ghanshiam Das and Kishen Lal have put in a petition praying that a case, in which they are some of the accused and which is now pending in the Court of the City Magistrate of Agra, be transferred to some other competent Magistrate's Court at Agra. The reasons given why an order of transfer should be made are set out in an affidavit. They are as follows: That in the same trial at the examination of witnesses for the prosecution it has transpired that the learned Magistrate who is trying the case had been to the locality on the date of the alleged occurrence and had seen bricks flying, that the case is one of a series of cases which has excited considerable amount of official interest and has been the subject of official discussion, that the Magistrate trying the case was a Magistrate most concerned with the riots, and that the applicants apprehend that they will not have a fair and impartial trial in the Court of the said Magistrate. The 9th paragraph of the affidavit contains further matter which I pass over, inasmuch as it is impossible that this can be a matter true to the personal knowledge of the deponent. The argument addressed to me is that as the Magistrate has seen the spot and has seen bricks flying he cannot remove from his mind what he then saw, and that will influence the whole of his decision and it will not be the decision of a judicial mind

EMPEROR *v.* SHEWAKRAM.

acting judicially. Great deal was said as to the necessity for the application to be looked at from the point of view of the accused. If the accused have no confidence in a Court trying their case the case ought to be transferred to a Court in which they have the fullest confidence. This matter I have already commented on in *Sumeshwar* v. *Emperor* (1). I see no reason to depart from the views which I expressed in that case. My attention was also called to *Emperor* v. *Abdul Latif* (2). In the explanation which accompanies this record, I see that it has been said that in cases of precisely similar nature this very Magistrate has been examined as a witness and has recorded his own answers to the questions that were put to him. Had this objection been pressed at the earliest date of the case it would have carried more weight. I am told that the objection was urged at the very earliest opportunity that it could have been urged. I find it impossible to believe that the applicants were ignorant of the fact that the trying Magistrate had been on the spot, and I am sure that if they had any *bona fide* intention of calling the Magistrate as a witness they would have stated that to those who were in charge of the conduct of the case. It appears also from the explanation to which I have already referred that an application for transfer was made to the District Magistrate. In his judgment he points out that two out of the four accused in this case protested against the transfer on the ground of expense and inconvenience. I am told that they have subsequently changed their mind. But there is nothing before me to that effect. It is expedient that this case should not linger on, that it should be tried promptly and brought to an end as speedily as possible, and as it has not been made to appear to me that a fair and impartial trial cannot be had or that an order of transfer is expedient in the interests of justice, I refuse the application. The stay order will be removed.

Application rejected.

(1) 21 Ind. Cas. 908; 14 Cr. L. J. 656; 12 A. L. J. 33.
(2) 26 A. 536; A. W. N. (1904) 94; 1 Cr. L. J. 338.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 73 OF 1913.

July 2, 1913.

Present:—Mr. Pratt, J. C.

EMPEROR—APPLICANT

versus

SHEWAKRAM—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *ss.* 4 (*h*), 190, 191 — *Complaint, who can file — Magistrate —Jurisdiction.*

Every member of the public has a right to set the law in motion by complaint, whether he is himself a witness of the facts which *prima facie* constitute an offence or not.

Where, therefore, a complaint is filed by a Public Prosecutor the Magistrate does not take cognizance on his own knowledge, or suspicion or information and the accused has no right to claim to be tried before another Court.

In re Ganesh Narayan Sathe, 13 B. 600; *Queen-Empress* v. *Bal Gangadhar Tilak*, 22 B. 112 and *Queen-Empress* v. *Sham Lall*, 14 C. 707, referred to.

Application by accused, under section 526 (1) (*iv*), Criminal Procedure Code, that he might be committed to the Court of Session for trial.

Mr. *F. J. de Verteuil*, for the Applicant.

The *Public Prosecutor* for the Crown.

JUDGMENT.—The accused Shewakram is being tried before the Sub-Divisional Magistrate, Tatta, for an offence under section 161, Indian Penal Code.

He applies for an order under section 526 (*iv*) directing that he may be committed for trial to the Court of Session. The principal ground on which the application is based is, that the proceedings before the Sub-Divisional Magistrate were initiated under section 190 (1) (*c*) and that the accused is, therefore, entitled to the benefit of section 191. The Magistrate took cognizance of the offence on a formal complaint in writing, sworn to by the Public Prosecutor for Sind. It is contended that this writing though purporting to be a complaint was not, in fact, a complaint because the Public Prosecutor had no personal knowledge of the facts constituting the offence. The word complaint is defined in section 4 (*h*) of the Code "as an allegation made orally or in writing to a Magistrate with a view to his

taking action under this Code that some person whether known or unknown has committed an offence" and the definition excludes a Police report. Section 190 (1) (*a*) empowers a Magistrate to take cognizance on "a complaint of facts which constitute such offence." And it is clear, that the complaint must be a complaint of facts. But the complaint is nothing more than an allegation that such facts have taken place—if made with a view to the Magistrate taking action in the matter. There is no authority for the proposition that the person making the complaint should be himself a witness of the facts. Every member of the public has a right to set the law in motion by complaint. This was settled in the leading case of *In re Ganesh Narayan Sathe* (1). In that case the complainant, Hanmantrao, had no personal knowledge of the facts alleged in his complaint, but it was held that the complaint was perfectly valid. The Criminal Procedure Code of 1872 contained, in section 140 corresponding to section 191, a provision "that any person acquainted with the facts of a case may make a complaint." It is significant that this provision has been omitted in the Codes of 1882 and 1898. Again in the case of offences against the State, the Codes in section 196 provide for the Magistrate taking cognizance when the complaint is filed by order of Government. There is no limitation that the person to whom this order is issued should be himself competent to give evidence as to the facts constituting the offence. In the case of *Queen-Empress* v. *Bal Gangadhar Tilak* (2) the complaint was filed by the Oriental Translator to Government.

As said in *Queen-Empress* v. *Sham Lall* (3) "all that is required is, that facts which *prima facie* constitute an offence should be brought to the notice of the Magistrate by the complainant." When the complainant does so with a view to the Magistrate taking action under the Code, his allegation is a complaint. The Public Prosecutor's complaint in this case contains specific allegations of facts which constitute an offence and ends with a prayer to the Magistrate to deal with the accused according to law. It is a perfectly valid complaint.

The real distinction between sub-clause (*c*) and sub-clauses (*a*) and (*b*) of section 190 (1) is that, in the two latter cases, an application is made to the Magistrate to take cognizance of the offence either by a complainant or by the Police, while in the former case the Magistrate takes cognizance *suo motu* either on his own knowledge, or suspicion, or on information received from some person who will not take the responsibility of setting the law in motion. In this case the law partly out of regard for the susceptibilities of the accused and partly to inspire confidence in the administration of justice allows the accused the right to claim to be tried before another Court. These considerations do not apply in the present case, for the Magistrate has been set in motion by an allegation of facts made by the Public Prosecutor with a view to his taking action and that allegation of facts is a perfect valid complaint.

The other grounds urged do not deserve serious notice. It is said that the accused was not represented at the preliminary inquiry. There is no provision of law for such representation and it is not denied that he was present. The Public Prosecutor was not examined as a witness, but, as he had no personal knowledge of the facts, there was no object in his being examined. The charge was framed while the cross-examination of some prosecution witnesses was reserved. But this procedure is sanctioned both by section 254 of the Code and rule 14, Chapter VI of Sind Courts Criminal Circulars. It is to the benefit of the accused that he should be informed as soon as possible of the nature of the specific charge which he has to meet: and this procedure saves the harassment of prosecution witnesses having to wait for a second cross-examination after the charge. I am not impressed with the argument that the offence is one under section 218 of the Indian Penal Code. That is a distinct offence which the Public Prosecutor says he is unable to establish. The substance of the charge on which the accused is being tried, and which he will have to meet, is that he corruptly received Rs. 100 from one of the

(1) 13 B. 600.
(2) 22 B. 112.
(3) 14 C. 707.

parties in a case pending before him. For that offence the Magistrate is competent to try the accused, and if he finds him guilty to adequately punish him.

I reject the application.

Application rejected.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 38 OF 1914.

April 17, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

In re URUMA MUDALI AND OTHERS—PRISONERS—APPELLANTS

Criminal Procedure Code (Act V of 1898), *ss.* 408, 413—*Several persons convicted at one trial—Different sentences—Right of appeal.*

Section 413, Criminal Procedure Code, prohibits an appeal against a sentence of less than one month's imprisonment or a fine of less than Rs. 50 passed by a District Magistrate or a Court of Session, and the mere fact that such sentences were passed on some of the accused while heavier sentences were passed on the rest would not give to the former a right of appeal only because there is one consolidated appeal by all convicted persons.

Appeal against an order of the Court of Session of the Coimbatore Division in Case No. 81 of the Calendar for 1913.

Mr. *R. Sadagopachariar* (with him Messrs. *C. Narasimhachariar* and *C. Rajagopala Aiyengar*), for the Appellants.

The *Public Prosecutor*, for the Government.

JUDGMENT.—Twenty-four accused persons were charged (among other offences) with rioting and being members of an unlawful assembly before the learned Sessions Judge of Coimbatore. Of the twenty-four, two were acquitted. Out of the twenty-two who were convicted of the above offences, four have not appealed. The remaining eighteen accused have filed this appeal. Of these eighteen appellants, fourteen have been sentenced to a fine of Rs. 10 each and under section 413 of the Criminal Procedure Code they are not entitled to appeal. Mr. Sadagopachariar's argument is that because in one and the same judgment, appellants Nos. 1, 2, 3 and 6 have been given sentences of three months' rigorous imprisonment and Rs. 750 fine, Rs. 200 fine, Rs. 200 fine, two months' rigorous imprisonment and Rs. 500 fine respectively, this fact entitles the other fourteen appellants also to prefer appeals against the lesser sentences passed on them. Reliance is placed in support of this argument on the case in *Palani Koravan* v. *Emperor* (1), decided on an interpretation of section 408, clause *(b)*, of the Criminal Procedure Code. We think that the construction of the words of section 408, clause *(b)*, throws no light on the words used in section 413, and that the words of section 413 clearly prohibit a convicted person whose sentence is less than one month's imprisonment or a fine of less than Rs. 50 from appealing to a higher Court if the Court which passes such sentence is the Court of the District Magistrate or a Court of Session: [see Criminal Revision Case No. 532 of 1910 on the file of the High Court]. Though, as a matter of long practice, several accused persons convicted in the same Sessions trial are allowed to appeal together, the consolidated appeal really consists of the several separate appeals made separately by the convicted persons. This appeal, so far as it is by the appellants other than the accused Nos. 1, 2, 3 and 6, is, therefore, dismissed.

As regards the remaining four appellants we see no sufficient reason to differ from the conclusion of the learned Sessions Judge (and of the two intelligent assessors who sat with him in the Sessions Court) that these four persons with several others formed an unlawful assembly in Kilwani village, threw stones at the houses of Ramasami Mudali and Shengoda Mudali and that several of the crowd trespassed into the compounds of those two persons. The common object of a crowd can usually be inferred only from their acts and exclamations and in this case there is the reliable evidence of the prosecution witnesses Nos. 1, 2, 3 and 11 proving, when read with the other evidence, that a riotous crowd trespassed into the compounds of those two people and threw stones on their houses. The evidence of the other prosecution witnesses and of the Court witnesses Nos. 3 and 4 is, no doubt, very unreliable as

(1) 17 M. L. J. 248; 5 Cr. L. J. 496.

THAIRIO v. EMPEROR.

pointed out by the Sessions Judge himself in paragraphs 21, 26, 30, 33 etc., of his address to the assessors; but so far as it corroborates the evidence of prosecution witnesses Nos. 1 to 3 and 11, that corroboration need not be wholly dispensed with. The evidence of one of the accused's party (D. W. No. 12) supports that portion of the prosecution story which establishes that stones were thrown by the accused's party also. The case for the defence that the appellants' party went innocently unarmed to rescue the 1st accused (a story inherently improbable as pointed out by the Sessions Judge in paragraph 9 of his address) cannot be accepted. Most of the appellant's party belong to Mettupalayam and their presence at Kilwani (where the riot took place) in a large crowd is naturally explained by the prosecution theory and not by the defence theory. The 1st and 6th accused who are brothers live in Mettupalayam. They have been assisting the 2nd accused in his litigation with the 2nd accused's brother's widow, Karuppayee. Ramasami Mudali and Sengoda Mudali into whose compounds the accused trespassed are partisans of Karuppayee.

The presence of accused Nos. 1, 2, 3 and 6 at Kilwani on the day of the riot and their arrest by the Police almost immediately after the riot are not denied. The evidence of prosecution witnesses Nos. 1 to 3 and 11 read together proves that the 6th accused was the leader of the riotous crowd who came to Kilwani from Mettupalayam and that all four were among the persons who made the riotous demonstration near and in the compounds of Ramasami Mudali and Sengoda Mudali. The story of the D. W. No. 8, a landless pauper, as to how he sent word to the 6th accused to come to Kilwani to rescue the 1st accused is not worth belief. The appeal as regards Nos. 1, 2, 3 and 6 also should be and is dismissed.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 79 OF 1913.

July 3, 1913.

Present:—Mr. Pratt J. C.

THAIRIO *wald* FAIZO—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Workmen's Breach of Contract Act (*XIII of* 1859), s. 2—*Sentence—Appeal—Revision.*

Where under the Workmen's Breach of Contract Act a person is sentenced to imprisonment for failing to comply with the order of re-payment of advance, he has no right to appeal; his remedy is by way of an application in revision.

Empror v. *Balu Salaji*, 1 Ind. Cas. 387; 33 B. 25; 8 Cr. L. J. 409; 10 Bom. L. R. 1126; *Crown* v. *Sohab*, 19 Ind. Cas. 512; 6 S. L. R. 165; 14 Cr. L. J. 256 and *Chand Khan* v. *Empress*, 9 C. 878, referred to.

Appeal from the order of the Resident Magistrate, Sujawal.

Mr. *Achalsing M. Advani*, for the Appellant.

JUDGMENT.—The appellant was ordered by the Resident Magistrate under the first part of section 2 (1) of the Workmen's Breach of Contract Act to re-pay an advance of Rs. 200.

On the appellant failing to comply with that order the Magistrate sentenced him under the second part of section 2 of the Act to be imprisoned for three months, or until the sum of Rs. 200 should be sooner re-paid.

The question for consideration is whether an appeal lies from either of these orders.

There is no doubt that no appeal lies from the order to re-pay under the first part of section 2. The nature of the proceeding under the first part of the section has been explained in *Emperor* v. *Balu Salaji* (1). It is not a penal proceeding at all, but a proceeding which may end in an order, for the disobedience of which a penalty has been imposed. That case has been followed in the High Court Jurisdiction of this Court in the case of *Crown* v. *Sohrab* (2) But it is argued that an appeal lies form the order under the second part of section 2 imposing a penalty and

(1) 1 Ind. Cas. 387; 33 B. 25; 8 Cr. L. J. 409; 10 Bom. L. R. 1126.

(2) 19 Ind. Cas. 512; 14 Cr. L. J. 256; 6 S. L. R. 165.

In re DAMAPPA PALAI.

inflicting a sentence of imprisonment. But there is no special provision in the Act for an appeal and, therefore, under section 404 of the Criminal Procedure Code no appeal lies unless provided by that Code. It is sought to apply section 403, but that section refers to cases where the accused is convicted on a trial. Is that the case here? I think not. The workman is not put on his trial for disobeying the order of the Magistrate. No separate complaint on that behalf is made and no process issued against him after the order is made on the first part of the section; if it be said that the Magistrate takes cognizance of the offence *suo motu* then the absurd consequence ensues that the workman could claim under section 191 to be tried before another Magistrate.

The order imposing the penalty seems to be analogous to an order under section 123, Criminal Procedure Code, committing a suspected person to prison for disobedience of an order under section 118.

Now the proceedings which lead up to an order under section 118 are penal and there is special provision in section 406 for an appeal from such an order, yet there is no appeal from the order under section 123 imposing a penalty for disobedience. *Chand Khan* v. *Empress* (3).

So here, there is no appeal from the order imposing the penalty under the second part of section 2. The word sentence is used in the Act, but the order inflicting that sentence is not a conviction on a trial, but the result of a special penal proceeding against which the only remedy is by way of application in revision to the High Court.

Appeal rejected as incompetent.

Appeal rejected.

(3) 9 C. 878.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 664 OF 1913.

CRIMINAL REVISION PETITION No. 539 OF 1913.

March 13, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

In re DAMAPPA PALAI AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 209, 436, 437 — Case exclusively triable by Court of Session—Discharge by Magistrate—Commitment by District Magistrate—Revision—High Court, power of.

It cannot be said that a Magistrate has no power whatever to pass an order of discharge in a case "exclusively triable by a Court of Session."

Where the entire prosecution evidence is quite unworthy of credit and bristles with improbabilities and where it is clear that the case is foredoomed to failure at the Sessions, it is the duty of the Subordinate Magistrate to discharge the accused.

National Bank of India, Ltd. v. *Kothandarama Chetty*, 21 Ind. Cas. 129; 14 M. L. T. 200; 14 Cr. L. J. 529; (1913) M. W. N. 728; *In re Bai Parvati*, 8 Ind. Cas. 631; 12 Bom. L. R. 923; 35 B. 163; 11 Cr. L. J. 692, followed.

Where an order of discharge passed by a Magistrate under section 209, Criminal Procedure Code, is revised by the District Magistrate and a commitment to the Sessions Court is directed, the High Court, acting under section 437 of the Code of Criminal Procedure, can interfere and can even go into questions of fact to see if the order of the District Magistrate was correct and proper.

Muthiah Chetty v. *Emperor*, 30 M. 224; 16 M. L. J. 529; 5 Cr. L. J. 100, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the proceedings of the District Magistrate of South Canara, in Criminal Revision Case No. 15 of 1913, preferred against that of the 2nd class Magistrate of Mangalore, in Revision Case No. 3 of 1913.

Mr. *K. Narayana Row* with him Mr. *H. Balakrishna Row*, for the Petitioners.

The *Public Prosecutor*, for the Government.

ORDER.—This is a petition to revise the order of the District Magistrate of South Canara. That order was evidently passed under section 436 of the Criminal Procedure Code and it directed that the petitioners before me (the accused in a criminal case) should be committed to the Sessions Court on the charge of dacoity preferred against them to the Stationary 2nd class Magistrate of Mangalore. The District Magistrate passed this order because he thought, in the words of section 436, that these accused persons had been "improperly discharged" by the 2nd class Magistrate of Mangalore of the said charge of dacoity.

In *Muthia Chetty* v. *Emperor* (1) it was held that the High Court may, in revision, "consider the facts, as well as the questions of law involved, to determine whether a Sessions Judge, who had set aside an order of dis-

(1) 30 M. 224; 16 M. L. J. 529; 5 Cr. L. J. 100.

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charge passed by a Magistrate and directed the accused to be committed to the Sessions Court, had properly exercised the powers given to the Sessions Judge by section 436," which section gives power both to the Sessions Judge and to the District Magistrate to revise such orders of discharge. The principle of that decision applies, of course, to a petition in revision directed against a similar order passed by a District Magistrate.

Though the High Court has thus got the power to go into questions of fact, it does so merely in order to see whether the District Magistrate's order is improper and not as a sort of Appellate Judge of facts over the District Magistrate. In other words, unless the District Magistrate's power of interference with the lower Magistrate's order of discharge was exercised on very weak and clearly untenable grounds, the High Court would not interfere with the discretion vested in law in the District Magistrate by section 436.

As regards the power of the Subordinate Magistrate to discharge the accused in a case where the accused is alleged to have committed even an offence triable exclusively by a Court of Session, it has been held in numerous cases, [see one of the recent cases reported as *In re Bai Parvati* (2)] that if the evidence tendered for the prosecution appears to the Magistrate to be totally unworthy of credit, he is entitled to discharge the accused. Of course, if there is evidence as to some material facts deposed to by credible witnesses, on which facts a Court or Jury may not unreasonably find the accused guilty, that is a case in which the accused should be put on his trial before a Sessions Court leaving it to the Judge or to the Jury (as the case may be) to find the accused's guilt proved or not proved on those facts, but where most of the important witnesses are totally unworthy of credit, according to the Magistrate, and where the case itself bristles with improbabilities, the Magistrate would be right in discharging the accused, "who should not be exposed to the expense and harassment of a Sessions trial which is practically foredoomed to failure" and in saving the accused "from the prolonged anxiety of undergoing a trial for an offence not brought home to the accused" and in saving also "the time of the Court of Session from being wasted over unsuitable cases." No doubt, in cases of this kind, the line between the Sub-Magistrate's "duty to discharge under section 209, Criminal Procedure Code, and the prerogative of the District Magistrate under section 436 is not easy to draw". [See the whole question elaborately considered in *National Bank of India, Ltd.* v. *Kothandarama Chetti* (3)]. As Bakewel, J., said at page 750: "I do not think that it is possible to fix positively the limits within which the Magistrate should exercise his discretion and prefer to express the rule negatively by saying that he must not in any way encroach upon the functions of a Jury." That was a case in which inference had to be drawn as to the knowledge or intention of the accused from certain facts spoken to by credible witnesses and it was held there that such drawing of the inference as to knowledge or intention should, on the facts of that particular case, have been left by the Magistrate, to the Jury to be empanelled at the Sessions. So far as the question relating to the Magistrate's power to discharge the accused if he finds the prosecution case wholly improbable and the prosecution evidence patently worthless, I do not think that the case of *National Bank of India Ltd.* v. *Kothandarama Chetti* (3) intended to depart from the earlier rulings. In the present case, the Sub-Magistrate's judgment, the District Magistrate's order passed under section 437 and the evidence for the prosecution were fully discussed before me and I have come to the conclusion that the District Magistrate's prerogative under section 436 was exercised in this case erroneously, and on very inadequate grounds; the 2nd class Magistrate having given very good reasons for his opinion that the prosecution evidence is so unreliable that the accused persons ought not to be committed to the Sessions and harassed with a trial in the Sessions Court on that evidence. I, therefore, set aside the order of the District Magistrate and direct all proceedings to be dropped against the petitioners in connection with the charge against them of dacoity under section 395, Indian Penal Code.

Order set aside.

(2) 8 Ind. Cas. 631: 35 B. 163; 12 Bom. L. R. 923; 1 Cr. L. J. 692.

(3) 21 Ind. Cas. 129; (1913) M. W. N. 728; 14 M. L. T. 200; 14 Cr. L. J. 529.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 70 OF 1913.

July 9, 1913.

Present:—Mr. Pratt, J. C.

NABIBUX *wald* UMERKHAN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Witness re-called on order of prosecuting officer—Magistrate—Jurisdiction—Criminal Procedure Code (Act V of 1898), *s.* 540.

A complaint for misappropriation of Government monies was filed by the order of an Assistant Collector. After the close of the case for the prosecution, the Assistant Collector directed the Magistrate to re-call and re-examine two of the prosecution witnesses and at the same time interviewed those witnesses and ordered them to give evidence. The Magistrate complied with the Assistant Collector's direction:

Held (reversing the conviction and sentence), that, as the Magistrate had virtually abdicated his magisterial function and become a mere delegate of the Assistant Collector, the trial was without jurisdiction.

Appeal from a conviction by the Resident Magistrate, Sujawal.

Mr. *Dipchand T. Ojha*, for the Appellant.

Mr. *Lalchand Hasomal*, (Assistant Public Prosecutor), for the Crown.

JUDGMENT.—I do not think that the appellant has had a fair trial.

He was a *tapedar* of Tapa Munarki in the *Taluka* of Jati and was prosecuted on a complaint filed by the *Mukhtyarkar* of Jati for misappropriating monies paid to him as Government assessment. The complaint was filed by the order of the Assistant Collector of the Shah Bunder Division. After the close of the case for the prosecution, two *tapedars* who had given evidence for the prosecution were re-called and re-examined by the Magistrate in order to prove the handwriting of the accused on the receipt which he is said to have given for the payment of the assessment. The Public Prosecutor explains that he had not examined the witnesses on this point as they had said that they were not acquainted with the accused's handwriting. But the witnesses were subsequently interviewed by the Assistant Collector and ordered to give evidence. This phrase—ordered to give evidence—occurs in an astonishing letter written by the Assistant Collector to the Magistrate in respect of one of the two witnesses. In that letter the Assistant Collector directs the Magistrate to re-call and re-examine the witness. I trust the Assistant Collector will, on consideration, realize the impropriety of making use of his official position to procure evidence and of interfering with the conduct of the trial in the Magistrate's Court.

The Magistrate complied with the direction given by the Assistant Collector and recorded the evidence of the two *tapedars*. When he did so, he virtually abdicated his magisterial function and became a mere delegate of the Assistant Collector who had initiated the prosecution.

The trial has been without jurisdiction, for a Magistrate cannot be both Judge and a delegate of the prosecutor.

I reverse the conviction and sentence, and, as the appellant has already undergone two-thirds of the sentence inflicted by the Magistrate. I do not think it necessary to order a re-trial.

Appeal allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 193 OF 1914.

March 30, 1914.

Present:—Mr. Justice Piggott.

HAR NARAYAN—APPLICANT

versus

RAMJI DAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), *s.* 562—*"Dishonest misappropriation and cheating," meaning of —Penal Code (Act XLV of* 1860), *ss.* 403, 404, 417, 418, 419, 420—*Statute, construction of.*

The words of a Statute should be given the extended meaning of which they are reasonably susceptible rather than the meaning as restricted by context, when such restriction would reduce them to mere surplusage.

The words "*dishonest misappropriation*" in section 562 of the Code of Criminal Procedure apply to the offence of criminal misappropriation in all its forms and are intended to include offences punishable under section 404 as well as under section 403 of the Indian Penal Code. Similarly, the word "cheating" in the same section covers the offence of cheating in all its forms and is intended to include offences punishable under sections 418, 419 and 420 as well as under section 417 of the Indian Penal Code.

NURO *v.* EMPEROR.

Criminal reference made by the Sessions Judge of Moradabad as per his letter No. $\frac{251}{VIII}$, dated 11th March 1914.

Mr. *M. L. Agarwala*, for the Applicant.

JUDGMENT.—I am clearly of opinion that the words "dishonest misappropriation" in section 562 of the Code of Criminal Procedure apply to the offence of criminal misappropriation in all its forms and are intented to include offences punishable under section 404 as well as under section 403 of the Indian Penal Code. Similarly the word "cheating" in the same section covers the offence of cheating in all its forms, and is intended to include offences punishable under sections 418, 419 and 420 as well as under section 417 of the Indian Penal Code. Otherwise the words in question are mere surplusage, the case of offences punishable under sections 403 and 417, Indian Penal Code, being sufficiently covered by the provisions which follow with regard to all offences punishable "with not more than two years' imprisonment". The argument to the contrary based on the distinct specification of the offences of "theft" and "theft in a building" does not impress me, the maximum period of imprisonment under sections 379 and 380 of the Indian Penal Code being in each case more than two years. No doubt, the word "theft" means simple theft and covers section 379, Indian Penal Code, only, but it does not follow that the words "cheating" and "dishonest misappropriation" have a similarly restricted meaning. I would prefer to give to the words of a Statute an extended meaning of which they are reasonably susceptible, rather than interpret their meaning as restricted by context, when such restriction would reduce them to mere surplusage. Let the record be returned.

Record returned.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 49 OF 1913.

July 10, 1913.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

NURO AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 299—Savage attack—Dangerous wounds followed by blood poisoning and fever—Murder.

A person was savagely attacked with murderous weapons and was dangerously wounded in consequence of which he was detained in hospital for over 40 days where he developed symptoms of blood poisoning followed by brain fever and eventually died:

Held, that the wounds were the cause of death and the accused were guilty of murder.

Criminal appeal from the order of the Additional Sessions Judge, Sukkur-Larkana.

Mr. *F. J. de Verteuil*, for the Appellants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—It has finally been contended on behalf of the appellants that the hatchet or sword wounds given to Zahri in the course of the attack did not actually cause his death. It has been urged that the wounds, though serious, had in a great measure healed up in the hospital and that blood-poisoning supervened causing brain fever, which brain fever must be held to be the real cause of death. Now, the particular facts of each case have to be taken into consideration to determine whether the wounds or injuries received were or were not the cause of death within the meaning of section 299 of the Indian Penal Code. Here, there was a savage attack upon Zahri with murderous weapons, hatchets and swords, resulting in dangerous wounds. These wounds were seven in number, of which the following three were the most severe as described by the Sub-Assistant Surgeon: (1) An incised horizontal wound 7 inches long, 4 inches broad, 3 inches deep communicating with the left lung; (2) a horizontal incised wound 5 inches long, 2 inches broad and 2 inches deep on the left shoulder; (3) a horizontal incised wound 5 inches long, 2 inches broad and 2 inches deep fracturing the left elbow. Looking to the nature of these

wounds it is not surprising to find from the medical history sheet put in by the Sub-Assistant Surgeon that Zahri suffered continuously from high fever from the date of admission to hospital on the 14th July up to the 24th August when symptoms of blood-poisoning developed followed, on the 25th August, by symptoms of brain fever. The Sub-Assistant Surgeon stated that, on the following day, Zahri was taken away from hospital by his relatives as there appeared to be no hope of his recovery and they desired that he should die in his own village. His death appears to have occurred on the day after his arrival in his village. The plain inference on these facts would appear to us to be that the wounds inflicted on Zahri were the cause of his death. But the Sub-Assistant Surgeon gave certificate on the 31st August that brain fever was probably the cause of death which he explained in his letter of the 14th September to mean that the wounds were not the cause of death. In his subsequent statement, however, before the Magistrate and at the trial he further explained that what he meant was, that the wounds were the indirect cause of death. Looking to the nature of the wounds and the medical history sheet we have no hesitation in coming to the conclusion that the latter explanation of the Sub-Assistant Surgeon is correct and that the wounds were the cause of death within the meaning of section 299 of the Indian Penal Code. We are fortified in this conclusion by a consideration of the cases referred to in paragraph 429 of the 3rd Edition of Mayne's Criminal Law.

We, therefore, confirm the convictions and sentences and dismiss the appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 1231 OF 1913.

February 4, 1914.

Present:—Mr. Justice Ryves and Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

PIARE LAL—OPPOSITE PARTY.

U. P. Municipalities Act (I of 1900), s. 147—Disobedience of notice—Validity of notice to be considered before conviction.

A conviction cannot be had under section 147 of the Municipalities Act, for the disobedience of a notice issued by a Municipal Board unless the Court is satisfied that the notice was lawfully issued by the Board.

Chhote v. Municipal Board of Lucknow, 9 O. C. 29; 3 Cr. L. J. 205, *Queen-Empress v. Jasoda Nand*, 20 A. 501; A. W. N. (1898) 141, followed.

Criminal reference made by the District Magistrate of Cawnpore as per his letter No. 886/III, dated 20th December 1913.

Mr. *Malcomson*, for the Crown.

JUDGMENT.—This is a reference by the District Magistrate of Cawnpore under the following circumstances. A written notice was served on one Piare Lal by the Municipal Board of Cawnpore ordering him to pull down a *chhajja* recently built by him on the eastern side of his house and also to demolish a *do-manzila* on the western side within one week. He did not do so and was charged in consequence under section 147 of the Municipalities Act I of 1900. He admitted receipt of this notice, but stated that he had not constructed any building without permission but that he had made ordinary repairs. No further evidence was tendered on behalf of the prosecution. The Bench trying the case held no offence had been proved against the accused and discharged him. The District Magistrate moved this Court suggesting that the validity of the notice issued by the Board was one which could only be questioned under section 152 of the Municipalities Act and that not having been so questioned it was not open to the accused to attack its validity in a Criminal Court in defence of a charge under section 147. What he was exactly charged with in this case was disobedience of a written notice lawfully issued by the Municipal Board under the powers conferred upon it by Chapter VII of the Act. It seems to us that before any one can be convicted of an offence under this section the Court must be satisfied that what he had disobeyed was a notice lawfully issued by the Board under the powers conferred upon it by the Act. This was held in *Ohhote v. Municipal Board of Lucknow* (1) by one of us. It seems also to be in conformity with the principle laid down

(1) 9 O. C. 29; 3 Cr. L. J. 205.

by a Bench of this Court in *Queen Empress* v. *Josoda Nand* (2).

Let the papers be returned.

(2) 20 A. 501; A. W. N. (1898) 141.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 59 OF 1913.

July 24, 1913.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

PIRU ABDULLA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 122—Judicial inquiry—Surety not to be rejected without taking evidence.

An inquiry under section 122, Criminal Procedure Code, being a judicial inquiry, a Magistrate cannot refuse to accept a surety on the ground of his knowledge as Magistrate that the surety's innocence of connection with thieves is far from established.

Imperator v. *Mahro*, 2 S. L. R. 11; 10 Cr. L. J. 225; *Crown* v. *Kamal*, 2 S. L. R. 15; 10 Cr. L. J. 230; *Emperor* v. *Haji Usman*, 7 Ind. Cas. 592; 4 S. L. R. 18; 11 Cr. L. J. 497, referred to.

Application for the revision of an order of the Sub-Divisional Magistrate, Shah Bander.

Mr. *Parsram Tolaram*, for the Applicant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—This is an application for revision of an order made by the Sub-Divisional Magistrate, Shah Bunder, refusing under section 122, Criminal Precedure Code, to accept two sureties (*viz.*) Hafiz Rato and Wadero Arab. We find that the Magistrate has made no order rejecting the surety Arab, and as it is still open to the accused to tender this man as surety, it is unnecessary for us to make any order as to Arab. As to the other surety Hafiz, the Magistrate says that he cannot be accepted on any account, as, he says, he knows from Magisterial experience that his innocence of connection with thieves is far from established. We take this to mean that the Magistrate has knowledge that this man is not a fit surety. But we have held that the inquiry under section 122 is a judicial inquiry; and this being so, the rule applies that a Magistrate cannot import his own knowledge into a case without giving evidence. *A fortiori* a Magistrate is not justified in relying on his personal knowledge

and dispensing with an inquiry and taking no evidence at all.

It is quite conceivable that if the inquiry had been held, evidence might have been taken which would have induced the Magistrate to alter his opinion.

We reverse the order of the Magistrate as to this surety and direct him to follow the procedure indicated in the case of *Imperator* v. *Mahro* (1) and *Crown* v. *Kamal* (2) and *Emperor* v. *Haji Usman* (3). He should examine the sureties as to their fitness and take such evidence as the accused may give, and base his decision on the evidence so recorded.

Order reversed.

(1) 2 S. L. R. 11; 10 Cr. L. J. 225.

(2) 2 S. L. R. 15; 10 Cr. L. J. 230.

(3) 7 Ind. Cas. 592; 4 S. L. R. 18; 11 Cr. L. J. 497.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 7 OF 1912 UNDER THE LEGAL PRACTITIONERS ACT.

August 28, 1912.

Present:—Mr. Justice Chitty and Mr. Justice Teunon.

In re DINESH CHANDRA BHATTACHARJEE, A MUKHTEAR.

Legal Practitioners Act (XVIII of 1879), s. 14—Mukhtear—Mukhtear having no license to practise in Revenue office—Misconduct—Commission of misconduct as private individual—Jurisdiction of Commissioner to report to High Court.

In the course of a Land Registration Appeal the Commissioner found that the conduct of a Mukhtear, who had no license to practise in a Revenue office, had been grossly improper and fraudulent, because he had fraudulently transferred certain properties and made certain discrepant statements one or other of which must have been false, he accordingly submitted a reference to the High Court recommending the Mukhtear's dismissal:

Held, that, as the misconduct according to the Commissioner's report was committed not in the capacity of a Mukhtear but as a private individual, and came to light only at the hearing of an appeal in a case to which he was not a party but only a witness, the matter did not fall within the purview of section 14 of the Legal Practitioners Act and the Commssioner had no authority to report the Mukhtear to the High Court.

Reference under section 14 of the Legal Practitioners Act of 1879 made by the Commissioner of the Dacca Division.

IMAMBUX *v.* EMPEROR.

Babu *Bimal Chandra Das Gupta*, for the Mukhtear.

Babu *Ram Charan Mitra* (Senior Government Pleader) in support of the reference.

JUDGMENT.—This is a reference under section 14 of the Legal Practitioners Act (XVIII of 1879) in the matter of Dinesh Chandra Bhattacharjee, a Mukhtear of Tengail, in the District of Mymensingh. He was admitted as a Mukhtear on the 9th October 1906, and his certificate which was renewed on 27th January 1912 authorises him to practise in the Courts of Munsifs and in all Criminal Courts of first instance. The reference is made by the Commissioner of the Dacca Division, who in the course of Land Registration appeal came to the conclusion that the conduct of the Mukhtear Dinesh Chandra Bhattacharjee had been grossly improper and fraudulent. The Commissioner accordingly framed two charges against the Mukhtear (1) with having fraudulently transferred to one Jadab Lal Chaudhuri the share which he had purchased in estate No 12 of the Mymensingh *Tauzi*, and (2) with having made certain discrepant statements in regard to his purchase of the property, one or other of which must have been false. The Mukhtear was called upon to meet these charges. No fresh evidence appears to have been recorded, but the Commissioner, acting upon the materials before him in the Land Registration appeal and the Mukhtear's explanation, found that both charges were proved and has recommended that the Mukhtear be dismissed.

A preliminary objection is taken to this reference or report that it is *ultra vires*. The Mukhtear Dinesh Chandra Bhattacharjee admittedly has no license to practise in any Revenue office, nor has he been charged at any such office with misconduct. The misconduct, which the Commissioner reports, was committed not in Dinesh Chunder Bhattacharjee's capacity as a Mukhtear practising in a Revenue office, but as a private individual and it came to light only in the hearing of an appeal in a case in which he was not a party but only a witness. We think, therefere, that the matter does not fall within the purview of section 14 of the Act and that the objection must be upheld. A further objection to the Commissioner's report is that he recorded no evidence in support of, or to refute the charges. It would have been only right and proper to have examined the parties concerned with the certificate sale and also Jadab Lal Chaudhuri to whom the Mukhtear is said to have subsequently sold the property which he had purchased. We need not consider the further point which was raised that the Commissioner of the Dacca Division had no power to report to this Court under section 14 (*a*). On this reference we hold that the Commissioner had no authority to act as he did or to report to this Court.

At the same time there are circumstances calling for an inquiry into the Mukhtear's conduct. As a Division Bench empowered only to deal with the reference we are unable to take further action in the matter, but we direct the Deputy Ragistrar to lay the papers before the Chief Justice in order that the Court may, if it thinks fit, order an inquiry under section 13.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 63 OF 1913.

July 24, 1913.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

IMAMBUX *wald* KHUDABUX—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Perjury, charge of—Contradictory statements—Presumption.

Where a charge for perjury is based on two contradictory statements, every possible presumption in favour of the reconciliation of the statements should be made.

Queen-Empress v. *Ghulet*, 7 A. 44; *Queen-Empress* v. *Ramji Sujabrao*, 10 B. 124, referred to.

Appeal from the judgment of the Additional Sessions Judge, Sukkur.

Mr. *Wadhumal Oodharam*, for the Appellant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The accused has been convicted of giving false evidence on three separate charges. The Sessions Judge has not recorded separate convictions and sentences on each head of charge as he should

have done, but has sentenced the accused to undergo three years' rigorous imprisonment for the offence of perjury. The first head of charge is in the alternative and refers to two contradictory statements. These were made by the accused in giving evidence, *first* before the Sub-Divisional Magistrate, and *secondly*, before the Sessions Court. The first statement is "I know Hajul; she was accused's wife. She died about seven or eight days ago. I do not know how she died, but in the morning Bagh called me out and told me that the previous night Hajul had had an attack of kidney pain and she had died.". The second statement is "Hajul died about two months ago. Bagh came and told me in the morning that his wife was suffering from kidney pain and I went and saw her and returned to my house. Next morning Bagh came and said his wife had died of kidney pain that night." These statements are said to be discrepant because in the first statement the accused says he does not know how Hajul died, whereas in the second statement he says he went and saw her when she was suffering from kidney pain. But, it does not necessarily follow that, because she was suffering from kidney pain, that she died of it, or that the accused should know that her death was due to that disease. It is a well known rule that in the Crown cases where the charge is based on contradictory statements, every possible presumption in favour of the reconciliation of the two statements should be made. See remarks of Duthoit, J., in *Queen-Empress* v. *Ghulet* (1) followed in *Queen-Empress* v. *Ramji Sajabarco* (2). We do not think that the two statements forming the basis of the charge are irreconcilable and, therefore, the conviction on that charge must fail.

The third charge or the only part of it that is considered in the judgment of the Sessions Court is the statement made by the accused that Bagh is his cousin. This statement has been erroneously considered by the Sessions Judge in the first head of charge. But the prosecution did not include it in that head of charge. On the 3rd count it is charged as a false statement made in the Sessions Court and, therefore, the onus is on the prosecution to prove affirmatively that Bagh is the cousin of the accused. But the only evidence tendered by the prosecution is the former statement of the accused before the 3rd class Magistrate that Bagh is his cousin. This is clearly insufficient, for that former statement may be either false or mistaken. On this head of charge also the prosecution must, therefore, fail.

As to the second charge, however, the case is stronger. That charge is that the accused gave false evidence before the Sessions Court when he said that he had said to the Sub-Divisional Magistrate that he visited Hajul on the night previous to her death. It is a matter of record that the accused made such a statement to the Magistrate and we agree with the lower Court in believing that the evidence was not mistaken, but intentionally false, for a comparison of this statement shows that the accused was improving his evidence in order to benefit Bagh who was on his trial for murder.

We confirm the conviction as under the second head of charge and reduce the sentence to one of rigorous imprisonment for six months.

Conviction confirmed.

(1) 7 A. 44.
(2) 10 B. 124.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1965 OF 1913.

March 12, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

CHANDAR BHAN AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Companies Act (VI of 1882), s. 74—Filing balance-sheet within year—Director resigning before expiry of year—Not liable for failure to file—Mere ceasing to hold necessary qualification shares, effect of—Vacation of office of Directorship.

A Company is not by law obliged to file a balance-sheet till a year from its registration is complete, and a Director of the Company who resigns office before the expiry of the year cannot be fixed with liability under section 74 of the Indian Companies Act, VI of 1882, for failure to file a balance-sheet with the Registrar of Joint Stock Companies.

Act VI of 1882 is not precise on the point, but under English Law the mere ceasing to hold the necessary qualification shares involves vacation of his office by a Director, and this is made clear by section 85 (2) of the new Act VII of 1913.

CHANDAR BHAN *v.* EMPEROR.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Lahore Division, dated 8th August 1913, confirming that of the Magistrate, 1st Class, Lahore District, dated 16th May 1913, convicting the petitioner.

Mr. *Gokal Chand Naurang*, for Mr. *Bhagat Ram Puri*, for the Petitioner.

JUDGMENT.—The petitioners, Chander Bhan Hooja and Ram Labhaya, young men of very indifferent education and said to be the sons respectively of a retired Police Sergeant and a deceased *Patwari*, have been convicted under section 74, Indian Companies Act, VI of 1882 and sentenced to fines of Rs. 200 each.

The Company here concerned was registered as "The Indian National Benefit Society, Limited, Lahore," on the 8th April 1911. Its professed objects were on the same grandiose scale as those of another society started in 1911, in which also Chandar Bhan took a prominent part discussed in our judgment in *Chhabildas* v. *Emperor* and *Chandar Bhan* v. *Emperor* (1). The articles of association for both Companies were practically identical, and adopted almost *en bloc* from a standard form in use elsewhere. The learned Sessions Judge dealt with the two cases on one day, and we can only suppose that he was misled by such features as are common to the two cases into assuming, without looking carefully into the matter, that the convictions were here equally justified. It may very well be the case that the connection of the petitioners with the present Company was discreditable to begin with and possibly dishonest, but it is quite clear to us that their convictions cannot stand.

The petitioners joined the Company as Directors in August and September 1911, but both resigned their posts early in March 1912, transferring their qualification shares to their successors. It is alleged by them, and apparently with truth, that they took no fees as Directors and attended no meetings during their brief connection with the Board. The Sessions Court has assumed that they continued to be Directors for over 11 months, but of this there is no proof and we observe that none of the documents referred to in the Magistrate's record as Exhibit P. A, B, C, or D. A are to be found on that record. Act VI of 1882 is not precise on the point, but under English Law the mere ceasing to hold the necessary qualification shares involves vacation of his office by a Director, and this is made clear by section 85 (2) of the new Act VII of 1913.

The petitioners have been convicted as Directors on account of failure to file a balance-sheet with the Registrar of Joint Stock Companies within twelve months after the Company had been registered. On the present meagre record we must hold that they were not Directors when the year expired, and the lower Courts are clearly mistaken in thinking that they can nevertheless be fixed with liability because they held office temporarily for some six months of the year. The Company was not by law obliged to file a balance sheet till the year was complete, and no Directors could compel the Managing Director or other officials to prepare that balance-sheet at an earlier stage. The petitioners ceased to have even a nominal voice in the affairs of the Company from at latest the 12th March 1912, and the balance-sheet was not due till the 8th April. It is neither sound law nor common fairness to expect them to do that which they had no power to do during the intervening period of nearly a month, and we can only suppose that these men were proceeded against because the real culprits, the Managing Director and others, had disappeared before the prosecution was started on a complaint dated 5th December 1912.

We are certainly not prepossessed in favour of the petitioners who may well have known all along that no good could come of a Company launched on the public in the reckless and deceptive manner indicated by what little we can gather as to its history. The petitioners are, however, saved from liability on the present charge against them by the fact that they severed their connection as Directors in time.

The revision is accordingly allowed. The convictions of both men are set aside and their fines of Rs. 200 each will be refunded if paid.

Petition allowed.

(1) 23 Ind. Cas. 508; 15 Cr. L. J. 300.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 93 OF 1913.

July 24, 1913.

Present:—Mr. Pratt, J. C., Mr. Kemp, A J.C., and Mr. Hayward, A. J. C.

In re MR. C. H. CLEMENTS.

Criminal Procedure Code (Act V of 1908), s. 4 (r) —Pleader accepting engagement in Court not authorized to practise—Duty.

It is the duty of a Pleader who appears in a Criminal Court of a District to which his *sanad* or certificate does not apply to inform the Magistrate that he cannot appear as of right and to apply for permission under section 4 (*r*) of the Criminal Procedure Code. The better course is not to accept a fee or an engagement until that permission has been accorded, but if the Pleader accepts the engagement before attending the Magistrate's Court he ought to explain to his client that his appearance will be contingent on the Magistrate's permission.

This was a reference from the District Judge, Hyderabad.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—This rule was issued to Mr. Clements in the following circumstances.

Mr. Clements holds a license to practise as a Pleader in the Courts of the Hyderabad District. It was decided by a Full Bench of this Court in the case of *Kimatrai* v. *Emperor* (1) that this license gave no authority to its holder to appear in the Criminal Courts of another District. The decision was passed on the 16th September 1910. Nevertheless, Mr. Clements in April 1913 accepted a fee of Rs. 20 to represent an accused person in a case before a Magistrate at Kotri in the Karachi District and before receiving the fee he did not tell his client that his appearance was contingent on the Magistrate's permission under section 4 (*r*), Criminal Procedure Code. As a matter of fact, the Magistrate refused to allow Mr. Clements to appear and he was, therefore, unable to represent his client.

Mr. Clements seeks to justify his conduct on two grounds. He says that he had received a letter from the Registrar of this Court informing him that his *sanad* would not be extended to the Civil Courts of Kotri and that he inferred that he might practise in the Criminal Courts. His second ground is that he had appeared twice before in this Court and did not anticipate that permission would be refused by the Magistrate. As to the first ground it is clear that a refusal to extend the *sanad* to the Civil Courts could not imply that the *sanad* had been extended to the Criminal Courts. No such order had been passed and we are satisfied that Mr. Clements did not believe that he had a right to appear in a Magistrate's Court at Kotri. As to the second ground it may be that he hoped to get permission, but that is at best, merely a mitigating circumstance. It is the duty of a Pleader who appears in a Criminal Court of a District to which his *sanad* or certificate does not apply to inform the Magistrate that he cannot appear as of right and to apply for permission under section 4 (*r*) of the Code of Criminal Procedure. The better course is not to accept a fee or an engagement until that permission has been accorded. But if the Pleader accepts an engagement before attending the Magistrate's Court he ought to explain to his client that his appearance will be contingent on the Magistrate's permission. Mr. Clements did not adopt either course. He took his stand on the Registrar's letter and pretended to be a person authorised to practise in the Criminal Courts at Kotri. This was a mere pretence whereby he deceived his client and attempted to deceive the Magistrate. Moreover, he declined to return the fee when permission to appear was denied him and he aggravated his refusal by claiming to keep the fee against expenses with respect to which there was no agreement between him and his client. He must have known that he had no lien on the fee, and these circumstances, together with his attitude in Court, suggest that he was in part actuated by a desire to recover what he says was already owing to him. Before passing order on the case we desire to give Mr. Clements an opportunity of making reparation by paying Rs. 20, the fee that he received, to the Nazir, District Court, Hyderabad, for the purpose of being refunded to his client.

We defer passing final orders till this day fortnight.

As Mr. Clements has re-paid the fee we

(1) 9 Ind. Cas. 717; 4 S. L. R. 207; 12 Cr. L. J. 118.

think it unnecessary to do more than record this order censuring him for misbehaviour.

Censure recorded.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 82 OF 1913.

July 24, 1913.

Present:—Mr. Pratt, J. C., and Mr. Kemp, A. J. C.

RAMZAN—ACCUSED—APPLICANT

versus

NOOR MAHOMED YACUB—COMPLAINANT—OPPONENT.

Workmen's Breach of Contract Act (XIII of 1859)—Contract to perform higher services than manual labour not within Act.

An agreement to render services far higher than those of manual labour is not a contract within the meaning of Workmen's Breach of Contract Act.

Emperor v. *Naga Tima*, 17 Ind. Cas. 789; 14 Bom. L. R. 956; 13 Cr. L. J. 853 and *Purna Chandra Nandan* v. *Tarak Nath Chandra*, 4 Ind. Cas. 413; 36 C. 917, 10 Cr. L. J. 577, referred to.

Revision application against the order of the City Magistrate, Karachi.

Mr. *Mulchand Maghanmal*, for the Appellant.

The *Public Prosecutor*, for the Crown.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order made by the City Magistrate, Karachi, under section 2 of the Workmen's Breach of Contract Act, XIII of 1859.

The applicant entered into an agreement with his employer on the 28th November 1910 to serve him at his butcher's shop for two years at a monthly wages of Rs. 30. The agreement which is in writing makes no reference to manual labour. By clause 6 of the agreement the applicant bound himself to give an account of his daily sales every evening. By clause 7 he admitted that he had received an advance of Rs. 60 and agreed to give credit for the advance of Rs. 60 from the pay of the last two months of the period contracted for. By clause 8 he agreed in case of default to re-pay Rs. 720 wages for the full period *plus* the advance of Rs. 60.

The Magistrate found that the applicant without lawful excuse left the service of his employer in the third month and ordered him to re-pay the advance of Rs. 60.

Now it is admitted that the applicant had to do manual work at the shop, for he cut and dressed the meat for sale. It may be conceded, therefore, that he was a workman. But the Act applies to contracts for the performance of work and it seems to us that this contract is not within the Act.

The only service expressed in the contract is that of sales and rendering of an account of sales. The duties of a clerk or shop assistant do not involve manual labour and even if the agreement implies that some manual labour has to be performed, the agreement is much wider in its scope than the agreements contemplated by the Act. The Act is a penal enactment and, therefore, subject to the rule of strict construction [See *Emperor* v. *Naga Tima* (1)]. In *Purna Chandra Nandan* v. *Tarak Nath Chandra* (2) the agreement was that of a grinder of surgical instruments who was paid not only by wages, but by a share of the profits. The Court held that the Act had no application for there were provisions in the agreement under which the workman was entitled to privileges for above those of an ordinary artificer or labourer. So here there are provisions in the agreement which require the applicant to render services far higher than those of manual labour.

Again, the Act only applies when the advance has been made on account of any work which the workman shall have contracted to perform. Here the work and labour for the first twenty-two months were fully paid for by wages. If the advance had been really on account of work it would have been recoverable from the wages payable at the beginning of the term of service. The advance was, therefore, not really on account of work at all, but was merely a pretence with the object of shaping the transaction into a form to which the Act would apply; and also of leaving the applicant indebted to his employer at the

(1) 17 Ind. Cas. 789; 14 Bom. L. R. 956; 13 Cr. L. J. 853.

(2) 4 Ind. Cas. 413; 36 C. 917; 10 Cr. L. J. 577.

close of the period of service and so compelling him to re-engage himself. The advance was similar to that referred to in *In re Abdul Rasul* (3), a loan re-payable out of wages.

The Magistrate, therefore, should not have made an order under section 2, but should have left the employer to his civil remedy under clause 8 of the agreement.

I have examined and given my opinion on the merits of this application, for it is important that Magistrates should exercise great caution in applying an Act which might very easily be used as a means for enforcing a species of slavery. But as applicant complied with the order and refunded the advance no penal proceeding was taken against him and we have no jurisdiction to interfere. We have already held following *Emperor* v. *Balu Salaji* (4) that proceeding under the first part of section 2 is not a criminal proceeding. I would, therefore, reject the application.

KEMP, A. J. C.—I agree with the learned Judicial Commissioner that under the cirstances of this case we have no jurisdiction to interfere; see *Emperor* v. *Balu Salaji* (4). I would, however, like to add that in my opinion there has been no "wilful" refusal to perform in this case. The use of the word "wilful" suggests deliberation and that can hardly be urged where the applicant has already worked for over two months and forfeited his wages by not completing the third month. If his act had been wilful would he have left before completing the third month and getting wages for it? His act in leaving may have been without lawful excuse, but I cannot say it was "wilful." The Magistrate has not dealt with this aspect of the case.

Again, I think on the facts of this case it might fairly be argued that if the advance was not against wages, but against the work to be done in the last two months of the service, the applicant has still an opportunity of doing that work and the complaint is premature. The appropriation of the advance to the remuneration for the last two months of service might, where the wages are Rs. 30 per month, fairly be taken as against the work to be performed during those two months. The mere breach of contract of service by the applicant in the 3rd month does not necessarily imply that he will fail to carry out a specific contract to re-pay the Rs. 60 by working during the last two months.

I think, however, the advance was against wages and not work.

Application rejected.

(3) 11 Ind. Cas. 586; 13 Bom. L. R. 548; 12 Cr. L. J. 402.

(4) 1 Ind. Cas. 387; 33 B. 25; 10 Bom. L. R. 1126; 8 Cr. L. J. 409.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 702 TO 707 OF 1913.

CASE REFERRED NOS. 98 TO 103 OF 1913.

November 4, 1913.

Present:—Mr. Justice Sankaran Nair.

In re AMBU AND OTHERS—ACCUSED.

Workmen's Breach of Contract Act (XIII of 1859)—Contract to work for twelve years.

A contract to work 8 hours a day for 12 years, for wages not shown to be above the market-rate, and to live in any house that may be provided, being otherwise a form of slavery, is illegal.

Where an advance made to a workman is merely a loan, Act XIII of 1859 does not apply.

Cases referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of South Canara, in his letter, dated 21st October 1913.

ORDER.—I agree with the District Magistrate. The contract by the accused to work for 12 years every day from 7 to 12 A. M. and 2 to 5 P. M., and to live in any house that may be provided for them, for wages at a rate that is not shown to be so far above the market-rate as to be a sufficient compensation for submission to what is otherwise a form of slavery is clearly illegal. Moreover, the advance is merely a loan. Act XIII of 1859 has no application. The Magistrate's orders are set aside.

Orders set aside.

RAMANADHAN PATTAR *v.* ACHUTA VARIER.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 994 OF 1912.

February 24, 1914.

Present:—Mr. Justice Seshagiri Iyer.

K. RAMANADHAN PATTAR—PLAINTIFF—PETITIONER

versus

ACHUTA VARIER AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 116—Suit for rent—Registered document.

A suit for rent under a registered document is governed by Article 116.

Vythilinga Pillai v. *Thetchanamurti*, 3 M. 76; 5 Ind. Jur. 76; *Ambalavana Pandaram* v. *Vaguran*, 19 M. 52; 5 M. L. J. 228; *Ramakrishna Chetty* v. *Subbaraya Iyer*, 18 Ind. Cas. 64; 24 M. L. J. 54; (1913) M. W. N. 303 and *Chengiah* v. *Thimma Nayanim*, 6 Ind. Cas. 766; 7 M. L. T. 419, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat, in Small Cause Suit No. 496 of 1912.

Mr. *C. V. Anantakrishna Iyer*, for the Petitioner.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—Whatever may be my own view regarding the applicability of Article 116 of the Limitation Act to suits for rent under a registered document, I am bound by the course of decisions in this Presidency commencing with *Vythilinga Pillai* v. *Thet Chanamurti Pillai* (1). This same principle has been applied to cases reported in *Ambalavana Pandaram* v. *Vaguran* (2) and in *Ramakrishna Chetty* v. *Subbaraya Iyar* (3) and has been expressly followed in *Chengiah* v. *Thimma Nayanim* (4). On these authorities the suit is not barred by limitation. I reverse the decision of the Subordinat Judge and direct him to re-place the suit on his file and to dispose of it according to law.

Costs will abide the result.

Petition allowed.

(1) 3 M. 76;5 Ind. Jur. 76.

(2) 19 M. 52; 5 M. L. J. 228.

(3) 18 Ind. Cas. 64; 24 M. L. J. 54; (1913) M. W. N. 303.

(4) 6 Ind. Cas. 766; 7 M. L. T. 419.

GOKUL CHAND *v.* BHIKA.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1001 OF 1913.

March 25, 1914.

Present:—Justice Sir George Knox, KT.

GOKUL CHAND—DECREE-HOLDER—APPELLANT

versus

BHIKA—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 3—Payment out of Court—Certificate of payment—Fact of payment inserted in application for execution, whether valid—Certificate of payment.

Order XXI, rule 2 of the Civil Procedure Code points to a definite proceeding with a petition on the part of a decree-holder and a formal act by the Court. It signifies that a decree-holder should come forward and in some special well-defined speech or writing certify to the Court that money payable under his decree has been paid out of Court, and that on the decree-holder so certifying the Court shall record the same accordingly.

In an application for execution the fact of payment out of Court by the judgment-debtor was omitted from the column in which it ought to have found a place, but it was mentioned in the body of the application with the remark that the judgment-debtor had endorsed the payment on the copy of the decree in his own handwriting and affixed his signature:

Held, that the Court was not bound to recognize such clandestine mention of payment.

Second appeal against the decree of the District Judge of Meerut, reversing that of the Munsif of Ghaziabad.

FACTS.—The decree-holder applied to execute his decree after 3 years from the date of the decree. He filed a copy of the decree on which there was an endorsement in the handwriting of the judgment-debtor of the payment of an amount out of Court. In the application to execute the decree it was stated that a sum of Rs. 20 had been received out of Court and that the judgment-debtor had made an endorsement in his own handwriting on the copy of the decree. The first Court held that the payment extended the period of limitation and allowed the application. The lower Appellate Court was of opinion that the payment not being certified could not be taken into consideration by the executing Court. It, therefore, dismissed the application as time-barred. The decree-holder appealed.

Mr. *P. L. Banerji*, for the Appellant, contended that all that the law required was that the decree-holder should certify the payment to the Court executing the decree. No particular form was prescribed for the certificate

nor was any time prescribed within which payments had to be certified. The application of the decree-holder contained a statement that the money was received by him out of Court and this was a sufficient certificate of payment by the decree-holder as required by Order XXI, rule 2. There was no warrant for the contention that the certificate of payment by the decree-holder must be an independent proceeding not amounting to the application for the execution of the decree. This view was supported by the opinion of Messrs. O. Kinealy and Rampini in their standard commentary on the Code of Civil Procedure. There was no case of any Court which decided that a certificate of payment made by the decree-holder in his application for execution of the decree would not be sufficient.

Mr. *P. D. Tandon*, for the Respondent, urged that there was a change in the law as enacted by the Code of 1908 and an uncertified payment could not be looked at even for the purpose of saving limitation. In the present case the decree-holder never certified the payment to the Court and he never intended that his application for execution should be treated as such.

Mr. *P. L. Banerji* was heard in reply.

JUDGMENT.—The appellant is one Gokul Chand. He holds a decree against the respondent Bhika which he obtained on the 28th of August 1909. He does not appear to have attempted to take out execution proceedings until the 5th of February 1913. The decree would, therefore, be barred by limitation. But the decree-holder in his application for execution has inserted the following words:—"The period of limitation for the execution of the decree was up to the 28th of August 1912. However, the judgment-debtor paid to the decree-holder a sum of Rs. 20 on account of interest on the 27th of January 1912 within three years of the date of the decree and Naubat, judgment-debtor, endorsed the payment on the decree in his own handwriting and affixed his signature. With effect from the aforesaid date the decree-holder is entitled to compute a fresh period of limitation and the decree is within time."

It is worth noting in connection with this that the application for execution does not follow the language used in rule 11, Order XXI, Civil Procedure Code. That rule requires the decree-holder to note whether any, and if so, what payment or other adjustment of the matter in controversy has been made. The application as it stands has at its heading only the words, "whether any adjustment has been made," and the entry in the column intended for that purpose simply says, no adjustment was made. Bhika, the respondent denied that any payments had been made. The Court of first instance tried the issue whether the payment of Rs. 20 had been made. It found that Bhika had paid Rs. 20 to the decree-holder on the 27th of January 1912. Bhika appealed and the District Judge of Meerut refrained from deciding this particular issue. He held that this payment has not been certified by the decree-holder to the Court, and that Order XXI, rule 3, Civil Procedure Code, prevented any Court executing the decree from recognizing a payment which had not been certified. Thus holding, he allowed the appeal and dismissed the application for execution. In appeal here it is contended that the decision of the lower Appellate Court on this point is wrong. The decree-holder was not bound by any period of limitation and the present application for execution in which the payment was mentioned was a sufficient certificate of such payment within the meaning of Order XXI, rule 2. It appears to me that the action of the decree-holder in the form in which it has been made in the present case is not such a certificate of payment as was intended by the Code. Looking at the application, I hold that the application was what it represented itself to be, namely, an application for execution of the decree. The omission of the fact of payment from the column in which it ought to find a place and in which we expect to find it would stand in the decree-holder's way, and the introduction of payment at an unusual place is a mere after-thought on his part and is not in my opinion, a certificate of payment. It is true that no form is prescribed for a certificate. But the wording of rule 2, Order XXI, signifies that a decree-holder shall come forward and in some special well-defined speech or writing certify to the Court that money payable under his decree has been paid out of Court. The rule goes on to say that on the decree.

holder so certifying, the Court shall record the same accordingly. All this points to a definite proceeding with a petition on the part of the decree-holder and a formal act by the Court. Nothing of that kind occurred in the present case, and I agree with the lower Appellate Court in holding that the Court was bound not to recognize this mention of payment slipped in in this *quasi* clandestine manner. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2244 AND 2300 OF 1911.

April 16, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

IN No. 2244 OF 1911.

BAMA CHARAN BHATTACHARYYA—PLAINTIFF—APPELLANT

versus

BOGALA CHARAN KUNDU AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 2300 OF 1911.

BOGALA CHARAN KUNDU—DEFENDANT No. 1—APPELLANT

versus

BAMA CHARAN BHATTACHARYYA—PLAINTIFF—AND NAGENDRA NATH SET AND ANOTHER—REMAINING DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Suit by decree-holder against judgment-debtor—Defence that decree was collusively obtained, whether available to defendant—Insolvency—Adjudication—Creditor of insolvent, if can enforce claim, without leave of Court—Pleadings.

In a suit under Order XXI, rule 63, of the Civil Procedure Code, a Court is not restricted to determine only the question as to whether the property ought to be attached or not. But when the decree-holder has been guilty of fraud in obtaining a decree, and has owing to that fraud purchased the property himself, if he brings a suit under the rule on the rejection of his claim, the defendant in the suit, against whom he had fraudulently obtained the decree and purchased the property, is entitled to set up the case that the suit from the beginning to the end was a fraud.

Naranayyan v. *Nageswarayyan*, 17 M. 389, followed *Gulibai* v. *Jagannath*, 10 B 659, distinguished.

After an adjudication order, no creditor of a person, who has been adjudicated an insolvent, is at liberty to enforce any claim against the insolvent or against his property without the leave of the Court, as provided by both the Presidency Towns Insolvency Act and the Provincial Insolvency Act.

Appeal from the decree of the Sub-Judge of Hooghly, dated May 11th, 1911, modifying that of the Second Munsif of Arambagh, dated June 30th, 1910.

FACTS.—This is an action for declaration of plaintiff's title to the disputed lands and for confirmation of his possession of them, and also for a declaration that they are not liable to be attached in execution of a decree obtained by defendant No. 1 against the other defendants.

Plaintiff's case is that defendant No. 2, Nagendra Nath Set, and his late younger brother Upendra Nath Set jointly borrowed Rs. 800 from plaintiff and executed a *hatchitta* in plaintiff's favour. Upendra died and defendant No. 3, Probala Dasi, is his sonless widow. Plaintiff brought a suit in the Third Sub-Judge's Court, Hooghly, against defendants Nos. 2 and 3 upon this *hatchitta* and secured an *ex parte* decree. In execution of this decree defendant No. 1, Bogala Charan Kundu, who had secured a money decree against defendants Nos. 2 and 3, intervened and prayed for rateable distribution. That prayer was rejected and then defendant No. 1 made bids for purchase of some of the attached properties, but as plaintiff made the highest bids, the defendant No. 1 was unsuccessful in making auction-purchase of any property. The plaintiff was the auction-purchaser and took symbolical possession of the auction-purchased properties by aid of the Court. The plaintiff is in possession since then. But defendants Nos. 2 and 3 in collusion with defendant No. 1 caused the latter to attach the properties in suit and the dwelling house of defendants Nos. 2 and 3 in execution of his decree. The plaintiff preferred a claim which was allowed with respect to the dwelling house, but disallowed with respect to the *bastu*, *khirki* and *boro pukur*. Hence this suit by the plaintiff.

Defendants Nos. 1 and 3 only appear to contest the action and have put in two separate written statements. They allege *inter*

alia that plaintiff's action was a fraudulent one, and the *hatchitta* on which he based his claim was a forged one, and that it was got up after the death of the husband of defendant No. 3.

The principal point for decision is:—Whether the plaintiff's money-decree is collusive and fraudulent and whether the plaintiff's auction-purchase under the decree did confer any title to the plaintiff?

The first Court held that the defendants failed to make out their allegations, and decreed the suit.

On appeal, the lower Appellate Court held that defendants Nos. 1 and 3 failed to prove that defendant No. 2 did not take any loan from the plaintiff and the decree obtained by the plaintiff was not binding upon defendant No. 2, and that the execution-sale did not pass defendant No. 2's half share in the properties in suit to the plaintiff. With respect to defendant No. 3, the Court found that the decree against her was a nullity as her husband did not execute the *hatchitta* in plaintiff's favour and that, therefore, the plaintiff's auction-purchase did not confer upon him any title with respect to the half share of defendant No. 3 in the properties in suit. So the plaintiff got a decree with respect to the half share of defendant No. 2.

From that decree both the plaintiff and the defendant No. 1 appealed to the High Court.

IN No. 2244.

Babus *Sarat Chandra Roy Chaudhury* and *Dhirendra Krishna Roy*, for Babu *Govinda Chandra Chakravarti*, for the Appellants.

Babu *Narendra Kumar Bose*, for the Respondent.

IN No. 2300.

Babus *Dwarka Nath Chakravarti* and *Hari Bhushan Mukerjee*, for the Appellant.

Babus *Sarat Chandra Roy Chaudhury* and *Dhirendra Krishna Roy*, for Babu *Gobinda Chandra Chakravarti*, for the Respondents.

JUDGMENT.

IN No. 2244.

FLETCHER, J.—This is an appeal from a judgment of the learned Subordinate Judge of Hooghly, dated the 15th May 1911. The suit was brought by the plaintiff, according to the plaint, to establish his title to and recover possession of certain properties mentioned in the Schedule. The suit was valued at Rs. 300 and the Court-fee was paid upon that amount. The facts appear to be as follows:—The plaintiff alleged that he lent to the defendant No. 2 who, it appears, is an insolvent and to the husband of the defendant No. 3 a sum of Rs. 800 on a *hatchitta*. That was lent as long ago as *Bysack* 1308, B. S., corresponding with April 1901. Subsequently, the plaintiff sued the defendants Nos. 2 and 3 upon that *hatchitta* and obtained an *ex parte* decree in June 1904. In execution of that decree, the property was sold and the plaintiff himself became the purchaser. The defendant No. 1 had also obtained a money-decree against the defendants Nos. 2 and 3, and, after the plaintiff's purchase the defendant No. 1, in execution of his decree in 1908, attached certain portions of the property that the plaintiff had purchased in execution of his own decree. The plaintiff thereupon preferred a claim and his claim was allowed as regards the dwelling house only but was disallowed as regards the other properties. The plaintiff thereupon brought this suit to establish his title.

The learned Subordinate Judge has found, and with those findings of fact we are not at liberty to interfere, that the husband of the defendant No. 3, that is, Upendra, did not sign the *hatchitta* sued upon. That document, the finding of the learned Judge shows conclusively, was, in his opinion, a forgery. The story, that was set up by the plaintiff and his witnesses during the trial of the case about the execution of this document at 9 A.M. of the 25th *Bysack* 1308, the learned Judge disbelieved. He came to the conclusion that Nagendra, the defendant No. 2, signed his brother's signature to that, not as the *Karta* of the family or owing to any inability of Upendra to write his own name, but to enable the plaintiff, if it became necessary to enforce his claim on the *hatchitta*, to obtain a decree not only against the defendant No. 2 but against his brother Upendra also. The learned Judge also found that the defendant No. 3, the widow of Upendra, was never served with any notice in the suit in which the decree was obtained on the *hatchitta*. On those findings, the lower

Appellate Court came to the conclusion that the decree was fraudulent as regards the third defendant and that the plaintiff's claim to the property, so far as regards the interest of the deceased Upendra, ought to be disallowed and, as regards that property, it dismissed the plaintiff's suit.

Against that decision, the learned Vakil, who has appeared on behalf of the plaintiff in this appeal, has urged many points. With the findings of fact of the lower Appellate Court, of course, the learned Vakil is not able to quarrel; but he wishes to dissociate his client, the plaintiff, from his position as an auction-purchaser, which clearly he was from that either of a forger or an abettor to a forgery, as found by the learned Judge of the Court of appeal below. The learned Judge not improperly thought that the position of the plaintiff in this transaction from the time of the forging of the name of Upendra down to his purchase in execution was one and the same and that it was impossible to take the plaintiff's title under the sale certificate and not look at the transactions in which he had been concerned which had proceeded the purchase in execution. In my opinion, the learned Judge was obviously right in that.

Then, it is objected that, in a suit under Order XXI, rule 63, Civil Procedure Code, the Court cannot go into any question except whether the property ought to be attached or not. In support of that, the learned Vakil for the appellant has referred us to the case of *Phul Kumari* v. *Ghanshyam Misra* (1), decided by the Judicial Committe of the Privy Council. That case goes far to support the decision of the learned Judge that this case is not a suit under that rule. That case came before the Judicial Committee of the Privy Council on a matter as to what was the proper Court-fee in a suit of that nature and the Privy Council decided that the fee was Rs. 10, as being for a suit to review an order or judgment of a Court not established by the royal Charter. The plaintiff apparently paid Rs. 10 as Court-fee in this case and the learned Judge made him pay the *ad valorem* fee according to the value of the property given in the Schedule to the plaint. It is said that there is a conflict of judicial decisions as to what can be gone into in a suit of this nature. The case that has been relied upon by the learned Vakil for the appellant is the case of *Gulibai* v. *Jagannath* (2). That case, however, was a very different case from the present and, as I read the judgment of Sir Charles Sargent, he did not mean to suggest that when the actual decree-holder has been guilty of fraud in obtaining a decree and has owing to that fraud purchased the property himself, if he brings a suit under Order XXI, rule 63, Civil Procedure Code, on the rejection of his claim, the defendant in the suit, against whom he fraudulently obtained the decree and owing to such fraud has improperly purchased the property, is not entitled to set up the case that the suit from the beginning to the end was a fraud. The decision of Sir Charles Sargent does not seem to me to touch that question. On the other hand, we have the decision of the Madras High Court in the case of *Naranayyan* v. *Nageswar Ayyan* (3), in which Mr. Justice Muttusami Ayyar and Mr. Justice Best came to the conclusion that, in a suit of this nature, it is open to the defendant to show that the suit was collusive and fraudulent. The present case is not a case such as the one which Sir Charles Sargent was considering in *Gulibai* v. *Jagannath* (2), where a stranger to the decree was setting up the case that the decree was obtained fraudulently, but it is a case where the very person who never was served with the notice of the proceedings and whose husband's name was forged, according to the finding of the learned Judge, on the document sued upon sets up the case that the decree and all proceedings that are consequent thereon are fraudulent. No case has been cited to us which shows that a person who is a party to the suit and has been defrauded is not entitled to set up such a case. In my opinion, the decision in the case of *Naranayyan* v. *Nageswar Ayyan* (3) is correct.

Then, there was another question which was raised before the learned Judge, and that was that the plaintiff alleged that he paid off the mortgage of one Asutosh Mukerjee. The learned Judge says that it is not safe to act upon the plaintiff's statement with regard to that, Asutosh being apparently a close

(1) 35 C. 202; 12 C. W. N. 169; 35 I. A. 22; 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1.

(2) 10 B. 659.

(3) 17 M. 389.

relation of the plaintiff. The Judge might have somewhat harshly used the plaintiff in coming to that finding; but if the plaintiff has been so harshly used, in the view that the learned Judge took of the evidence, he has only got himself to blame, because if he put forward a document as genuine which the Court found to be a forgery and if the story set up by him was found to be false, it is contrary to human nature to say that that story did not re-act upon the mind of the learned Judge when he refused to believe that the endorsement of payment on the back of Asutosh's mortgage had been satisfactorily proved. The learned Judge in this case, no doubt, thought that, if the plaintiff was capable of being a party to a forgery at 9 A.M., of the 25th *Bysack* 1308, there was nothing to prevent him from being a party to the forgery in putting his relative's endorsement on the back of the mortgage-bond of Asutosh Mukerjee. Having regard to the findings of fact that the learned Subordinate Judge came to, it is impossible for us to disturb the judgment appealed from. The present appeal, therefore, fails and must be dismissed. We make no order as to costs.

RICHARDSON, J.—I agree as to the merits. As to the defences open to a defendant in such a suit as this, regard being had to the mode in which the plaintiff framed his suit and the prayer for delivery of possession, it seems to me that the learned Judge in the Court below was justified in admitting the defences which he has admitted and in dealing with the case in the manner in which he has dealt with it by his judgment.

In No. 2300.

It appears that the second defendant in this case has been adjudicated an insolvent. Of course, any property that he had has vested, if he has been adjudicated an insolvent within the limits of the Presidency town, in the Official Assignee of the Presidency town and, if he has been adjudicated an insolvent under the provisions of the Provincial Insolvency Act, then in the Court of the place where he resides or carries on business. Both the Presidency Towns Insolvency Act and the Provincial Insolvency Act provide that, after the adjudication, no creditor of a person who has been adjudicated an insolvent is at liberty to enforce any claim against the insolvent or against his property without the leave of the Court. No such sanction of the Court has been obtained in this case and, therefore, the appellant in this case has no *locus standi* before us. On that ground the present appeal fails and must be dismissed. We make no order as to costs.

This order is made without prejudice to any claim that the appellant has against the person representing the estate of the insolvent, if he be so advised to enforce it.

Appeals dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 89 OF 1913.

March 31, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

Proet CHATAR BUGH—PLAINTIFF—APPELLANT

versus

Pandit RAGHBEER DAYAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 15—Arbitration—Agreement to refer to arbitration—Revocation—Supersession of reference—Apprehension of misconduct of arbitrator, whether good ground for supersession.

In the case of an agreement to refer to arbitration come to out of Court, neither party can revoke the agreement at his own will and pleasure; but either party may do so for good and sufficient cause. A reference to arbitration made under the orders of the Court cannot be terminated by a mere revocation on the part of either the plaintiff or the defendant, but can only be superseded by an order of the Court. The fact that one of the parties concerned has lost faith in the fairness or impartiality of the arbitrator is not a valid ground for superseding the arbitration. Corruption or misconduct on the part of the arbitrator is a good ground for setting aside the award after the same has been received, but a Court is not authorized to take cognizance, during the pendency of the arbitration proceedings, of an allegation that the arbitrator is corrupt or partial or is misconducting himself so as to suspend the proceedings in arbitration and, if satisfied of the truth of the allegation, to supersede the arbitration before any award has been received.

Bombay Fire Insurance Co. v. *Ahmedbhoy*, 1 Ind. Cas. 14: 11 Bom. L. R. 1, referred to.

Application for revision against the decree of the Subordinate Judge of Agra, dated 20th June 1912.

Mr. *Nihal Chand*, for the Appellant.

Mr. *Durga Charan Banerji*, (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the Respondent.

CHATAR BUGH *v.* RAGHBEER DAYAL.

JUDGMENT.

PIGGOTT, J.—The revisional jurisdiction of this Court is being invoked by a plaintiff whose claim for a sum of Rs. 1,200 *plus* interest has been dismissed by the Additional Subordinate Judge of Agra under somewhat peculiar circumstances. The suit, having been duly instituted, was referred to arbitration by an agreement under para. 1 of the second Schedule to the Civil Procedure Code. The arbitrator had been directed to submit his award by August 8th, 1911. On July 20th, 1911, the defendant presented to this Court an application, supported by affidavit, asking the Court to supersede the arbitration, on the ground that he had lost confidence in the fairness and impartiality of the arbitrator. The Court directed that this application should come up for orders on July 28th, 1911, after notice to the plaintiff's Pleader; it did not take the precaution of issuing orders to the arbitrator to suspend his proceedings pending the disposal of the said application. It is a matter for controversy whether the plaintiff's Pleader did or did not receive notice; the record does not show that de did, and on the date fixed (July 28th, 1911) the matter was actually heard and disposed of *ex parte*. The Court had no materials before it except the affidavit filed along with the application of July 20th, 1911, and this affidavit is very badly drafted and does not bind down the deponent to affirming anything material as of his own personal knowledge. The Court, however, contented itself with taking note of the fact that no one appeared to contest the application, and thereupon passed an order superseding the arbitration and fixing a date for proceeding with the suit. It at the same time issued an order to the arbitrator directing him to send in all papers connected with the proceedings before him. It would seem that this order reached the arbitrator on July 30th, 1911, and his reply reached the Court on August 1st, 1911. He sent in a large number of papers, and with the rest, an award in favour of the plaintiff for Rs. 1,200 *plus* a certain amount of interest, the said award purporting to be dated July 27th, 1911. The plaintiff went up to this Court in revision against the order of July 28th, 1911; but a Bench of this Court held that no "case" had yet been "decided" within the meaning of section 115 of the Civil Procedure Code, and that there could be no interference at this stage.

By the time the learned Subordinate Judge came to take up the suit again, it would seem that he was beginning to entertain an impression unfavourable to the plaintiff's conduct of the case, at any rate he passed a peremptory order requiring the personal attendance of the plaintiff on the next date fixed for hearing. The case then came up on June 20th, 1912, the plaintiff being represented by Pleader, but not appearing in person as directed. His Pleader put in these applications one after the other, all of which were rejected by the Court. One at least of these applications was very improperly worded, and I feel compelled to place on record the impression, left on my mind by a perusal of the proceedings of that date, that there was some loss of temper on both sides. A mere inspection of the order by which the learned Subordinate Judge finally dismissed the plaintiff's suit suggests that it was written in haste and in some agitation of mind. The order as passed does not specify under what provisions of the Code of Civil Procedure it purports to be passed; and it certainly seems open to argument whether the Court intended to apply the provisions of Order XVII, rule 2, or those of Order IX, rule 12, Civil Procedure Code. When a Court comes to the conclusion that a plaintiff before it has so mismanaged his case that, whatever may be the merits of his claim, it is right and proper that his suit should be dismissed without an adjudication on the merits, it is most desirable that the Court should itself pause to consider, and should place clearly on record, the precise provisions of the law under which it proposes to act. The plaintiff appealed to the District Judge against the order of dismissal; but the District Judge held the order to have been passed under Order IX, rule 12, Civil Procedure Code, and not to be open to appeal. The question of the propriety of the District Judge's order is not before us, and there has been no argument on the point. I mention the matter only by way of explaining the unsatisfactory position into which the litigation has now got and as accounting for the plaintiff's delay in bringing the matter before this Court in revision.

CHATAR BUGH v. RAGHBEER DAYAL.

The plaintiff's contention now is that the Subordinate Judge's order of July 28th, 1911, superseding the arbitration was either altogether without jurisdiction, or at any rate was vitiated by such material irregularity as to make it a proper subject for interference by this Court in revision. If this order be set aside, it is further contended that the Subordinate Judge had no jurisdiction to proceed with the suit himself, and that all his subsequent orders, up to and including the order dismissing the suit, are equally without jurisdiction. It is further suggested that we should quash this order of dismissal, and remand the case to the Court below, with directions that it should take cognizance of the arbitrator's award in favour of the plaintiff, and either pass a decree in the terms of that award, or consider whether it is open to it, at this stage, to pass an order setting aside the award under paragraph 15 of the second Schedule to the Civil Procedure Code.

We were taken in argument through a great deal of the voluminous case-law on the subject; but most of the cases cited seem to me but remotely relevant to the facts before us. It is settled law that, in the case of an agreement to refer to arbitration come to out of Court, neither party can revoke the agreement at his own will and pleasure; but either party may do so for good and sufficient cause, and various cases have arisen in which the Courts have been called upon to inquire into the validity or sufficiency of the cause alleged for revoking such an agreement. It was conceded before us in argument that reference to arbitration made under the orders of the Court cannot be terminated by a mere revocation on the part of either plaintiff or defendant, but can only be superseded by an order of the Court. The second Schedule to the Code of Civil Procedure specifies certain cases in which the Court may supersede a reference to arbitration made under its orders; the fact that one of the parties concerned has lost faith in the fairness or impartiality of the arbitrator is nowhere laid down as a valid ground for superseding the arbitration. Corruption or misconduct on the part of the arbitrator is a good ground for setting aside the award after the same has been received; but it is nowhere laid down that the Court is authorized to take cognizance, during the pendency of the arbitration, of an allegation that the arbitrator is corrupt or partial or is misconducting himself so as to suspend the proceedings in arbitration and, if satisfied of the truth of the allegation, to supersede the arbitration before any award has been received. It is contended that the Court must be presumed to have inherent jurisdiction to do both these things, for good cause shown. The learned Advocate for the defendant in this case, who is himself a most distinguished authority on the subject of the Law of Arbitration, could only refer us to one reported case, *Bombay Fire Insurance Co.* v. *Ahmedbhoy* (1), where this proposition was laid down. I must confess to grave doubts on the point. The learned Judge of the Bombay High Court speaks of the necessity of protecting a party from "multiplied expenses" and "interminable delays" on the part of the arbitrator. With all respect for his opinion, I suggest that in an arbitration conducted under the orders of the Court (and this is the case with which we are now dealing), the Court has very large powers of control against "interminable delays," at any rate it can provide at once by its order specifying the period within which award is to be returned. It seems to me unsound on general principles to invoke the "inherent jurisdiction" of the Court in a matter for which provision appears to be made in the Code itself. I am by no means satisfied that the intention of the second Schedule to the Code of Civil Procedure is not that, when once a reference to arbitration has been made under the orders of the Court, the reference should only be superseded for one of the reasons given in the Schedule itself, and that allegations of corruption or misconduct against the arbitration should be left to be dealt with under para. 15, after the award has been received.

I should be quite content, however, to dispose of the matter now before us on the principles laid down by Mr. Justice

(1) 1 Ind. Cas. 14; 11 Bom. L. R. 1.

Davar in *Bombay Fire Insurance Co.* v. *Ahmedbhoy* (1). The inherent jurisdiction of the Court, if it can be called into play at all in this fashion while the arbitration is pending, should be cautiously and sparingly exercised, and only when it is obvious that the ends of justice would not be met by requiring the dissatisfied party to wait and see what the award might be, and then to assail it on the ground of corruption or misconduct, if satisfied that such allegations can be made out. An application to a Court to interfere with an arbitration proceeding pending under its order should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken. In the present case the learned Subordinate Judge seems to me to have taken action on an unsatisfactory application, supported by a worthless affidavit. Having decided to entertain that application, he did not at once issue orders to the arbitrator to suspend his proceedings pending enquiry: he did not cause notice of the application to be formally served on the opposite party; he superseded the arbitration with no legal evidence before him of any one single fact justifying his interference, and he did so by an *ex parte* order which was not prefaced by any finding that the plaintiff or his Pleader had notice of the date fixed for hearing the defendant's application. Now we are dealing in this case with an order which was admittedly not within the jurisdiction of the Court below under any of the provisions of the Code of Civil Procedure which deal specifically with the whole question of submissions to arbitration. The order can only be justified, if at all, by invoking the inherent jurisdiction of the Court. Under these circumstances I do think that it is both proper and necessary that this Court, having the record before it in revision, should consider the circumstances under which that inherent jurisdiction was invoked and the manner in which it was exercised. In my opinion it was invoked under circumstances which did not call for its exercise, and was exercised with material irregularity.

I think that if we set aside this order of July 28th, 1911, and all subsequent orders in the case as passed without jurisdiction, we can direct the Court below to take up and consider the question of the validity of the award. It was suggested in argument that the provisions of Article 158 of the first Schedule to the Indian Limitation Act (Act IX of 1908) would prevent this. In reply to this I hold that the defendant's application of July 20th, 1911, was, though premature and irregular in form, in substance a plea of corruption and misconduct against the arbitrator. The Court would have jurisdiction to take cognizance of it as an objection against the award, and to do so on the date on which it takes cognizance of the award itself. I would hold further that the award, though received by the Court on August 1st, 1911, has not, in consequence of the mistaken order of July 28th, 1911, been legally before the Court below at all up to the present date. That Court should, therefore, take cognizance of it on the date on which it receives back the record from this Court, issue notice of the same to the parties and allow ten days for objections, in case the defendant desires to file further objections. It may be matter for enquiry whether the award was really made on the date which it purports to bear, as it would certainly amount to misconduct on the arbitrator's part if he made the award after the Court's order of July 28th, 1911, reached him and purposely ante-dated it.

For these reasons, I would set aside the order dismissing the plaintiff's suit as well as the order superseding the arbitration, and remand the case to the Court below with directions as suggested above.

RAFIQUE, J.—I concur.

BY THE COURT.—The order of the Court is that the order of the lower Court dismissing the plaintiff's suit as also the order superseding the arbitration is set aside and the case is remanded to the Court below to consider the validity of the award and to dispose of the suit according to law. The costs of this application will be costs with suit and will include fees on the higher scale.

Order set aside.

KANAI LAL JALAN *v.* RASIK LAL SADHUKHAN.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 295 OF 1910 AND MISCELLANEOUS CIVIL APPEAL No. 653 OF 1911.

March 27, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Chatterjea.

KANAI LAL JALAN—APPELLANT

versus

RASIK LAL SADHUKHAN—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 108 (h)—Estoppel—Mortgage suit—Defendant setting up permanent tenure created before mortgage—Decree that defendant, subsequent incumbrancer, could redeem—Defendant, if estopped from setting up tenancy before mortgage—Improvement by tenant—Fixtures—Right to remove after determination of tenancy—Equitable right—Benamdar *defendant in mortgage suit, estoppel against, whether binds beneficiary.*

In a mortgage suit the mortgagor's tenants were made defendants on the allegation that they had taken their tenancies from the mortgagor after the date of the mortgage. The tenants pleaded that they held a permanent tenure created prior to the mortgage. The Court held that the tenants were subsequent incumbrancers and could redeem the mortgage within a time fixed. They having failed to redeem, the property was sold by order of the Court and the sale certificate was not made subject to any tenancies whatsoever:

Held, that the tenants were estopped from saying subsequently that their tenancy was prior to the interest of the auction-purchaser.

The right of a tenant to remove buildings, if he has not removed them before the determination of his lease, is an equitable one, and in accordance with the usages and customs of the country.

In re Thakoor Chunder Pramanik, B. L. R. Sup. Vol. (F. B.) 595; 6 W. R. 228, relied upon.

Where a lease was not determined by any notice to quit and the decree in the suit, under which the tenant lost his right, did not give him any opportunity to remove the buildings, the High Court allowed three months' time to remove them.

A *benamdar* defendant in a mortgage suit represents the interest of the person beneficially entitled, and an estoppel created against the *benamdar* by the judgment and decree in the suit binds the beneficiary.

Rash Behary Sarkar v. *Mohendra Nath Ghose*, 21 Ind. Cas. 979, 19 C. L. J. 34, followed.

Appeal from the decree of the District Judge of Hooghly, dated April 2nd, 1910.

Dr. *Rash Behary Ghosh* and Dr. *Sarat Chandra Basak*, for the Appellant.

Mr. *Pugh*, Counsel, Babus *Dwarka Nath Chakravarti*, *Mohendra Nath Roy* and *Kali Kinkar Chakravarti*, for the Respondent.

JUDGMENT.—These two appeals have been heard together and we shall deliver one judgment in the two appeals as the points that have been raised and argued are common to both. The appellant before us acquired his interest in the property at a sale held in execution of a mortgage decree on the 17th June, 1907.

The main question before us is, are the respondents estopped from raising the question as to whether the interest that the appellant purchased at the sale in execution is subject to a permanent tenancy in favour of the respondents? But before considering the main question raised in the Appeal No. 653 of 1911 we will dispose of an objection that has been raised to the competency of that appeal.

The case, out of which the Appeal No. 653 of 1911 arises, has been before this Court before. On that occasion, the case was remanded to the lower Court and directed to be re-heard.

On the former appeal to this Court, an objection was taken as to the competency of the appeal; but that objection was overruled and this case together with other analogous cases was remanded to the lower Court with this direction, "that these appeals must be allowed and the cases remanded to the Court below in order that the applications may be dealt with as proper applications under section 244 of the Civil Procedure Code".

Section 244 of the old Code is for the present purposes in identically the same terms as section 47 of the present Code. The respondent, however, objects that the present application is one under Order XXI, rule 93, of Schedule I to the Code of Civil Procedure and that, therefore, there is no appeal from the order of the lower Court.

Having regard, however, to the terms of the order remanding the case to the lower Court and to the fact that the proceedings in that Court are headed as being under section 47 of the Code of Civil Procedure, we do not think it is open to us to go into this matter. We, therefore, overrule the objection as to the competency of the appeal.

No such objection arises in the other appeal that is now before us which is an appeal from an original decree. Now, as we have already stated, the appellant purchased the property at a sale in execution of a mortgage decree. That sale took place in a suit (No. 57 of 1904) and the respondent Rasik Lal Sadhukhan was defendant No. 23 in that suit.

KANAI LAL JALAN v. RASIK LAL SADHUKHAN.

By the plaint in that suit, the plaintiff in para. 7 alleged that the tenants, defendants to that suit, had taken their tenancies from the mortgagor after the date of the mortgage to the plaintiff and accordingly he prayed (amongst other reliefs) that the property might be sold free from the tenancies. By para. 3 of his written statement filed in that suit, the respondent Rasick Lal alleged that he had acquired the interest of certain persons named Rana which was a permanent tenancy in a portion of the property, and subsequent to the mortgages he had obtained from the mortgagors a *patta* at the same rent.

It appears to us to be quite clear that the case the respondent Rasik Lal was setting up in his written statement was that he held a permanent tenure created prior to the mortgages which was confirmed by a confirmatory lease after the date of the mortgage.

The issues settled in that suit comprised the following Issue No. 11: "Are the leases created by defendants Nos. 1 and 2 in favour of the tenants defendants including defendants Nos. 4 and 5 after the mortgages in suit valid and binding on the plaintiff? Are the properties saleable under the plaintiff's mortgages free from all incumbrances under the said leases? Are some of these leases prior to the plaintiff's mortgages"?

By his judgment in that suit, the learned Judge found in answer to issue No. 11: "The other defendants are subsequent incumbrancers and they can redeem the plaintiff's mortgage if they like, or share in the surplus sale-proceeds".

By the decree passed in that suit, it was ordered that, in default of payment to the plaintiff of the amount therein mentioned, 'the mortgaged properties will be sold free from all incumbrances'. The property was subsequently sold by order of the Court and the appellant became the purchaser.

The sale certificate to him is dated the 3rd of October 1907 and is not made subject to any tenancies whatsoever. On these facts, it seems to us clear that the respondents are now estopped from saying that their tenancy is prior to the interest purchased by the appellant at the sale by the Court.

This matter was, in our opinion, directly in issue in the former suit and decided against the respondent Rasik Lal, and the decree in that suit ordered the sale of the property free from the tenancies which were set up by the respondent Rasik Lal in his written statement. In our opinion, it is not open to the respondent to go into that question again in these present appeals.

As to the other questions that have been raised in these appeals the next question is as to the right of the respondents to the buildings on the land.

It is contended on behalf of the appellant that under section 108 clause (*h*) of the Transfer of Property Act, the right of the tenant to remove fixtures must be exercised during the continuance of the lease. But the provisions of the section are subject to local usage. In the case of *Ismai Kani Rowthan* v. *Nazar Ali Sahib* (1), it was pointed out that the section provides only for the tenant removing fixtures during the continuance of the lease, and nothing is said as to the rights of the parties in respect of such things after the determination of the lease, if they have not been already removed by the lessee. The learned Judges observed as follows: "The question may arise whether the tenant forfeits all his rights in such things if he has not so removed them, and in the absence of any contract on that point, the question will have to be solved with reference to "local usage," whatever may be the precise sense in which that expression is used in section 108. According to the customary or common law of the land as laid down in *In the matter of the petition of Thakoor Chunder Paramanick* (2), the option in such cases will be with the lessor either to take the building on paying compensation, or if he is unwilling to pay compensation to allow the tenant to remove the building". In that case the lessor did not object to the removal of the building, and the only question was, whether the tenant was entitled to compensation and the question was decided against the tenant. But the view taken of the right of the tenant to remove buildings, if he has not removed them before the determination of the lease, appears to be an equitable one and in accordance with the usages and customs of the country as laid down by the Full Bench in the case of *Thakoor Paramanick* (2). The leases in these

(1) 27 M. 211; 14 M. L. J. 25.
(2) B. L. R. Supp. Vol. (F. B.) 595; 6 W. R. 228.

cases were not determined by any notice to quit, and the decree in the mortgage suit under which the defendants lost their rights did not give them any opportunity to remove the buildings. Under the circumstances we think they should be allowed to remove the buildings (three months' time being allowed for the removal thereof) unless the appellant chooses to take the buildings on paying compensation.

The building of the respondents in regular Appeal No. 295 of 1910 has, however, been acquired under the Land Acquisition Act and Rs. 3,621-5-7 has been awarded as compensation for the building. It is contended on behalf of the appellant that the respondent is entitled (if at all) to the value of the materials only after the determination of the building. Under the peculiar circumstances we think that the respondent should get one-half of the amount awarded on account of the building under the Land Acquisition Act. As for the compensation allowed for the land, we think the appellant is entitled to the whole of it. Interest will run on the said amounts at the rate of six per cent. per annum from the date when the said amounts were withdrawn by the appellant till the date of payment.

Another point that was raised in the Appeal No. 295 of 1910 was that as the respondent Rasik Lal was merely a *benamdar* for his father, the estoppel created against him by the judgment and decree in the mortgage suit does not bind the other respondents to Appeal No. 295 of 1910. But, in our opinion that is not so. We agree with the view expressed by Mookerjee, J., in *Rashbehari Sarkar* v. *Mohendra Nath Ghose* (3), that the *benamdar* defendant in the mortgage suit represented the interests of the persons beneficially entitled. In the result the order and decree appealed from must be varied in accordance with the above remarks.

There should be no order as to the costs of this appeal or of the proceedings in the Courts below.

Order varied.

(3) 21 Ind. Cas. 979; 19 C. L. J. 34.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 236 OF 1913.

March 4, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

NARAYANA SASTRIGAL—DEFENDANT—APPELLANT

versus

MANGALATHAMMAL—PLAINTIFF—RESPONDENT.

Suit brought in wrong name—Amendment of plaint—Limitation.

Where a plaintiff, intending to sue one person, by mistake enters the name of another, an amendment of the name, even if made after the period of limitation, does not bar the suit.

Challinor v. *Roder*, 1 T. L. R. 527, followed.

But where under some mistake or error the plaintiff intends to sue the wrong person, an amendment will not make the suit within time against the right person if it is already barred against him.

Appeal against the order of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 958 of 1912, preferred against that of the District Munsif of Valangiman at Kumbakonam, in Original Suit No. 71 of 1912.

Mr. *T. Nateshi Aiyar*, for the Appellant.

Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—If the plaintiff intended to sue Narayana Sastri but mistook his name and entered the name Vaithianada instead, the amendment was rightly allowed and the suit is not barred. *Challinor* v. *Roder* (1). If, however, the plaintiff intended to sue the individual Vaithianada under the mistake that he (Vaithianada) had obtained the order or under any other error, then the suit cannot be considered to have been instituted against Narayana within the period of limitation and must be considered barred.

No issue was raised about this by the District Munsif and the Subordinate Judge, whilst framing a correct issue, decided it without hearing evidence. Without interfering with the order of remand we set aside the finding of the Subordinate Judge on the 2nd issue and remand that issue also to the District Munsif for disposal according to law.

Costs will abide the result.

Suit remanded.

(1) 1 T. L. R. 527.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 254 OF 1912.

February 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

RAVIPATI RAMAYYA—PLAINTIFF—PETITIONER

versus

ADDANKI SESHAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Inamdar *and lessee—Increase in quit-rent consequent on enfranchisement—Tenant, whether liable for increase.*

Where an *inam* is held by lessees for a fixed period and the *inamdar* gets it enfranchised for his own benefit, his lessees are not liable for the consequent increase in the quit-rent.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Narasaraopet, in Small Cause Suit No. 856 of 1911.

Mr. *V. Ramadoss*, for the Petitioner.

Mr. *P. Nagabushanam*, for the Respondents.

JUDGMENT.—This is an unsustainable petition by the plaintiff. The petitioner got his *inam* enfranchised for his own benefit and hence was charged by the Government with the burden of paying an increased quit rent. He wants to recover the increase in the assessment from the defendants who are only lessees for a fixed number of years under him. The analogy of the *mulgeni* tenant and his landlord has absolutely no application. These tenants agreed and could have agreed to pay only the assessment as it stood at the time of their lease for the period of their lease, and not the increased assessment which was imposed at their landlord's request for their landlord's benefit. The plaintiff's claim is wholly inequitable and I dismiss this revision petition with costs.

Petition dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL APPEAL No. 17 OF 1913.

SUIT No. 693 OF 1912.

September 5, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

THE GREAT INDIAN PENINSULA RAILWAY—DEFENDANT—APPELLANT

versus

THE MUNICIPAL CORPORATION OF BOMBAY—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), s. 7—Words "Notwithstanding anything in any other enactment for the time being in force," effect of—Streets, laying of Railway lines upon—Land Acquisition Act (I of 1894), whether to be resorted to—City of Bombay Municipal Act (Bom. Act III of 1888), ss. 289, 293—Permission under s. 293—Effect of s. 289.

The words 'notwithstanding anything in any other enactment for the time being in force', in section 7 of the Railway Act, empower a Railway Company to do certain acts specified in the section regardless of the provisions of other enactments.

Therefore, where a Railway Company wishes to lay a line of Railway upon and across a Bombay Municipal street, it is neither necessary nor appropriate to proceed under the Land Acquisition Act or to obtain permission under section 293 of the City of Bombay Municipal Act.

The effect of section 289 of the Bombay City Municipal Act is only to vest in the corporation such property as is necessary for the control, protection, and maintenance of the street as a highway for public use.

Appeal from a decree of Beaman, J., who tried the case on the Original Side.

FACTS appear from the following judgment of Beaman, J.:—

"Notwithstanding the ingenious arguments of defendant's Counsel the point seems too simple to allow of any doubt. Without enquiring how much or how little under the term "street" vests under section 289 of the Municipal Act, enough certainly does (and this was almost conceded) to support an action for trespass against any one interfering with the use of a public street as such. Section 293 expressly and designedly contemplates a case like this. No argument has been attempted in support of what was foreshadowed in the first issue. That was abandoned. No permission has been granted. Then let me consider section 7 of the Railways Act. Is a public street "immoveable property"? Certainly. Does this public street belong to the defendant Company? Certainly not. The only question remaining to be answered is whether it is immoveable property

subject to the Land Acquisition Act. In my opinion, most surely it is. Defendant contends that it is not, because it is already a public street, and that which is already public property cannot be acquired a second time for a second public purpose. I am not aware of any authority or of any reason upon which that proposition can be founded. I am referred to section 10 and section 14, the latter more emphatically, in support of this contention. I am unable to see how the section can have any bearing or relevancy. The former section merely deals with damage caused by the Company acting under section 7 and pre-supposes, of course, that it is acting under that section. It is said for the defendant Company here, that it cannot be a trespasser because it is acting under statutory authority. That simply begs the question. If it is, *cedit quæstio*. If not, it is as much a trespasser as though section 7 were not there. Section 14 cannot possibly bear the artificial strain put upon it to support the defendant's argument. It merely deals with a numerous class of cases, of which this might have formed an example, had the Municipality acting under section 293 of its Act permitted the defendant Company to lay its rails without any conditions. I do not think that any of the cases cited for the defendant Company are of any assistance. Nor do I think that I gain much from *Rangeley* v. *The Midland Railway Company* (1) upon which the plaintiff relies. That is certainly in point, and in spite of the attempt of the defendant to distinguish between the provisions of section 84 of the Land Clauses Act in England and the provisions of the Land Acquisition Act, the case is a good enough authority upon the general principle. But here I do not feel in need of authority. I have the Statutes and I have only to apply them to a simple set of admitted facts. Under those Statutes the defendant Company could make its private terms with the Municipality, or it could acquire the portion of the street it needed under the Land Acquisition Act. But until it has done one or the other it is clearly a trespasser upon the plaintiff's land. It does not seem to me to affect this conclusion in the least that there may be some doubt as to the quantum of interest the plaintiff has to sell in proceedings under the Land Acquisition Act. The plaintiffs do not press for any particular quantum of damages and it would be sufficient to award them Rs. 500 as damages for trespass and all costs of the suit. Declarations in terms of prayers (*a*) and (*b*) of the plaint and decree in terms of prayer (*c*) thereof."

(1) (1868) 3 Ch. 306; 37 L. J. Ch. 313; 18 L. T. 69; 13 W. R. 547.

Messrs *Binning* and *Campbell*, for the Appellant.

Mr. *Jardine*, with him Mr. *Strangman* (Advocate General), for the Respondent.

JUDGMENT.

SCOTT, C. J.—This suit was instituted by the Municipal Corporation and Commissioner of Bombay against the Great Indian Peninsula Railway Company to establish that the defendant Company could not lawfully maintain lines of Railway across the Sewri Koliwada Road, a public street vested in the Corporation under section 289 of the Bombay City Municipal Act, without either obtaining permission granted by the Corporation and confirmed by Government under section 293 of the Municipal Act or acquiring the land required for the level crossing under the hand Acquisition Act.

The defendant Company pleaded that they had authority to make and maintain the lines of Railway under section 7 of the Indian Railways Act (IX of 1890) which so far as is material is in the following terms:—

"(1) Subject to the provisions of this Act and, in the case of immoveable property not belonging to the Railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for Companies, and subject also, in the case of a Railway Company, to the provisions of any contract between the Company and the Government, a Railway administration may for the purpose of constructing a Railway or the accommodation or other works connected therewith, and notwithstanding anything in any other enactment for the time being in force, (*c*) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways, or tramways, or any rivers, canals brooks, streams or other waters, or any drains, water-pipes, gas-pipes or telegraph lines, such temporary or permanent

inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines of railway, ways, passages, conduits, drains, piers, cuttings and fences as the Railway Administration thinks proper...

(2) The exercise of the powers conferred on a Railway Administration by sub-section (1) shall be subject to the control of the Governor-General in Council."

It appears from Exhibit 1 that the scheme for the Bombay Port Trust Railway, to run from Sion down the east side of the Island to the Ballard Pier and to be constructed and worked by the defendant Company, was prepared by the Company with the approval of the Secretary of State on the recommendation of the Government of India. The plan put in with Exhibit A shows the level crossing in question as part of this scheme. The learned trial Judge held that applying the Statutes to the admitted facts the defendant Company could make its private terms with the Municipality or it could acquire the portion of the street it needed under the Land Acquisition Act, but until it had done one or the other it was a trespasser on Municipal land. His reasoning was:—The public street is immoveable property not belonging to the defendant Company and subject to the Land Acquisition Act, therefore, the defendant Company cannot exercise the power given by section 7 of the Railways Act without first acquiring a portion of the street, which they have not done.

We are unable to agree with this view of the law. Where a Railway Company wishes to lay a line of Railway upon and across a street it is neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land. If the Government under section 7 of that Act were to direct the Collector to take order for the acquisition of the land, he would make his award and take possession and the land would then vest absolutely in Government for the Railway Company free from all incumbrances. The land would then cease to be portion of the street and the Railway Company would be unable to exercise the power given to it of constructing the Railways upon and across the 'street.'

The differences in the English and Indian Statute Law upon the subject of Railway construction are differences of procedure which do not render English decisions inapplicable to this case. In England the special undertaking is sanctioned by a special Act of Parliament: in India, by the sanction of the Governor-General through the Home Department. Section 6 of the Railways Clauses Consolidation Act, 1845, provides that "in exercising the power given to the Company by the special Act to construct the Railway and to take lands for that purpose the Company shall be subject to the provisions and restrictions contained in this Act and in the Lands Clause Consolidation Act", while the provisions of the special Act incorporate both the Lands Clauses and the Railways Consolidation Acts: for an example, see *Abraham* v. *Great Northern Railway Company* (2). The provisions of the Lands Clauses Act *with regard to compulsory acquisition* as interpreted by the House of Lords in *Great Western Railway Company* v. *Swindon and Cheltenham Extension Railway Company* (3) are substantially of the same extent as those under the Land Acquisition Act of 1890 as interpreted by section 3 (*a*) and (*b*), for Lord Watson at page 800 said: "Taking that (the Lands Clauses Act) Act *per se*, and irrespective of the terms of any other Statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate are servitude rights burdening the corporeal lands taken by the Company, which are destroyed or impaired by the construction of the Railway. The Company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorised works injuriously affected the dominant land to which the easements are attached. As for the land upon which the Railway is to be constructed, the compulsory clauses of the General Act contemplate that the Company shall take the soil itself, and not a mere right to use

(2) (1851) 16 Q. B. 586; 20 L. J. Q. B. 322; 15 Jur. 855; 117 Eng. Rep. 1004; 83 R. R. 620.

(3) (1884) 9 App. Cas. 787; 53 L. J. Ch. 1075; 51 L. T. 798, 32 W. R. 957; 48 J. P. 821.

it in perpetuity." To the same effect is Lord FitzGerald's opinion expressed on page 792.

The effect of section 289 of the Bombay City Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control, protection and maintenance of the street as a highway for public use: see *Tunbridge Wells Corporotion* v. *Baird* (4)

The Judicial Committee have held that a Municipality in whom public ways were vested was not entitled to compensation in respect of portions of such ways taken by a tramway company under statutory powers: see *Municipal Council of Sydney* v. *Young* (5).

Reference has been made for the respondents to section 290 of the Municipal Act which provides that whenever any public street or part of it is permanently closed the site may be disposed of as land vesting in the Corporation. That position does not arise in the present case but when it does arise it may have to be determined what it is that the Corporation is disposing of.

It is well established that a Railway Company, acting under section 16 of the Railways Clauses Consolidation Act, 1845, (upon which section 7 of the Indian Railways Act is closely modelled), by constructing a railway upon and across part of the bed of a navigable river or across a highway is doing what if done by an unauthorized person would be indictable as a nuisance: see *Abraham* v. *Great Northern Railway Company* (2) and *Oliver* v. *North Eastern Railway Co.* (6). In the latter case the trial Judge told the Jury that as to the duty of the Railway Company with regard to the rails at the level crossing, they must consider the case as if the Company had the express sanction of an Act of Parliament to put the rails there. In such a case the Company would have power to put down such rails as are necessary for the purposes of the line but the rails must be laid and kept so as to cause as little injury or danger as possible. A rule for new trial on the ground of misdirection was discharged. For a general statement of the obligations of persons interrupting highways under statutory authority see the judgment of Moulton, L. J., in *Hertfordshire County Council* v. *Great Eastern Railway* (7).

In a case analogous to the present where the Corporation of a borough, being empowered by a local Act which incorporated the Lands Clauses Acts to erect and maintain "on, in, over or under" any street in which their tramways were laid poles and posts for the purpose of working the tramways by mechanical power, erected a post for that purpose in the pavement of the street, which at that point was the property of a neighbouring owner, subject to the right of the public to use the same as a foot-path; it was held that the corporation were not taking the land within the meaning of section 189 of the Lands Clauses Act, 1845, but were merely exercising statutory power in the nature of an easement and an action for trespass could not be maintained against them: see *Escott* v. *Newport Corporation* (8).

The case of *Rangeley* v. *The Midland Railway Company* (1), referred to by the learned trial Judge and relied upon by the respondents, decided that a Railway Company could not dedicate to the public the surface of a neighbour's land without first acquiring it under the Lands Clauses Act. It does not appear to us to support the plaintiff's position.

The statutory authority under section 7 of the Railways Act to lay the railway across the street without resort to the Land Acquisition Act being, in our opinion, established, the application of section 293 of the City of Bombay Municipal Act is excluded by the words "notwithstanding anything in any other enactment for the time being in force." The Railways Act, section 16, overrides the Municipal Act and the sole control over the Railway administration is vested in the Governor-General. (See section 16 (2) and

(4) (1896) A. C. 434; 65 L. J. Q. B. 451; 74 L. T. 385; 60 J. P. 788.

(5) (1898) A. C. 457; 67 L. J. P. C. 40; 78 L. T. 365; 46 W. R. 561 (P. C.).

(6) (1874) 9 Q. B. 409; 43 L. J. Q. B. 198.

(7) (1909)2 K. B. 403; 78 L. J. K. B. 1076; 101 L. T. 213; 73 J. P. 353; 7 L. G. R. 1006; 53 S. J. 575; 25 T. L. R. 573.

(8) (1904) 2 K. B. 369; 73 L. J. K. B. 693; 68 J. P. 135; 52 W. R. 543; 90 L. T. 348; 20 T. L. R. 158; 2 L. G. R. 779.

Municipal Commissioner of Bombay v. *G. I. P. Railway* (9). The evidence so far as it goes indicates that the Railway across the Sewri Koliwada Road has the approval of the controlling authority.

We, therefore, reverse the decree of the lower Court and allow the appeal, dismissing the suit with costs throughout.

BATCHELOR, J.—I quite agree.

Appeal allowed.

Attorneys for the Plaintiffs: Messrs. *Little & Co.*

Attorneys for the Defendants: Messrs. *Crawford, Brown & Co.*

(9) 4 Ind. Cas. 281;11 Bom. L. R. 1181; 34 B. 252.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 254 OF 1913.

March 9, 1914.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

ENATULLA AND OTHERS—DEFENDANTS—APPELLANTS

versus

JIBAN MOHAN ROY—PLAINTIFF—RESPONDENT.

Ex parte *decree—Non-appearance of defendants at adjourned hearing—Decree* ex parte *in plaintiff's favour—Application by defendants for setting aside* ex parte *decree—Civil Procedure Code (Act V of* 1908), *O. IX, r.* 13; *O. XVII, rr.* 2 *and* 3.

The provisions of Order IX of the Civil Procedure Code by themselves do not apply to a case in which the defendant has appeared in answer to a summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in Order XVII which deals with adjournments.

Where the hearing of a case is proceeding from day to day and the case is adjourned to the next day because the cross-examination of a witness is unfinished, the adjournment is not at the instance of a party under rule 3 of Order XVII, but at the instance of the Court under rule 2. Under such circumstances if the Court disposes of the suit *ex parte* on the default of the defendants, it does so under rule 2 of Order XVII in one of the modes under Order IX, and the defendant's application under rule 13 of Order IX for setting aside the *ex parte* decree may be entertained.

Janardan Dobey v. *Ramdhone Singh*, 23 C. 738 (F B.), followed.

Appeal from the order of the Sub-Judge of Rungpur, dated May 17th, 1913.

FACTS.—The hearing of a case having commenced before the Sub-Judge of Rungpur, both the parties appeared before him. The case proceeded from day to day. The plaintiff in the course of nine days examined 14 witnesses who were cross-examined by the defendants' Pleader, and then closed his case. The defence Pleader then began his case and examined one of the defendants whose cross-examination, not having been finished on the third day of his examination, stood adjourned to the next day when neither he, the witness, nor the Pleader for the defence appeared. The Subordinate Judge consequently noted the case for the defence as closed, and proceeded to hear the arguments of the plaintiff's Pleader. There was no argument for the defendants and the Subordinate Judge delivered his judgment decreeing the suit in plaintiff's favour.

The defendants then made an application under Order IX, rule 13, of the Civil Procedure Code for setting aside the *ex parte* decree. The Court held that it had no power to set aside the decree under Order IX, rule 13. and that the defendant's remedy lay in a review or an appeal.

The defendants appealed to the High Court.

Babus *D. N. Bagchi* and *S. K. Sinha*, for the Appellants.

Babus *D. N. Chakravarti* and *Naresh Chandra Sen Gupta*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Rangpur rejecting an application to set aside a decree said to have been passed *ex parte*. The application was made under Order IX, rule 13, of the Code of Civil Procedure. The decree sought to be set aside was passed under these circumstances. On the day the hearing of the case commenced both the parties appeared. The case then proceeded from day to day. The plaintiff in the course of nine days examined 14 witnesses, who were cross-examined by the defendants' Pleader and then closed his case. The defendants' Pleader then began his case and examined one of the defendants whose cross-examination, not having been finished on the third day of his examination, stood adjourned to the next day when neither he, the witness, nor the Pleader for the defence appeared. The Subordinate Judge consequently noted the case for the defence as closed and proceeded to

hear the argument of the Pleader for the plaintiff. There was no argument for the defendants and the Subordinate Judge delivered his judgment decreeing the suit in plaintiff's favour.

The defendants made the application, out of which this appeal has arisen, for setting aside the decree alleging that it had been passed *ex parte*. The Subordinate Judge relying on the case *Kader Khan* v. *Juggeswar Prasad Singh* (1) held that he had no power to set aside the decree under rule 13 of Order IX and that the defendants' remedy lay in a review or an appeal.

In this appeal it has been argued for the appellant that the decree was passed *ex parte*. The expression *ex parte* has not been defined anywhere in the Code nor does it appear to have been the subject of a judicial decision for its definition. Its accepted meaning, however, according to Wharton's Law Lexicon, seems to be "a proceeding by one party in the absence of the other." We may remark here that this accepted meaning does not help us in this case one way or the other. Rule 6 of Order IX lays down that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served the Court may proceed *ex parte*. For correctly applying this rule it is important to consider what constitutes "appearance" of the defendant. The nature of the defendant's appearance in obedience to the summons is best explained by the language of the form prescribed in the first Schedule, Appendix B, for summons to a defendant. That form directs the defendant to appear in person or by Pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions. The defendant's failure to appear in either of the ways specified would lead to the determination of the suit in his absence. The test of a defendant's "appearance" is whether such of the requirements of the summons as relate to appearance have or have not been fulfilled. In the present case the defendants appeared by their Pleader, whose being furnished with due instructions cannot be doubted as he conducted the case for the defence up to the stage when he failed to attend the hearing of the case. Thus it cannot be said that the Subordinate Judge proceeded under rule 6 of Order IX.

The provisions of Order IX by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in Order XVII which deals with adjournments. Rule 2 of that Order lays down that "where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit"; while rule 3 of the same Order lays down that "where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

The distinction between the two rules is that the former rule applies to hearings adjourned at the instance of the Court, while the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted. A further distinction between the two rules has been pointed out in the case of *Mariannissa* v. *Ramkalpa Gorain* (2) that in a case where there are no materials on the record the proper procedure to follow would be that laid down in rule 2 (section 157 of the former Code), but if there are materials on the record the Court ought to proceed under rule 3 (section 158 of the former Code). Thus to apply the procedure laid down in rule 3 to a case there must be the presence of both the elements, *viz.*, (1) the adjournment must have been at the instance of a party and (2) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the

(1) 35 C. 1023.

(2) 34 C. 235; 5 C. L. J. 260.

other does not justify the application of rule 3.

The question in this appeal is whether the procedure of the Subordinate Judge on the default of the defendants was under rule 2 or rule 3 of Order XVII. The hearing of the case was proceeding from day to day and the case stood over for the next day as the cross-examination of the witness had not been finished. The adjournment, therefore, was not at the instance of a party. In the circumstances we are of the opinion that on the default of the defendants the Subordinate Judge proceeded under rule 2 to dispose of the suit in one of the modes directed in that behalf by Order IX. That being our view we think, on the authority of the Full Bench decision in *Jonardan Dobey* v. *Ramdhone Singh* (3), that the appellants' application under rule 13 Order IX should have been entertained. The order of the lower Court is set aside.

The appeal is decreed. The Subordinate Judge will now proceed to consider if the appellants make out sufficient cause for the decree to be set aside.

We assess hearing fee at five gold *mohurs*.

Appeal decreed.

(3) 23 C. 738.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 25 OF 1910.

July 12, 1913.

Present:—Mr. Pratt, J. C., and Mr. Kemp, A. J. C.

Seth RAMDAS SON OF SETH SHIVANDAS—APPELLANT

versus

Diwan PARTABRAI SON OF GURDASSMAL AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), *s.* 253—*Partnership—Death—Dissolution—Obligations of legal representatives of deceased—Limitation Act (IX of* 1908), *Sch 1, Art.* 106—*Pleadings.*

After the death of a partner the partnership is at an end and there is no obligation on his legal representatives to continue the partnership, but if it is continued it is altogether a new partnership.

Downs v. *Collins*, 6 Hare 418, referred to.

Obiter:—A pleading of a hesitating and non-committal character is apt to create a suspicion in the mind of the Court that the party asking for relief on it does not know what his own case is of that he is preparing to shift and change his case according to circumstances at the hearing.

Appeal from the decision of the Sub-Judge, Sukkur.

Mr. *Lalchand Chuhermal*, for the Appellant.

Mr. *Lalchand Hassomal*, for the Respondents.

JUDGMENT.—Plaintiff filed this suit on 7th May 1906, for dissolution, and an account of the partnership entered into on 10th October 1898 between him and defendants Nos. 1 to 10 and 17 to 20 inclusive and certain other persons who have died before the filing of the suit. The partnership terms are more fully set out in paragraph 2 of the plaint and in the judgment of the learned first class Subordinate Judge, dated 13th June 1910. Shortly put, the plaintiff and defendants Nos. 17 to 20 inclusive were the *shahs* or financing partners, most of the others being the *gumashthas* or working partners, and the object of the partnership was to take up works on contract in which all the partners were to share in certain proportions. On 1st January 1899, a contract for certain construction work was obtained in the 1st defendant's name with the Bengal Dwars Company and in accordance with the partnership agreement the *shahs* provided Rs. 36,000 to finance the work. It went on till February 1900, when the Company deprived the 1st defendant of the contract and took away the materials lying at the works. On 13th July 1900, a suit was filed in first defendant's name against the Company in the Calcutta High Court for Rs. 70,324-15-6 for the value of the materials and damages, and against this claim the Company deposited in Court Rs. 21,513-1-6 which was paid out to the *shahs*. A sum of Rs. 9,000, so the plaintiff says, was advanced from time to time by the *shah* partners for the expenses of this suit which was decided in January 1904. An appeal was preferred against the decision and decided about April 1905, dismissing the claim for damages and referring the accounts to a commissioner. At the date of the present suit the accounts were still proceeding before the commissioner, but as the plaintiff did not expect that any sum would be awarded beyond the costs of the suit he

has brought his present suit for a dissolution and an account.

Now it is material to consider the changes which have occurred in the membership of the partnership since the agreement of 10th October 1898. A minor partner, Dipchand, died in 1898. Defendant No. 19 is his father and has been joined as his heir and legal representative. Sujanmal, another partner, died in March 1899 and, therefore, plaintiff says, the shares were altered and the share of the deceased's heirs was taken up by defendant No. 18. However, he has joined Sujanmal's heirs, defendants Nos. 11 and 12, as party defendants to this suit.

On 4th September 1899 and in 1900 two more partners, *viz.*, Hotumal and Beghraj (defendant No. 10) were discharged from the partnership and Hotumal's heirs, defendants Nos. 13 and 14, have been joined, Hotumal having since died and the plaintiff joining his heirs "to avoid any dispute". Finally, on 28th July 1900, another partner Asudamal died and his heirs, defendants Nos. 15 and 16, have been joined in consequence as party defendants. What apparently was in the mind of the legal gentleman who drafted the plaint was that the plaintiff was entitled to a dissolution of some kind of continuing partnership in which the heirs and legal representatives of deceased partners continued to be partners. He seems to have conceived that it was all one partnership from the date of the original agreement in writing of 10th October 1898. A good deal of evidence has been recorded and commented on by the learned first class Subordinate Judge as to the changes in the partnership on the death or discharge of each of the persons above-mentioned, but it appears to us clear, so far as the decision on the point of limitation raised in this suit is concerned, that what we have to particularly note is that the last partner on the plaintiff's own case to die or sever his connection with the partnership was Asudamal and that his severance took place when he died on 28th July 1900.

On 7th December 1909, the learned Subordinate Judge directed the plaintiff to amend his plaint by stating in respect of what partnership he claimed relief. Clearly, when a partnership is continued after the death of one partner there is technically a new partnership, and as in the present case several partners had either died or severed their connection with the partnership since the original document of 10th October 1898, it was obligatory on the plaintiff to confine his case to the particular partnership in respect of which he claimed dissolution and an account. Although the surviving partners may, in certain cases, have a claim for damages against the estate of a deceased partner in respect of obligations contracted before his death, they cannot compel the legal representatives of a deceased partner to continue the partnership. *Downs* v. *Collins* (1).

Therefore, whether we assume that all the original partners had undertaken absolutely *inter se* that the partnership work of 1st January 1899 would be carried out by them or not, it is clear that on the death or severance of each partner a new partnership technically came into being.

Accordingly, on 10th December 1909, the plaintiff filed an amended plaint to which for vagueness and uncertainty it would be hard to find a parallel. Despite the fact that the Judge had expressly decided that the plaintiff must confine himself to the particular partnership in respect of which he was seeking relief, we find the plaintiff in paragraph 9 of the amended plaint still praying for a dissolution of the "Partnership" which from the preceding paragraphs in the plaint suggests the partnership of 10th October 1898, and in paragraph 19 for an account "of the partnership which was continued after the death of Asudamal with the consent and advice of the parties on the old terms and with the altered shares". Paragraph 20 of the plaint which contains the prayer refers vaguely to "the partnership". Some special merit appears to have been attached by those responsible for this pleading to its ambiguity.

It is quite wrong to imagine that a pleading of this hesitating and non-committal character is the acme of good drafting. On the contrary, it is apt to create a suspicion in the mind of the Court that the party asking for relief on

(1) (1848) 6 Hare 418; 67 E. R. 1228; 77 R. R. 171.

it does not know what his own case is or that he is preparing to shift and change his case according to circumstances at the hearing; and this is precisely what the plaintiff has done in this instance. No suggestion of a new arrangement after Asudamal's death was put forward in the original plaint (see paragraph 13 of that plaint), though it has been raised in paragraph 15 of the amended plaint. We are, however, quite clear on the evidence that the Subordinate Judge's finding on this point is correct and that any new arrangement alleged to have been arrived at after Asudamal's death is an after-thought to bring the claim within time. It is unnecessary to recapitulate the evidence on this point and it will be sufficient to say that we agree with the reasons adduced by the learned Judge. We cannot, however, allow the evidence taken in the lower Court to pass without one comment and to that we would draw the attention of the Judge. The procedure which compelled the plaintiff to call the first defendant as his witness is not one to be commended. It placed the plaintiff in this respect at a disadvantage although in the present case this could not affect our opinion on the merits. Clearly it should not be allowed. *Musammat Lal Kunwar* v. *Chiranji Lal* (2).

The lower Court dismissed the suit on the issue as to limitation holding that the suit, being for a partnership account brought more than 3 years after dissolution, was barred by Article 106 of the Limitation Act. That point if decided against the appellant in this appeal will be fatal to him in spite of the 23 objections he has lodged against the judgment and decree of the lower Court. Now this suit was for a partnership account. As such it must be brought within 3 years of dissolution under Article 106, Limitation Act. Plaintiff claims that the partnership had not been dissolved at the date of the suit. In this he is wrong. The agreement of 10th October 1898 provided for the taking of works on contract. Only one such work was obtained under the contract of 1st January 1899. When that was put an end to by the Company taking away the contract in February 1900, the partnership either came to an end then or at the latest after the efflux of a reasonable time from that date. No other contracts were obtained. Not only does the evidence show that most of the partners took to other occupations after 1900, but assuming that the partnership remained open for a reasonable length of time after February 1900, such a period had certainly expired by 7th May 1903, the date which would bring the suit within time. The Calcutta High Court litigation was only for the purpose of recovering the outstandings. We have already held no new partnership was entered into after Asudamal's death and, as that occurred on 28th July 1900, that in itself effected a dissolution. So in no event can the plaintiff successfully contend that his suit is within time.

His suit is for dissolution and a partnership account. It is not for a share of assets received or contribution for payments made after dissolution, and he cannot be allowed to alter it into such.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(2) 5 Ind. Cas. 549; 7 M. L. T. 57; 14 C. W. N. 285; 11 C. L. J. 172; (1910) M. W. N. 8; 12 Bom. L. R. 244; 20 M. L. J. 183; 37 I. A. 1; 32 A. 104.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2467 OF 1910.

March 17, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Mullick.

Rani DINAMANI CHAUDHURANI—PLAINTIFF—APPELLANT

versus

JAGAT CHANDRA BHATTACHARJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 50—*Presumption—Assertion by tenant of certain rent more than twenty years before suit—Same rent claimed in present suit—Presumption that rent has not been altered for twenty years—Ancient document—Proper custody—Interference with discretion as to custody by Appellate Court—Evidence Act (I of* 1872), *ss.* 13, 43, 90—*Assertions of right—Admissibility in evidence.*

The presumption of section 50 of the Bengal Tenancy Act does not rest upon whether one uniform rate of rent has been paid or not, but upon whether the rent has or has not been changed.

Where a tenure-holder asserted in a rent suit, brought against him more than twenty years before the present suit for rent, that his rent was Rs. 71 *sicca*, and in the present suit rent was claimed at the same rate, and there was no evidence of a change of rent:

DINAMANI CHAUDHURANI *v.* JAGAT CHANDRA BHATTACHARJEE.

Held, (1) that the fact that in the present suit rent was claimed at the same rate was an admission that the rent of the tenure had remained unaltered for upwards of twenty years and was evidence that there had been no change in the rate of rent from the date of the previous suit;

(2) that the defendants were entitled to the presumption under section 50 of the Bengal Tenancy Act.

Documents containing assertions of the right of a tenure-holder to hold the tenure at a certain rental are admissible under section 13 of the Evidence Act.

Ram Ranjan Chakrabarti v. *Ram Narain Singh*, 22 C. 533; 22 I. A. 60, referred to.

Whether the custody of a document is a proper one under section 90 of the Evidence Act, is a question to be decided upon the circumstances of each case; and an Appellate Court will always be slow to interfere with the discretion of the Court below vested in it under section 90 in refusing or admitting the document.

Appeal from the decree of the District Judge of Mymensingh, dated April 19th, 1910, confirmining that of the Third Sub-Judge of Mymensingh, dated June 4th, 1909.

FACTS.—The tenure in arrears is in estate No. 45. The owner of the estate left a widow named Jahnobi Chaudhurani when he died in 1253 B. S. She adopted a son named Baikuntha. Mother and son quarrelled, and in 1272 B. S they made an *ikrar-namah* by which Jahnobi was to remain in possession for her life-time. Baikuntha died in 1294, leaving the present plaintiff Dinamani Chadhurani as his widow, and she succeeded to the property in 1306 B. S. when Jahnobi died. During the *thak* survey; the village Pouli was measured as part of another estate, the predecessors of the defendants brought a suit against the proprietors of the other estate and succeeded in having the village included in estate No. 45. They then asserted their *taluki* right. Jahnobi took no part in that case although she was made a party. A few years later Jahnobi dispossessed the defendants because they were claiming *taluki* rights, but they recovered possession by two suits under section 9 of the Specific Relief Act. Jahnobi then brought a regular suit No. 22 of 1883 to recover possession of the whole fourteen annas of Pouli; the defendants pleaded that they had a *kaemi mokurari* right in the land and that their rent was Rs. 71 *sicca*. This suit was finally decided by the Hon'ble High Court on July 16th, 1885, adversely to the plaintiff. She has now sued the defendants as owners of the tenure named fourteen annas *deha* of *Kismat* Pouli for rent of the years 1312 to 1314 at the rate of Rs. 75 odd with cesses and damages and for an enhancement of the rent with effect from the beginning of 1316 B. S. The defendants maintain that the tenure was created before the Permanent Settlement, and that its rent is fixed and has never been changed, and is, therefore, not liable to enhancement.

The learned Sub-Judge found that the suit for enhancement was not barred either by *res judicata* or by limitation, but that the tenure was a permanent one with a fixed *jama*. Consequently he dismissed the prayer for an enhancement of the rent. On appeal the learned District Judge agreed with the learned Sub-Judge and also held that it was proved that the *taluk* existed from before the Permanent Settlement.

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghosh*, Babus *Dwarka Nath Chakravarti*, *Basanta Kumar Bose*, *Kritanta Kumar Bose* and *Umesh Chandra Ghosh*, for the Appellant.

Babus *Ram Charan Mitter*, Senior Government Pleader, *Jnanendra Nath Sarkar* and *Satindra Nath Mukherjee*, for Babu *Akhil Bandhu Guha*, for the Respondents.

JUDGMENT.

WOODROFFE J.—The question involved in this appeal is whether the tenure is permanent at a fixed rent or whether the rent is liable to be enhanced. The right to such enhancement is denied by the respondents and this contention was upheld by the lower Courts.

The grounds upon which the learned Judge has proceeded are, *firstly*, that the respondents are entitled to the presumption provided by section 50 of the Tenancy Act. In this connection it is pointed out that the rent which is now claimed is equivalent to Rs. 71 *sicca* which appears in previous documents referred to.

The following objection has been taken upon this matter. It has been pointed out that in the suit the decision in which was passed by the High Court on the 16th July 1885, this Court while holding that the defendants had *taluki* rights in the land observed that there was no proper

proof as to the rent paid. It is submitted in argument that the learned Judge is right in saying that the presumption of this section does not rest upon whether one uniform rate has been paid or not, but upon whether the rent has or has not been changed. Exception has, however, been taken to the passage in which he says: "If Jahnobi Chaudhurani had brought a rent suit immediately after the decision of the suit in the High Court, she would have obtained a decree for rent at the rate now claimed by her successor-in-interest."

This might have been better put so as to avoid giving an opening to the criticism which has been passed upon the judgment in this respect; because it is true that we do not know whether the defendants' predecessors would have admitted the rate of rent now asserted, had the plaintiffs' predecessors brought a suit immediately after the decision of the High Court. What, however, we do know is that the rate of rent for which they now sue is the same as the rate which was asserted by the tenure-holders in the eighties, and perhaps from this circumstance we might assume that had the suit been brought at an earlier date, it would have been for the rent at the rate at which the plaintiff now sues. At least it might be said that it was a possible or probable conclusion.

The remark, however, is unnecessary. What is sufficient is that we have a rate of rent Rs. 71 *sicca* asserted in the suit which was brought in the eighties in this Court. We also have the present suit brought at the same rent and this, as the learned Judge has pointed out, is an admission that the rent of the *taluk* has remained unaltered for upwards of twenty years and is certainly evidence that there has been no change in the rate of rent from the date of the High Court suit. No evidence whatever has been given of the change of rent. Therefore, I think that the learned Judge was right in his conclusion that the rent had remained unchanged during the twenty years immediately before the institution of the suit and that the defendants are, therefore, entitled to the presumption under section 50 of the Tenancy Act. This is sufficient to dispose of the suit; but as the learned Pleader for the appellant has referred to other grounds, I may mention what appears to me to be the answer to the objections made by him.

It was also argued successfully before the lower Court that the defendant has shown that the tenure was created before the Permanent Settlement with a fixed rent of Rs. 71 *sicca*. This allegation was sought to be proved by two classes of evidence. There was first a number of documents put in as being assertions of right made on several occasions many years ago. It is said that this evidence was not admissible, it being sought to distinguish the decision in *Ram Ranjan Chakerbarti* v. *Ram Narain Singh* (1) on the ground that there had been a decree for rent given at a certain rate and this judgment was held admissible. It is true that the Privy Council appear, in their decision referred to, to have treated the evidence as being admissible under section 43 of the Evidence Act, and this was done because the document was a judgment which fell under section 43. They did not differ from the view taken by the High Court that the document in that case was admissible also under section 13 as assertions of right and I see no reason for holding that the learned Judge was in error in admitting the documents as assertions of right and as such admissible under section 13 of the Evidence Act.

These documents, however, do not go beyond the year 1815. It is unnecessary to consider whether the evidence would or would not be sufficient if it stood alone, because we have it that there is another document (Exhibit H) which carries the defendants' case, if that document be accepted, up to 1793—the year of the Permanent Settlement. Objection has, however, been taken to this document on the ground that it should not have been admitted under section 90 of the Evidence Act as it had not been shown that the custody was a proper one. Assuming for the purposes of argument only that this question of custody is a question of law

(1) 22 C. 533; 22 I. A. 60.

with which we could interfere in second appeal, their Lordships of the Privy Council have held that the Courts will always be slow to interfere with the discretion of a Court vested in it under section 90 refusing or admitting a document. Whether the custody is a proper one under section 90, is a question to be decided upon the circumstances of each case. We have to see here if the circumstances of this particular case are such as to render the origin legitimate or probable. The learned Judge has given his reasons for saying that the custody was proper and I see no reason for interfering with his decision in this respect.

I may observe, however, that the document was produced in 1883 in the High Court and there although the learned Judges criticised certain documents then introduced on the ground apparently, as the learned Judge pointed out in this case, that they were copies and not originals, nothing adverse was said to the document which I am now considering and, moreover, this document which is relied on for the purpose of showing the rent in 1793 is corroborated by many other documents in this case which go to prove the same fact.

On the last question of limitation, I need not under the circumstances discuss whether there could be an acquisition by prescription of the land as a tenure at fixed rent. It would have been only necessary to discuss this question in the event of the respondents failing upon the other two grounds to which I have referred and on which they succeed.

In the circumstances, therefore, the appeal must be dismissed with costs.

MULLICK, J.—I agree.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 16 OF 1912.

July 18, 1913.

Present:—Mr. Pratt, J. C., and Mr. Kemp, A. J. C.

GULAM HYDER GHOUSBUX—APPELLANT

versus

ABDUL FATEH MAHOMEDKHAN—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 42, order under—Appeal.

An order appointing a guardian under section 42 of the Guardians and Wards Act is one passed in exercise of powers conferred by section 7 of the Act and as such is appealable under section 47 of the Act.

Appeal against the order of the Joint Judge, Sukkur-Larkana.

Mr. *Lalchand Hassomal*, for the Appellant.

Mr. *DeCruz*, for the Respondent.

JUDGNENT.—This an appeal from the order of the Joint Judge, Sukkur-Larkana, appointing the Court of Wards as the guardian of the property of the three minor children of Khan Bahadur Rasul Baksh. The guardian who was first appointed was Abdul Fateh, an uncle of the minors. He resigned on certain charges of misconduct being made against him, and on his resignation an application under section 8 was made by Ghulam Hyder, the present appellant. The Joint Judge declined to appoint Ghulam Hyder and made the appointment of the Court of Wards under section 42.

A preliminary objection is raised that no appeal lies because section 42 is not referred to in section 47—the section of the Act which allows an appeal. But section 47 allows an appeal from an order under section 7 appointing or declaring a guardian. The order of appointment, therefore, expressed to be made under section 42 is made in exercise of the power given under section 7. We, therefore, overrule the preliminary objection and determine the appeal on its merits.

The only objection raised to the appointment of the Court of Wards is that its management would be expensive. The Joint Judge has, however, considered this ground and has come to the conclusion that it is better to pay for the better management than to take a serious risk

that would seem probable if the application of Ghulam Hyder were admitted.

Mr. Lalchand has strongly urged upon us the social position and good character of the applicant and as to these there is no question. But there are other facts in the case which incline us to agree with the Joint Judge. The applicant's brother admittedly made a claim against the estate only two years ago. If that claim were revived either by that brother or by Abdul Fateh, the applicant would find himself in an embarrassing position for his own interest would be opposed to that of the minors.

Again, the applicant is the husband of one of the minors. If his wife on attaining majority filed a suit for partition the applicant's interest as husband of the wife and his duty to the other minors would also come in conflict. Even if his wife did not sue for partition the applicant would find himself in an embarrassing position in having to decide what share of the profits belong to his wife and what share to the minors. The applicant is still a young man with little experience of the world and we doubt whether he has the administrative capacity that the management of such a large estate requries.

We confirm the order of the Joint Judge and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3349 OF 1911.
February 2, 1914.
Present:—Mr. Justice Teunon.
Raja SHYAM CHANDRA MORDARAJ HARI CHANDAN, AND ON HIS DEATH HIS HEIR AND LEGAL PRESENTATIVE RAJA KESHORE CHANDRA MORDARAJ HARI CHANDAN—PLAINTIFF—APPELLANT
versus
BHANGA DEI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 61, 66—Withdrawal of portion of claim in suit—Application for withdrawal in second appeal, whether may be granted—Deposit of rent—Interest.

The plaintiff sued for rent for the years 1314 to 1316 and for the first half year of 1317. There was also a prayer for ejectment. Seeing that the plaintiff could not succeed in his prayer for ejectment, as he had sued for rent for the first half of 1317, he prayed in second appeal that he might be permitted to withdraw his claim in respect of 1317:

Held, that the application could not be granted at that stage.

A deposit of rent without the interest then due is not a sufficient deposit within section 61 of the Bengal Tenancy Act.

Appeal from the decree of the District Judge of Cuttack, dated July 29, 1911, affirming that of the Deputy Collector of Balasore, dated March 30, 1911.

Babu *Shiba Prosonna Bhattacharyya*, for the Appellant.

Babu *Suresh Chandra Chakravarti*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for rent for the years 1314 to 1316 and for the first half year of 1317. There was also a prayer for ejectment under the provisions of section 66 of the Bengal Tenancy Act.

The Courts below have granted the plaintiff a decree for the arrear claimed in respect of the first half of the year 1317 and also for a sum of Rs. 3-15-6 as the balance due for the last *kist* of 1314. The prayer for ejectment was refused.

Before me it is conceded that, whatever the status of the tenants may be, inasmuch as the plaintff in this suit sued for rent for the first half of 1317, he cannot succeed in his prayer for ejectment. The plaintiff now asks that he may be permitted to withdraw his claim in respect of 1317, but this application is one which I cannot grant at this stage.

The only other question raised in the appeal is whether the two deposits of rent made on the 6th of November 1909 under the provisions of section 61 and the following sections of the Bengal Tenancy Act were good deposits. The plaintiff landlord objects to these deposits on two grounds. It has been found that the last day of payment of the second *kist* of 1316 was 1st October; but the deposits were made on the 6th of November, the sum deposited being Rs. 227-10-3 the full amount of rent and cesses for that *kist*. It is clear, therefore, that, on 6th November, a sum amounting to about or over Rs. 3 was then due as interest. The interest due was not deposited; and to that extent the deposits are insufficient.

KALAGARA RAMANNA v. KALAGRA GANGAYYA.

The next objection taken is that, in their application, depositing these amounts, the defendants have described themselves as *maurusi sarvarakars* and the tenure as *maurusi sarvarakari*; while, according to the plaintiff, by reason of a compromise entered into by the predecessors of the defendants with him (the plaintiff) in Suit No. 353 of 1897 the defendants have given up that status and are not entitled to use the term or description *maurusi*, but are *sarvarakars* merely. Neither of the Courts below has dealt or dealt satisfactorily with this question; but, on the first finding that the deposits were insufficient, into this second objection on the part of the plaintiff I need not enter.

The deposit being insufficient, the plaintiff is now entitled to a further decree for the arrear of rent for the second *kist* of 1316 and cesses and interest thereon at 12½ per cent. per annum up to this date, with interest on the decretal amount at 6 per cent. Under all the circumstances of the case, I make no order as to the costs of this appeal.

Decree varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1429 OF 1912.

October 1, 1913.

Present:—Mr. Justice Miller and Mr. Justice Tyabji.

KALAGARA RAMANNA AND OTHERS—APPELLANTS

versus

KALAGRA GANGAYYA AND OTHERS—RESPONDENTS.

*Hindu Law—Alienation by widow—Part of consideration not binding on reversioners—*Bona fide *purchaser may retain property on paying to reversioners part of consideration not found binding—Proper decree.*

Where in a *bona fide* sale by a Hindu widow a portion of the consideration money is found not to be binding on the reversioners, it is at the option of the alienee to retain the property and pay the amount so found to the reversioners.

Felaram Roy v. *Bagalanand Banerjee*, 6 Ind. Cas. 207; 14 C. W. N. 895, followed.

Second appeal against the decree of the District Court of Kistna, at Masulipatam, in Appeal Suit No. 222 of 1910, preferred against that of the Subordinate Judge of Kistna, at Ellore, in Original Suit No. 42 of 1908.

The Hon'ble Mr. *T. V. Seshagiri Aiyer* for Mr. *T. R. Ramachandra Aiyer*, for the Appellant.

Mr. *K. Narain Rao*, for the Respondents.

JUDGMENT.—The District Judge finds that out of the sum of Rs. 1,300, the price paid for the property, Rs. 1,022 was to pay off a debt or debts which the widow was legally justified in paying out of the corpus of her son's estate and that as regards the balance, Rs. 278, there was no justification for obtaining that money by sale of the land. The District Judge also finds that both sales were *bona fide* transactions, and that the prices paid were not unreasonably low. These findings we accept, but we do not think they justify the decree which the District Judge has made.

The sale, Exhibit IV, for Rs. 700 is clearly wholly good as found by the District Judge, and the reversioners have no claim to recover the property. The only ground suggested in support of the decree is inadequacy of price, but the District Judge's finding is that the price was not unreasonable.

As regards the sale for Rs. 600, the sum of Rs. 322 is binding, so to phrase it, on the reversioners and Rs. 278 is not binding, but the sale was *bona fide* and the purchaser is, we think, entitled to retain the land.

We accept the view taken of this question in *Felaram Roy* v. *Bagalanand Banerjee* (1) and think that the right decree as regards the second sale will be one which permits the purchaser to retain the land; we need not consider the question whether the reversioners have a right to recover the sum of Rs. 278, because that question was not argued, and it was stated by Mr. Seshagiri Aiyer that, if we accept the District Judge's finding his clients were willing to pay that amount to retain the land.

We leave that question open for further consideration, should it arise. The decree will, therefore, be that the suit be dismissed with costs throughout, as against defendants Nos. 1 to 14 and 17 and 18; and that, if the 15th defendant do not within three months pay the amount of Rs. 218 with

(1) 6 Ind. Cas. 207; 14 C. W. N. 895.

interest at 6 per cent. per annum from the date of the death of the widow *i.e.*, 24th January 1900, the plaintiff be at liberty to sell the property covered by Exhibit III for the amount, but if the payment is made within three months, the plaintiffs' suit will stand dismissed as against the 15th and 16th defendants also. The 15th defendant will pay his own costs but not the plaintiffs'. The memorandum of objections is dismissed with costs.

Suit dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 32 AND 41 OF 1913.

October 13, 1913.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

THE SECRETARY OF STATE FOR INDIA—APPELLANT

versus

MAJOR J. E HUGHES—RESPONDENT.

Poona Cantonment Taxation Regulations, 1881—*Increase in rate, not according to Regulations—Illegal—Payment under protest—Suit to recover—Jurisdiction of Civil Court—Payment by cheque effected when cashed—Limitation runs from date cheque is cashed—Limitation Act (IX of* 1908*), Sch. I, Art.* 64.

A Cantonment Magistrate disregarding the Cantonment Taxation Regulations increased the tax of a club which was paid under protest and an appeal to the Cantonment Committee was rejected:

Held, that the Civil Court had jurisdiction to entertain a suit to recover the money as the money was claimed and received from the club without the shadow of a right.

Where money is paid by cheque the limitation to recover the money runs from the date of the receipt of the money by the payee and not from the date of the delivery of the cheque.

Mesrey Docks and Harbour Board v. *Birkenhead Assessment Committee*, (1901) A. C. 175; 70 L. J. K. B. 584; 65 J. P. 579; 49 W. R. 610; 84 L. T. 542; 17 T. L. R. 445; *Kasandass* v. *Anklesh:var Municipality*, 26 B. 294; 3 Bom. L. R. 882, referred to.

First appeals from the decision of the District Judge of Poona, in Civil Suit No. 3 of 1912.

Mr. *Strangman*, Advocate-General, with him Mr. *S. S. Patkar* (Government Pleader), for the Appellant.

Mr. *Weldon*, (with him Messrs. *Cragie and Co.*), for the Respondent.

JUDGMENT.—This suit was instituted by the plaintiffs to recover payment of the amount of taxes levied by the Cantonment authorities at Poona, which the plaintiffs paid under protest on the ground that the assessment was illegal. The learned District Judge, by whom the case was heard, disposed of it in favour of the plaintiffs, and this appeal has been preferred by Government on two grounds, *first*, that the Court had no jurisdiction to entertain the suit; and, *secondly*, that in respect of a portion of the money claimed the suit is barred by the provisions of Article 62 of the Limitation Act.

The argument on the question of jurisdiction amounted to this. According to the assessment rules certain authorities have been constituted for the assessment of taxes, and their assessment is final, except in so far as any question may arise as to the legality of their action having regard to the jurisdiction conferred upon them by the assessment rules, and it was contended that the assessment of the tax complained of by the plaintiffs was a pure question of fact and not of law, and that, therefore, no question arose for the decision of a Court of Law, on the analogy, I presume, of applications in revision to the High Court under section 115 of the Code of Civil Procedure. The contention that the assessment of the tax raises a pure question of fact was based upon a passage from the judgment of Lord Halsbury in the *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1); but if that judgment is read as a whole, it does not, as we shall have occasion to show later on, support the appellant's contention.

The rules affecting the taxation for Cantonment purposes of occupiers in Poona were framed by the Government of Bombay under the powers conferred by section 22 of the Cantonments Act of 1880, powers which have been continued substantially in the same words through various Cantonment Acts up to the present time. Under those enactments it is provided that the local Government may, by notification in the official Gazette, impose in any Cantonment, which is not included in the Municipality,

(1) (1901) A. C. 175; 70 L. J. K. B. 584; 65 J. P. 579; 49 W. R. 610, 84 L. T. 542, 17 T. L. R. 445.

any tax which, under any enactment in force at the date of the notification, can be imposed in any Municipality within the territories administered by such Government; and that when any tax is leviable in a Cantonment in pursuance of such notification the Local Government may by notification apply or adapt to the Cantonment the provisions of any enactment or rules in force at the date of the notification in any Municipality within the territories aforesaid relating to the assessment, collection or recovery of any tax, and refund or revision of or exemption from any such tax.

In intended execution of the powers conferred by section 22 of the Cantonments Act of 1880, Poona Cantonment Taxation Regulations were notified in the year 1881, which purported to adapt the taxation provisions of the City of Bombay Municipal Act of 1872 and 1878. According to such adaptation the Cantonment Magistrate took the place of the Municipal Commissioner, and the Cantonment Committee took the place of the Court of Petty Session, for the purpose of hearing appeals against rates. The regulations with which we are concerned in this appeal are Regulations 1, 2, 7, 8, 10, 13, 15, and 42. Regulation 1 provides that "the estimated gross annual rent at which the houses, buildings and lands liable to property rates might reasonably be expected to let from year to year shall, for the purposes of the said rates, be held and deemed to be the annual value of such houses, buildings and lands." Regulation 2 provides that "the rates shall be leviable from the actual occupier if he hold the house, building or land immediately from Government".

By Government Notification of the 17th of September 1891, a general property rate of four per cent. per annum of the annual value of houses, buildings and lands liable to property rate was imposed on the Cantonment of Poona, and the plaintiffs as occupiers of the Race Course in the Cantonment which they held immediately from Government were liable for the rate.

Until the year 1908, the plaintiffs had been called upon to pay a tax of Rs. 201, assessed upon an estimated gross letting value of the Race Course property of Rs. 5,038. On the 8th of October 1908, they received the following notice from the Cantonment Magistrate:—"Under Poona Cantonment Taxation Regulations the Cantonment Magistrate hereby gives notice to the Secretary, Western India Turf Club, with regard to the property indicated in the margin that he has revised the valuation of the said property, and assessed the rate at Rs. 9,840 per annum on an annual income of Rs. 2,46,000, and that any complaints against such valuation must be made to the Cantonment Magistrate in writing and received at this office within three days from the service of this notice." This, therefore, was a case falling under Regulation 10 under which the rates might be increased; that Regulation provides that "notice of the amendment shall be given to the person interested and the date fixed for the hearing of complaints which shall be made and heard in the manner prescribed in section 8 for complaints concerning original rates in the assessment book." Regulation 8 provides that "all complaints against valuations shall be made to the Cantonment Magistrate by application in writing left at his office three days before the day fixed in the public notice for revising the valuations and rates," the public notice being the notice provided for by Regulation 7 which must prescribe a day, not being less than fifteen days from the publication of notice, when the Magistrate will proceed to revise the valuations and rates. It is, therefore, apparent that the Cantonment Magistrate in notifying that any complaints against the increased rate must be made within three days from the service of his notice of the 8th of October 1908 was disregarding the express provisions of the Regulations.

It is contended, however, that such disregard of the Regulations is of no importance under Regulation 42, provided the directions in the Regulations have been in substance and effect complied with, and that, if that is so, the action of the Cantonment Magistrate cannot be quashed or set aside in any Court. It appears to us that the Regulations have not been in substance or effect complied with. The plaintiffs are called upon within three days to show cause why the rate imposed upon them should not be raised from Rs. 201 to Rs. 9,840. Such a serious demand was a matter requiring very

attentive consideration; and reasonable time was not given to the plaintiffs to take any advice upon the subject. On that ground alone, therefore, we think that the action of the Cantonment Magistrate was not warranted by the Regulations. An appeal was preferred from his assessment to the Cantonment Committee under Regulation 13. The Cantonment Committee only have jurisdiction to hear an appeal against a rate provided it is charged under the provisions of the foregoing Regulations. The appeal to that Committee resulted in a curt Resolution as follows:—"Resolved that the appeal of the Turf Club be rejected," and the request for reasons for this resolution was met by a further resolution as follows:—"Resolved that the Solicitors to the Turf Club be informed that the Committee consider that they are not bound to record their reasons for rejecting an appeal." The Turf Club then appealed to the Governor in Council, but they were informed that under the Regulations the Governor in Council had no power to interfere with the decision of the Cantonment Committee, which according to the provisions of Regulation 15 was to be final. It is not surprising under the circumstances that the plaintiffs paid their tax under protest, and have filed this suit for the recovery of the same as money had and received for their use.

Up to this point we have dealt with the objection to the action of the Cantonment authorities on the ground of procedure and, for the reasons stated, we think that the objection is well founded, that the Cantonment Magistrate did not charge a rate under the provisions of the Regulations, an appeal with reference to which could be heard and determined by the Cantonment Committee.

But there is a more serious objection than that caused by the procedure laid down in the Regulations. It is this: that the Cantonment Magistrate has wholly disregarded the basis upon which the rate is to be assessed. He has assessed a rate upon the gross income of the plaintiffs, which would not even be a basis for the levy of income-tax. Even if the plaintiffs' net profits, which average about Rs. 30,000 year, had been taken as the basis of valuation, it is clear, for the reasons stated by the District Judge, that no hypothetical tenant could be expected to offer such a sum as rent for the property in question, for as the District Judge points out "if the plaintiffs were to let the Race Course and buildings for more than about Rs. 30,000 a year, it is obvious that their tenant would conduct business at a loss," and if they were to let it for that sum only he would make no profit. It would, therefore, not be reasonable to expect that he would offer such a rent. It appears to us that the judgment of Lord Halsbury in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (1), already referred to, so far from being any authority in favour of the contention of the appellants, is a direct authority for the proposition that where a taxing authority is called upon to assess the tax based upon annual letting value, he does very wrong indeed if he rates as if he were dealing with the question for the income-tax. The Cantonment Magistrate has, as stated by the District Judge, "not calculated the tax on the annual value, but on some strange and novel method of his own. The law does not justify his action at all. It was outside the law, and he has assumed powers which the law has not given to him. The enhancement of the tax was, therefore, *ultra vires*, and not a legitimate method of arriving at a fair letting value of the house." It is, therefore, clear upon the authority of *Kasandas* v. *Ankleshwar Municipality* (2) that the case is one in which the jurisdiction of the Civil Courts is not ousted. The money has been claimed and received from the plaintiffs without the shadow of a right, and the plaintiffs having paid under protest are entitled to recover the money, unless their claim is barred by limitation. It is only contended that their claim is barred in respect of the first payment made by them for one half year, being the sum of Rs. 4,819-3-10. A cheque for that sum was given to the Cantonment Magistrate by the Turf Club on the 28th November 1908, but it was not cashed by him; and on the 5th of May 1909, he wrote saying that he had made a mistake in the figure which should be Rs. 4,671, and that the cheque drawn on the 28th November would be returned on payment of the sum of Rs. 4,671. The first cheque was, however, cashed

(2) 26 B. 294; 3 Bom. L. R. 882.

on the 27th of May 1909. This suit was instituted on the 28th March 1912, more than three years after the delivery of the cheque, but less than three years after the cashing of the same. We are of opinion that limitation runs, not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee, and that, therefore, Article 62 is no bar to the plaintiffs' claim in respect of this payment. The appeal, therefore, must be dismissed.

We would add for the consideration of the Government an observation on a question which it has not been necessary to decide, having regard to the success of the plaintiffs upon the points raised by them. It is this, whether the Cantonment Taxation Regulations can be regarded as an adaptation of the provisions of the taxation sections of the City of Bombay Municipal Act of 1872 and 1878 in respect of appeals from rates. Those sections allowed an appeal to the Court of Petty Session, that is to the Presidency Magistrate, a judicial tribunal, whereas Regulation 13 of the Poona Regulations gives the appeal to the Cantonment Committee, which is a lay body, one of the most important members of which is the Cantonment Magistrate, from whom the appeal is preferred.

The plaintiffs must have their costs of this appeal and of the next appeal which fails with the failure of this appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 203 OF 1912.

April 16, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

NAGENDRA BALA CHOWDHURANI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Drainage dues—Instalment bond executed by proprietors in favour of Government to pay drainage dues—Suit for partition—Appointment of Receiver—Sale of property by Receiver to third person subject to drainage dues—Non-payment of instalments due by proprietors—Liability of third person to pay instalments—Public Demands Recovery Act (I B. C. of 1895), s. 7—Drainage Act VI B. C. of 1880) ss. 28 (2), 31, 36, 36A, 38.

The proprietors of certain properties executed in 1898 in favour of the Secretary of State an instalment bond under section 37 of the Bengal Drainage Act, 1880, for the payment of the amount which they were liable to pay under the terms of the Act. There was a partition suit in respect of the properties, in which a Receiver was appointed who sold the properties in suit to the plaintiff subject to the drainage dues. The proprietors having made default in payment of some instalments, a certificate was filed in the Collectorate against them. When the estate passed into the possession of the Receiver his name was added and after the plaintiff's purchase her name was added. The plaintiff's objection to this procedure having been rejected, she instituted this suit:

Held, that, under section 38 of the Drainage Act, the person liable to satisfy the engagement entered into with the defendant was the person who gave it; that under the terms of that section the provisions contained in the Public Demands Recovery Act, 1895, for summarily recovering the amount remaining due under the terms of the engagement, could be put in force against the persons who gave it; that as the plaintiff did not give it, she was not a person liable to pay the public demand within the meaning of section 7 of the Public Demands Recovery Act; and that no revision of the certificate having taken place under section 36A of the Drainage Act, the plaintiff was not bound to pay the instalments.

Appeal from the decree of the Sub-Judge of Hooghly, dated April 30th, 1912.

FACTS.—This is a suit for a declaration that a certificate made against the plaintiff by the Collector of Hooghly under the Public Demands Recovery Act is illegal, invalid and wholly without jurisdiction.

Some properties belonging to the Mukherjis of Janai were benefited by the Rajapur drainage scheme. The Collector of Hooghly then filed a certificate under the Bengal Drainage Act, VI of 1880, B. C., for the recovery of a sum of Rs. 43,173-1-6 against the Mukherjis. Some of the Mukherjis having instituted a suit for partition in the original side of the High Court, a Receiver was appointed who sold a portion of the estate for the liquidation of the debts of the estate, and the plaintiff purchased the property in question in 1905. The Receiver paid a portion of the amount for which the certificate was filed, as his name was inserted in it. Previous to the institution of the partition suit, the Mukherjis executed a *kistibandi* bond on February 4, 1898, in respect of the amount due to Government under section 38 of the Drainage Act. As they made default in payment of the sums due under the bond, a certificate was filed

by the Collector of Hooghly, and the plaintiff having executed an indemnity bond in respect of Rs. 28,843-8-9 which remained due under the certificate, her name was inserted in it. The plaintiff principally alleged that the certificate was not duly made against her and that it is invalid so far as she is concerned.

The suit was at first dismissed as being barred by limitation under section 15 of the Public Demands Recovery Act, and that section 244 of the old Civil Procedure Code was a bar to such a suit. On appeal by the plaintiff, the High Court set aside that judgment and remanded the case for retrial on the merits.

The Court below remarked on the point whether the certificate was illegal &c, and whether the plaintiff's name was rightly added, as follows:—

"In the present case, it appears from the evidence of the defendant's witness No. 2 and from the conveyance Exhibit A5, executed by the Receiver, and from the indemnity bond, Exhibit A4, executed by plaintiff, that the plaintiff purchased the property subject to the drainage dues and expressly undertook to pay them, a notice of such charges having been read over at the time of the sale. Her Counsel, Mr. S. P. Sinha, undertook to pay the drainage charges, and she executed the indemnity bond before the sale was confirmed and the conveyance was executed by the receiver in her favour binding her to pay the drainage charges due to Government. * * Besides, the amount due under the certificate is a first charge upon the property benefited under sections 31, 37 and 38 of the Drainage Act of 1880, and no purchaser of it can avoid the payment of the sum for which the certificate is filed. * * The plaintiff simply denies her liability to pay the amount due under the *kistibandi* bond and contends that the Certificate Officer had no jurisdiction to file the certificate against her for the sum due under the instalment bond. Having executed the indemnity bond in favour of the Reciever in respect of the amount due under the instalment bond, and having undertaken to pay the sum before the High Court before the confirmation of the Receiver's sale at which she purchased the property, it does not lie in her mouth now to deny her liability and to question the authority of the Certificate Officer to file the certificate against her."

The Court dismissed the suit.

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghosh*, Babus *Sarat Chandra Roy Chaudhri* and *Dhirendra Krishna Roy*, for the Appellant.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff from the judgment of the 2nd Subordinate Judge of Hooghly, dated the 31st of April 1912, dismissing her suit.

The suit was brought by the plaintiff for the purpose of obtaining a declaration that a certificate purported to have been made against her on behalf of the Secretary of State for India in Council under the Public Demands Recovery Act, 1895, was illegal and invalid.

The plaintiff purchased the property described in the Schedule to the plaint on the 15th of April 1905 at a sale held by a Receiver appointed by this Court in its original jurisdiction.

The property in question formerly belonged to a family of Mukherjis, some of whom instituted a suit for partition in this Court. In that suit a Receiver was appointed and under the orders of the Court a portion of the estate was sold for liquidation of the debts of the estate. The plaintiff became the purchaser at that sale and the sale to her was duly confirmed by the Court.

Under the provisions of the Bengal Drainage Act, 1880, certain works known as Rajapur Drainage Scheme were executed for the improvement of amongst other properties the property subsequently purchased by the plaintiff. For the payment of the amount that they were liable to pay under the terms of the Act, three of the Mukherjis executed on the 4th of February 1898 in favour of the Secretary of State for India in Council an instalment bond. The Mukherjees subsequently made default in payment of certain of the instalments under the bond and thereupon under the provisions of the Public Demands Recovery Act, 1895, a certificate was filed in the Collectorate against them, the certificate being No. 507 of 1900-1901. When the estate passed into the possession

of the Receiver his name was added or substituted in the certificate in the course of the year 1903 04 and after the purchase by the plaintiff her name was added or substituted on the record on the 9th of July 1906. The plaintiff objected to this procedure but the Revenue Authorities declined to interfere. Thereupon the plaintiff instituted this suit.

When the case first came on for hearing the learned Subordinate Judge dismissed the suit on the preliminary grounds that section 244 of the Code of Civil Procedure, 1882, was a bar to the suit, and further that the suit was barred by limitation. The plaintiff preferred an appeal to this Court and the order of the learned Judge was reversed and the case remanded for trial in the lower Court.

The case that we have now to deal with is on the footing that the amended certificate is a certificate filed against the plaintiff.

This question must be dealt with quite apart from the charge given by the Bengal Drainage Act, 1880, for the expenses of works executed under the terms of the Act.

The only point we have to consider in this appeal is, was the certificate validly made against the plaintiff? The answer to that question depends on whether or not the plaintiff is a person 'liable to pay the public demand'.

Now section 28 (2) of the Bengal Drainage Act, 1880, directs that the Commissioners after making the classification therein mentioned shall proceed to apportion the total cost of construction upon the improved lands and shall draw up a statement showing the amount payable by each land-holder.

Section 31 of the Act provides that the total sum so made payable with interest shall be a first charge upon such lands.

By section 36 it is enacted that whenever the Commissioner of the Division shall confirm any apportionment and report or whenever one month shall elapse from the publication of any report without any appeal having been preferred, he shall pass an order declaring the sums payable in respect of the lands and the persons liable to pay the same to be determined.

As soon as any apportionment has been determined, the Collector is authorised by the terms of section 37 of the Act to cause a notice to be served upon any land-holder who has not paid the sum payable by him requiring him within one month to pay such sum with interest or to enter into an engagement for the payment by instalments over a period of not more than ten years of such sum together with interest on the instalments for the time being remaining unpaid.

Under the terms of this section the Mukherjees executed in favour of the defendant the instalment bond of the 4th of February 1898.

Section 38 provides (amongst other things) that if any land-holder having entered into such an engagement fails to discharge any instalment payable thereunder, such instalment together with interest shall be recoverable under the provisions of any law for the time being in force for the recovery of public demands.

It is very obvious that under the terms of this section the person liable to satisfy the 'engagement' entered into with the defendant is the person or persons who gave it and that under the terms of the section the provisions contained in the Public Demands Recovery Act, 1895, for summarily recovering the amount remaining due under the terms of the 'engagement' can only be put in force against the persons who gave it. The plaintiff in this suit is not such a person.

The Bengal Drainage Act, 1880, has, however, been amended by the Bengal Drainage (Amendment) Act, 1902, and under provisions of the amending Act a new section 36A has been inserted in the Act authorising the Collector to revise an order passed under section 36 as to the names of the persons liable to pay by reason (amongst others) of any change having taken place in the ownership or joint ownership of the land.

The learned Senior Government Pleader has informed us that no such revision has taken place in the present case and, therefore, it is not necessary to consider what liability, if any, the plaintiff would have been under if the order made under section 36 of the Act had been revised by the Collector.

In the result the present appeal must be allowed and a decree passed in favour of the plaintiff declaring the certificate invalid as against her.

The defendant must pay to the plaintiff her costs both in this Court and the Court below. We assess the hearing fee at five hundred rupees.

RICHARDSON, J.—I have read this judgment and agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND APPEALS NOS. 705, 987 AND 1479 OF 1912.

November 20, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

V. R. RY. SETHURAM MADIGAI ROW SAHIB, A MAN OF UNSOUND MIND, BY HIS MOTHER PADMA BAI AMMANI AS NEXT FRIEND—PLAINTIFF—APPELLANT

versus

GOPAL ROW PEISHWA AND OTHERS—RESPONDENTS.

Injunction, mandatory, suit for—Damages—Balance of convenience.

Where upon a balance of convenience, damages will be an adequate remedy, relief by way of mandatory injunction should not be granted.

Second appeals against the decrees of the Subordinate Judge of Tanjore, in Appeal Suits Nos. 157, 156 and 174 of 1910, preferred against those of the District Munsif of Tanjore, in Original Suits Nos. 405 and 461 of 1908 respectively.

Mr. *T. Ethiraja Mudaliar*, for the Appellant.

Messrs. *T. V. Gopalasawmi Mudaliar* and *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—In these connected appeals the lower Appellate Court has found that there is a lane between the houses of the 2nd plaintiff and the defendant, which leads to the house of 1st plaintiff; and that this lane and a strip of land 3 feet broad parallel thereto are the common property of the 1st plaintiff and the defendant. The defendant has erected a building which encroaches upon a small portion of this common property, 2 feet *by* 2 feet, and has also built some steps to a door-way in his wall which project 3 feet into the common property; and this has been done in spite of objections taken by the appellant.

In the plaints in both suits, the plaintiffs (appellants) exaggerated their claims; in Original Suit No. 405 of 1908 they claimed the exclusive property in land found to belong to the defendant, and in Original Suit No. 461 of 1908 they claimed that a door-way made by the defendant in his house should be removed. In both suits the plaintiffs prayed for a mandatory injunction for the removal of the building and of the steps which encroached upon the common property.

The Subordinote Judge has found that the piece of land, including the lane, between the houses of the parties can be partitioned in such a way as to give to each party a strip of land 5 feet 10 inches in width from North to South, and 39 feet from East to West, and that, if this division be effected the portions of the land upon which the defendant has encroached can be allotted to the defendant as part of his share of the common property Upon these facts he has held that the plaintiffs have failed to show that the acts of the defendant have caused such material and substantial injury as could not be remedied in a suit for partition of the common property. and has confirmed the decrees of the Court of first instance which dismissed both the suits. The lane gives access to the 1st plaintiff's house, and it is obvious that to reduce its width by about one-half will be extremely inconvenient to him, and will deprive him of the right which he has heretofore exercised of freely passing over the common property.

In fact, each party has not only a right of ownership in common in the soil of the lane, but a right of way over the whole of the surface, and the effect of forcing the plaintiffs to ask for partition is to deprive them of this right. Without expressing any opinion upon the decisions relied upon by the Subordinate Judge, we think that the present case does not fall within them.

The small piece of land upon which the defendant has encroached forms part of the 1st plaintiff's vearandah, and is only 2 feet square, so that the inconvenience is not great, but it cannot be compensated by giving the plaintiffs the sole ownership of another piece of land of the same area, and as we have pointed out a division of the whole of the common property would be injurious to the plaintiffs. The question, therefore, is whether the remedy granted to the plaintiffs should

be by way of injuction or in damages. The 1st plaintiff was originally in fault, in claiming the land as his exclusive property, and upon the balance of convenience, we think that damages would be an adequate remedy and we assess them at Rs. 20.

The result is that there will be a decree in Second Appeal No. 705 of 1912 setting aside the decrees of both the lower Courts and declaring that the peice of land 2 feet square upon which the defendant has erected his building is the joint property of the 1st plaintiff and the defendant, and awarding to the plaintiff the sum of Rs. 20 as damages; and there will be no order in Second Appeal No. 987 of 1912 except that the respondent do pay the appellant's costs.

There will be a decree in Second Appeal No. 1479 of 1912, reversing the decree of the lower Appellate Court and restoring that of the District Munsif. The parties will bear their own costs in the District Munsif's Court in both cases, and the defendant will pay the plaintiff's costs of all proceedings in this and the lower Appellate Court. The memorandum of objections in Second Appeal No. 705 of 1912 will be dismissed. Order for costs will be against the defendant (1st respondent) only.

Decree modified.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 811 OF 1912.
October 13, 1913.
Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.
SITARAM BHIMAJI DESHPANDE AND ANOTHER—DEFENDANTS—APPELLANT
versus
SADHU AWAJI PARIT AND ANOTHER—PLAINTIFFS——RESPONDENT.

Landlord and tenant—Year by year tenancy—Suit for ejectment—Burden of proof—Present right to possession—Jus tertii—*Pleadings.*

In a suit for ejectment against a tenant from year to year, not being a possessory suit brought within six months of a wrongful dispossession, the plaintiff in order to succeed must establish such title as carries a present right to possession and the defendants are entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim.

Second appeal from the decision of the Acting District Judge of Satara, in Appeal No. 11 of 1910.

Mr. *Strangman*, Advocate-General (with him Mr. *S. R. Bakhale*), for the Appellants.

Mr. *Binning*, (with him Mr. *K. H. Kelkar*,) for the Respondents.

JUDGMENT.—The plaintiffs brought this suit in 1908 to recover possession of land alleging that in 1899 they had been wrongfully deprived of their possession by Raghunath Ramchandra who and the defendants, who derive title under him, have been in wrongful possession ever since. The defendants pleaded that Raghunath was the owner and that the plaintiffs had been his tenants until they relinquished the property as they could not pay the rent.

The learned Subordinate Judge raised four issues: 1st, whether before 1899 the plaintiffs held the property under the Swami of Chaphal or under Raghunath Ramchandra; 2nd, whether the plaintiffs gave up possession voluntarily; 3rd, whether the defendants were entitled to retain possession against the plaintiffs; and 4th as to the mesne profits recoverable by the plaintiffs. His findings were that the plaintiffs held under the Swami of Chaphal and not under Raghunath; that the plaintiffs did not give up the possession voluntarily; and that the defendants were not entitled to retain possession against the plaintiffs.

The Assistant Judge, Mr. Ferrers, in appeal reversed the decision of the Subordinate Judge holding that a tenant who could not prove a right of permanent occupancy, which was the plaintiffs' position, could not after eight years recover on the strength of his previous possession. He held that as the plaintiffs had failed to prove title as *mirasi* tenants they must be presumed to have been tenants from year to year, and that their title being to an annual tenancy had long since expired, for they had withdrawn from the land for eight years. He accordingly allowed the appeal.

His decree was set aside by the High Court and the case remanded for trial to the Appellate Court on the ground that if the plaintiffs had been in possession as tenants from year to year and the defendants thereafter came into possession by dispossessing them the

defendats could only retain possession by showing a better title and that the defendants' evidence as to title must be investigated.

The appeal was re-heard on remand by the District Judge, Mr. Baker, who raised four issues as follows:—1. Who have got the occupancy rights to the land? 2. Have defendants a better title? 3. What is the nature of plaintiffs' possession? 4. Whether the defendants have wrongfully dispossessed plaintiffs?

He held, quoting from the remand judgment, that the dispossession by the defendants appeared to be wrongful as they had not shown a better title than the plaintiffs saying that that disposed of issues Nos. 2 and 4 and that "as regards issues Nos. 1 and 3" the learned Counsel for respondents says "plaintiffs do not prove their title and it is not necessary. As their Kaul is not proved there would be some difficulty in doing so. They may be taken to be tenants of the Swami of Chaphal, still they are entitled to possession as against defendants."

He, therefore, dismissed the appeal with costs.

The case now comes up for the second time in second appeal.

This is a suit based upon title. It is not a possessory suit brought within six months of a wrongful dispossession but a suit against defendants who had been in possession for eight years. The presumption of right arising from possession applies as much to a defendant as to a plaintiff [see *Jowala Buksh* v. *Dharum Singh* (1)], and the fact of possession within twelve years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendant can show: see *Dharani Kanta* v. *Gabar Ali* (2). To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession. The Assistant Judge, Mr. Ferrers, having found the plaintiffs on failure to prove their title as permanent tenants to be only tenants from year to year, thought that so far as their previous possession was equivalent to title it was a title which was annual only and which for want of renewal had long ceased to be, but he failed to recollect that ordinarily, unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit. He found, it is true, that the plaintiffs had withdrawn from the land but that finding for some reason, which does not appear on the remand judgment, was not accepted by the High Court. The District Judge, Mr. Baker, said that the alleged relinquishment of the land by the plaintiffs was to be received with great suspicion, but only held that there had been a wrongful dispossession as a legal inference arising from the pronouncement in the remand judgment. It seems to us that upon the admitted facts it would be a reasonable inference that as the plaintiffs had not asserted their right as yearly tenants for eight years, they must be taken to have abandoned the tenancy or to have relinquished such other occupancy rights as they might have and if so they would have no present right to possession such as would entitle them to maintain a suit for ejectment. The only cases cited to us as establishing the plaintiffs' right as yearly tenants to maintain ejectment were *Doe dem. Hughes* v. *Dyeball* (3) and *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (4) in which there was no delay by the tenant in suing the trespasser and, therefore, no possibility of such an inference as seems to arise in the present case.

Counsel for the appellants contends that on the facts found by the District Judge the plaintiffs have no title. It is not disputed that the *Inamdar* of the land was the Swami of Chaphal and the plaintiffs attempted to prove a permanent lease by the Swami in their favour. The proof failed as the lease was held to be a forgery. The payments made by the plaintiffs for the land while their possession continued are held to have been made either to Ramchandra, the Khatedar, or to the village officers as assessment and not as rent. These facts, it is contended, show no tenancy by the plaintiffs and prove that the title is and was actually in the Swami. The defendants are entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim; see *Doe dem. Carter* v. *Barnard* (5).

(1) 10 M. I. A. 511 at p. 528; 19 E. R. 1066.

(2) 18 Ind. Cas. 17; 15 Bom. L. R. 445 at p. 451; 13 M. L. T. 185 (P. C.); (1913) M. W. N. 157; 17 C. W. N. 389; 17 C. L. J. 277; 25 M. L. J. 95.

(3) (1829) Mood. and Malk. 346; 3 Car. & P. 610.

(4) 8 B. 371.

(5) (1849) 13 Q. B. 945; 18 L. J. Q. B 306; 13 Jur. 915; 116 E. R. 1524; 78 R. R. 564.

Defendants' counsel also relies upon *Nagle* v. *Shea* (6) in which it was held that the defendant in ejectment might set up and prove *jus tertii*. Sir Frederick Pollock, in Pollock and Wright on Possession, page 98, thinks this case conflicts with *Davison* v. *Gent* (7). The passage in Bramwell B.'s judgment in that case is not clear owing to the equivocal use of the pronoun "he", but here at all events the plaintiffs' own case discloses the *jus tertii* and brings the case within *Doe dem. Carter* v. *Barnard* (5). In this connection we may observe that *Jeffries* v. *Great Western Railway Company* (8), relied upon by the Court in *Ali* v. *Pachubibi* (9) to show that a *jus tertii* cannot be set up in a suit for possession, was an action in trover for chattels.

In our opinion the plaintiffs have failed to prove title, that is, a present right to possession of the land in suit.

There are, moreover, facts found which show that Raghunath Ramchandra was the plaintiff's 'superior holder', as that term is defined by the Land Revenue Code, and in that capacity Raghunath Ramchandra got decrees in assistance suits against the plaintiffs in 1899 and 1900 under section 86 of that Code. It is no answer to say, as does the District Judge, that the decisions were *ex parte* and the plaintiffs did not appear. These proceedings together with the fact that Raghunath Ramchandra and since him the defendants have been the Khatedars of the lands in suit are evidence of a title in the defendants which must prevail against the failure of the plaintiffs to prove any title.

We reverse that decree and dismiss the suit with costs throughout.

Decree reversed.

(6) (1874) Ir. Rep. 8 C. L. 224.

(7) (1857) 26 L. J. Ex. 122; 1 H. N. 744; 3 Jur. (N. S.) 342; 5 W. R. 229; 28 L. T. (o. s.) 291; 108 R. R. 804.

(8) (1856) 5 El. and Bl. 802; 25 L. J. Q. B. 107; 2 Jur. (N.S.) 230; 4 W. R. 201; 119 E. R. 680; 26 L. T. (o.s.) 214; 103 R. R. 753.

(9) 5 Bom. L. R. 264.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 35 OF 1912.

July 9, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

BENGAL PROVINCIAL RAILWAY—DEFENDANT (APPELLANT IN SECOND APPEAL)—APPELLANT

versus

GOPI MOHAN SINGH—PLAINTIFF—(RESPONDENT IN SECOND APPEAL)—RESPONDENT.

Railway accident—Damage to plaintiff's carriage—Gate at level crossing left open—Damage by defendant's train—Negligence of defendant—Contributory negligence of plaintiff.

The plaintiff sued for damages on the allegation that a train of the defendant company ran into and damaged the plaintiff's carriage as it was crossing the defendant company's line. The evidence showed that there was a gate at this level crossing where the accident occurred and that this gate was left open:

Held, (1) that there was an invitation to all comers that the line could be crossed with safety:

(2) that there was, therefore, ample evidence to support the finding of negligence against the defendant; and

(3) that there was no contributory negligence on the part of the plaintiff.

Appeal from the judgment of Mr. Justice D. Chatterjee, dated Feburary 27th, 1912, in Second Appeal No. 1868 of 1910.

Babu *Provash Chandra Mitra*, for the Appellant.

Babu *Hira Lal Sanyal*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Digambar Chatterjee confirming the decree of the lower Appellate Court.

The suit was one brought by the plaintiff against a Railway Company for damages. The cause of action alleged was that a train of the defendant Company ran into and damaged the plaintiff's carriage as it was crossing the defendant Company's line. The question, therefore, turns upon whether or not there was negligence on the part of the defendant Company, and if so, whether or not there was a contributory negligence on the part of the plaintiff. As this case comes before the High Court by way of second appeal, we cannot disturb any finding of fact, if there was any evidence to support it. The Judge of the lower Appellate Court has come to the conclusion that the proximate cause of the damage to the plaintiff's carriage was

the running of the train aganist the carriage, and he finds that there was negligence on the part of the defendant Company. The evidence shews that there was a gate at this level crossing where the accident occurred and that this gate was left open. There was thus an invitation to all comers to cross the line an intimation that it could be crossed with safety. There is, therefore, ample evidence to support the finding of negligence against the defendant Company and it cannot be disturbed.

Then, was there contributory negligence on the part of the plaintiff? There again we have the finding of the lower Appellate Court that there was not, for the learned Judge of that Court excludes the running of the carriage across the line, as he terms it, as being a cause of the accident, and that expression in the context in which it appears amounts to a negation by the Court of any contributory negligence on the part of the plaintiff.

The result then is that we have negligence proved to the satisfaction of the lower Appellate Court on materials which justify that finding, and contributory negligence on the part of the plaintiff not proved to the satisfaction of that Court. The result is that the claim in the suit is established.

Then remains to be seen whether damages are proved. The evidence in support of those damages has been criticised before us, and it has been suggested that there has been no damage. We have not gone through the evidence: nor is it necessary that we should do so, because we accept the finding of the lower Appellate Court that Rs. 316 has been proved to have been spent by the plaintiff in repairing his carriage. This clearly establishes damages resulting from the tort of the defendant Company.

This appeal, therefore, in my opinion must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 585 OF 1914.

March 20, 1914.

Present:—Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

THE PRESIDENT, VAKILS' ASSOCIATION, HIGH COURT, MADRAS —PETITIONER

versus

A VAKIL OF THE HIGH COURT—RESPONDENT.

Letters Patent, Madras, cl. 10—Vakil—Professional misconduct—Suggestion by Vakil that he can influence Judge by improper means.

A Vakil is guilty of professional misconduct meriting more than a mere warning for suggesting that he is in a position to influence a Judge by indirect and improper means.

Petition praying that in the circumstances stated therein the High Court will be pleased to take action in the matter of the conduct of a Vakil of the High Court under clause 10 of the Letters Patent.

Mr. *M.O. Parthasarathy Aiyangar* instructed by Mr. *G. S. Ramachandra Aiyer*, for the Vakil.

The *Advocate General, Amicus Curiæ.*

ORDER.

WHITE, C. J.—This matter comes before us on a resolution of the Council of the Vakils' Association with reference to a letter written on the 23rd July 1912 by a Vakil of this Court. By direction of this Court the matter was inquired into by the Council of the Vakils' Association and the Vakil was asked by the Council to submit an explanation that he might have in connection with the writing of this letter. At a meeting of the Council of the Association held on the 22nd February 1913, the following resolution was passed: "Resolved that taking all the facts in the explanation to be true, this Council is of opinion that the Vakil is guilty of grave professional misconduct in writing the letter, dated 23rd July 1912, to S. Madhuvayyar, private Vakil, Kumbakonam. It is, therefore, requested that this Honourable Court may be graciously pleased to take action against the said Vakil under section 10 of the Letters Patent."

In dealing with this case we proceed on the same assumption as that adopted by the Vakils' Association, namely, that "the

facts in the explanation are true." The letter as translated is in these terms:—

"Please destroy this after perusal. Many crores of prostrations. Your letter to hand, I am glad I have got it." (This sentence, "your letter to hand, I am glad I have got it" does not appear in the translation of the letter which is before us, but we may take it that this is an accurate translation of the sentence. It is the translation suggested by the Vakil's counsel, Mr. Parthasarathy Aiyangar). Then the letter goes on: "The Tirukkavaloor incendiarism case is to come on for trial before Singaravelu Mudaliar Avergal, the Sub-Magistrate. The said Mudaliar was a Sub-Magistrate here at Tanjore. He was previously the Sub-Magistrate of Kumbakonam Town. He was a particular friend of mine when he was here. I need not write to you more. You will know it if you go over here to the town and make enquiries. I shall by all means positively secure advantage to our side. However great be the Vakil that may appear, what I shall be able to achieve before the said Sub-Magistrate will be different. I shall tell you that if you come in person. I intend going to Mannargudi on the 30th instant. You may see me positively if you come here on Friday the 26th instant. Or if you intimate the time of your arrival I shall remain in town. I may perhaps go to Kumbakonam on the 25th instant. I shall then see you. I intend going to Mannargudi on the 27th instant. We shall surely succeed in the aforesaid case, and there need be no anxiety. Please get me engaged as Vakil. Ask the Sub-Magistrate too if you please. I solicit a reply in any case." The explanation of the Vakil which we take to be true as regards all statements of fact, is this:—

"In regard to the letter dated 23rd July 1912 I beg to state as follows:—About June end or July beginning 1912 Mr. Madhuvier, a private Vakil, approached me on behalf of Tirukkavaloor party in what is called the Tirukkavaloor arson case, and proposed certain terms which I accepted. As he had not brought the records with him, he said he would go to me subsequently with the party and the records. A few days later, Mr. Madhuvier wrote to me a letter, which unfortunately I have not preserved, to the following effect as far as I am able to recollect its contents:—'The clients agreed to engage you on the terms settled, but are now hesitating on the ground of some information that the old Magistrate has been transferred and the new Magistrate is said to have had a difference and consequent misunderstanding with you. The informant seems to have said that the Magistrate himself gave him the information. The clients are afraid that they might lose a good case by engaging one who was not on good terms with the Magistrate. I assured the clients that it could not be so but they were still hesitating and considering if it would not be better to go to a Vakil of longer standing. Please write to me if the information is untrue and also what you think of the case. I shall speak to the clients and then go to you with them.' It was in reply to this letter that I wrote the letter in question. I had a difference with one Mr. E. Singaravelu Mudaliar, Sub-Magistrate of Valangiman, but not with the Singaravelu Mudaliar who was to be the new Sub-Magistrate of the Court. My relations with the latter were good and were known to be such at Tanjore where he was previously Magistrate. Far from the case being lost to the clients by engaging me I thought I would be more advantageous to the party as I had appeared before him on previous occasions and known his ways, and as I had accidentally come to know of certain facts regarding that case which would be useful to the party and which would not be available to others. This was what I conveyed in the letter in question and asked him to go and see me with a view to tell him what information I had about the case. I also told him that he might verify from the Magistrate himself that I had no difference and no misunderstanding with him. As the letter was a reply to Mr. Madhuvier's to remove a misapprehension I advised him to tear it off."

The Vakil has been represented before us by a very experienced Advocate of this Court. The Advocate-General was requested to appear in support of the notice to show cause. He has, however, as *amicus curiæ* urged before us that this is a case in which we ought not to take action under the Letters Patent. We have considered the letter with great care by the light of the explanation. If I could read the letter as nothing more

than a statement that the report referred to in the letter, to which the letter of the Vakil purports to be a reply, was untrue, and if the rest of the Vakil's letter could be regarded as nothing more than a glorifying of himself and of his own professional powers, I may be of opinion that the letter, though not in good taste, did not constitute an act of professional misconduct. To my mind, however, the letter is something a great deal more than a statement that it was not true that the relations between the Vakil and the Magistrate, who was about to try the case in which the Vakil hoped to appear, were strained with boastful observations thrown in. As I read the letter it appears to me that the writer of the letter intended to convey to the mind of the private Vakil to whom the letter was written that the writer was in a position to influence the Magistrate by indirect and improper means. If that is the right view of the letter, no one can contend for one moment that it does not constitute an act of professional misconduct on the part of the Vakil. Having arrived at the conclusion that the Vakil was guilty of an act of professional misconduct, we have considered whether we can accede to the request put forward by Mr. Parthasarathi Aiyangar that a caution to the Vakil would meet the requirements of the case. We find ourselves unable to accede to the request. We have come to the conclusion that the imposing of a period of suspension is necessary and the order of the Court is that Mr. ..... a Vakil of this Court, be suspended from practice for three months from this date.

SANKARAN NAIR, J.—I agree.
OLDFIELD, J.—I agree.

Vakil suspended.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 3566 OF 1911.
March 31, 1914.
Present:—Mr. Justice Coxe and Mr. Justice Imam.
CHHATTUR DHARI CHOWDHURY AND ANOTHER—DEFENDANTS 1ST PARTY—APPELLANTS
versus
GAYA PROSAD SINGH—PLAINTIFF AND OTHERS—DEFENDANTS 2ND PARTY—RESPONDENTS.

Mortgage—Suit by first mortgagee without making second mortgagee party—Purchase by first mortgagee—Purchase by second mortgagee in suit on his mortgage previous to purchase by first mortgagee—Whether first mortgagee entitled to possession subject to second mortgagee's right to redeem.

A first mortgagee, who has bought the mortgaged property in a suit upon his own mortgage, to which suit the second mortgagee was not a party, is entitled to possession as against the second mortgagee, though the latter had previously obtained possession by a sale under his own mortgage, as he is merely entitled to redeem the prior mortgage.

Har Pershad Lal v. *Dalmardan Singh*, 32 C. 891, 9 C. W. N. 728; 1 C. L. J. 371; and *Ganga Das Bhattar* v. *Jogendra Nath Mittra*, 5 C. L. J. 315; 11 C. W. N. 403, followed.

Mulla Veettil Seethi Kutti v. *Korambath Paruthooli Achutan Nair*, 9 Ind. Cas. 513; (1911) 1 M. W. N. 165; 21 M. L. J. 213; 9 M. L. T. 431, not followed.

Appeal from the decree of the District Judge of Darbhanga, dated September 18th, 1911, affirming that of the Munsif of Darbhanga, dated March 27th, 1911.

FACTS.—This was a suit by a first mortgagee for possession of five-*gunda* share of *Mouza* Herail which he had sold up in execution of a mortgage decree, dated the 26th September 1907. The representatives of the original mortgagor were made parties, but they did not appear. The suit was, however, contested by the defendants first party who are second mortgagees. The mortgage-bonds of these defendants were of a subsequent date to those of the plaintiff, but they had obtained a decree upon them on the 10th July 1906 and their sale certificate is dated the 26th November 1907. The plaintiff did not take possession till the 30th April 1909 and when he went to get his name registered in the Collectorate, he found the name of the defendants first party registered, and on their objection his application was dismissed. When the plaintiff sued upon his mortgage, he did not make the second mortgagees parties to the suit.

The first Court has given a decree for possession subject to the right of the defendants first party to redeem, the amount to be paid by them to be settled by taking an account in their presence. The defendants first party not being satisfied with that decree appealed to the District Court and raised the point that the suit for possession was barred by limitation. The Court on the appeal remarked as follows:—

"The second point now urged is based upon very important decision of a Full Bench of the Madars High Court in the case of *Mulla Vittil Seetthi Kutti* v. *Korambath Paruthooli Achuthan Nair* (1). It has been ruled in this case that the second mortgagee is totally unaffected by any suit brought by the first mortgagee to which he was not a party and that the first mortgagee is not entitled to a decree for possession subject to the right of the second mortgagee to redeem.

"The judgments of the Calcutta High Court in similar circumstances are in the cases of *Har Pershad Lal* v. *Dalmardan Singh* (2), *Ganga Das Bhattar* v. *Jogendra Nath Mittra* (3), *Jugdeo Singh* v. *Habibulla Khan* (4), which have been followed by the learned Munsif in this case. The Full Bench of the Madras High Court has disapproved of the views taken in these cases of the rights of the first and second mortgagees and have agreed with the view taken by Rampini, J., in the case of *Har Parshad Lal* v. *Dalmardan Singh* (2) which was overruled by the two other Justices who delivered judgments in that case. According to Mr. Justice Rampini's view and that of the Madras High Court, the right of the first mortgagee to sue the second mortgagee for possession would date from the due date of his bond, the decree and sale which followed being of no effect against the second mortgagee. On this view, the present case would be barred, as being brought over twelve years after the due date of respondent's bond. Appellant's Pleader asks this Court to follow the Madras High Court rather than the Calcutta rulings because their ruling is based upon rulings of the Privy Council, which were not considered by the Benches of the Calcutta High Court in the cases above-mentioned. I am bound to follow the Calcutta cases already mentioned and must, therefore, uphold the decision of the learned Munsif."

The Appellate Court dismissed the appeal with costs. The defendants first party appealed to the High Court.

Babu *Shoroshi Charan Mitra* for the Appellants:—My client, not being party to the plaintiff's previous suit, is not bound by the decree and the sale thereon. In *Umes Chander Sircar* v. *Zahur Fatima* (5) the Privy Council held that the second mortgagee was not affected by the proceedings held in his absence. The second mortgagee was allowed to redeem on the basis of the mortgage and not on the basis of the decree. When plaintiff brought the suit, the equity of redemption had passed to me; so plaintiff not having acquired by the sale the equity of redemption cannot sue for possession. See also *Gobind Lal Roy* v. *Ramjanam Misser* (6). The plaintiff's only remedy is to sue on the mortgage and such a suit would not be barred. See *Mulla Vittil Seethi Kutti* v. *Korambath Paruthooli Achutan Nair* (1) and the cases cited therein. The cases in our Court *Har Pershad Lal* v. *Dalmardan Singh* (2), *Ganga Das Bhattar* v. *Jogendra Nath Mitter* (3) and *Jugdeo Singh* v. *Habibulla Khan* (4), being against the principle laid down by the Privy Council in several cases, should not be followed.

Babu *Shachindra Prosad Ghose*, for the Respondent: I submit the cases in our Court are exactly in point and should be followed.

JUDGMENT.

COXE, J.—The facts in this case as they have been laid before us are as follows:—

The mortgagor-defendants mortgaged the property in suit to the plaintiff in September 1896, the due date being in May 1897. In June 1907 the plaintiffs sued on their mortgage and obtained a decree on the 26th September 1907. They purchased the property in execution in April 1909.

The mortgage of the mortgagee defendants was executed in 1899. They sued on it in 1906 and obtained a decree on the 18th June 1906. They purchased it in execution on the 17th September 1907.

The plaintiff did not make the mortgagee-defendants parties to his suit and found that

(1) 9 Ind. Cas. 513; (1911) 1 M. W. N. 165; 21 M. L. J. 213; 9 M. L. T. 431.
(2) 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371.
(3) 5 C. L. J. 315; 11 C. W. N. 403.
(4) 6 C. L. J. 512; 12 C. W. N. 107.
(5) 18 C. 164; 17 I. A. 201.
(6) 21 C. 70; 20 I. A. 165.

they had been registered as owners of the property. He brought this suit for recovery of the property with an alternative prayer that the defendants might, if necessary, be given an opportunity to redeem. The Courts below have decreed the suit.

The mortgagee-defendants have appealed and on their behalf it is argued, relying on *Mulla Vittil Seethi Kutti* v. *Korambath Paruthooli Achutan Nair* (1), that his rights are unaffected by the plaintiff's decree to which he was not a party, and all that the plaintiff can do is to sue him on the mortgage, a proceeding which is now barred. This view is opposed to the decisions in *Har Parshad Lal* v. *Dalmardan Singh* (2) and *Ganga Das Bhatter* v. *Jogendra Nath Mittra* (3). It is not impossible that these rulings may have to be considered further, but the present is certainly not a case for dissenting from them, when the defendant's purchase was made just at the time that the plaintiff was suing on his mortgage.

The appeal must be dismissed, but in the circumstances of the case I would not allow costs.

IMAM, J.—I agree.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 81 OF 1912.

July 27, 1913.

Present:—Mr. Pratt, J. C., and Mr. Kemp, A. J. C.

TAHILRAM MANIRAM—APPLICANTS

versus

J. A. BLACKWELL AND OTHERS—OPPONENTS.

Civil Procedure Code (Act V of 1908), *s.* 109, *cl.* (*c*) —*Certificate for leave to appeal to Privy Council, when granted.*

Under section 109, clause (c) of the Civil Procedure Code a certificate for leave to appeal to His Majesty in Council should be granted only in cases in which the decision is of general importance or affects any large body of persons or threatens the religious or civil rights of any class of the community, and not where it is to serve as a precedent for similar subsequent cases.

Mr. *Wadhumal Oodharam*, for the Applicant.

Mr. *Dipchand Chandumal*, for the Opponents.

JUDGMENT.—This is a petition for a certificate under section 109, clause (*c*), of the Code of Civil Procedure (Act V of 1908) for leave to appeal to His Majesty in Council against the decree of the Appellate Court, dated 9th September 1912, passed in an appeal from the Additional Judicial Commissioner of Sind.

It is admitted that the matter in dispute is below the appealable value. The petitioner, however, approaches us under clause (*c*) of section 109. That clause refers to cases where the matter is under the appealable value or is not measurable in money. It is admitted that the subject-matter in this case is measurable in money.

In order to bring himself within the terms of clause (*c*), the petitioner must satisfy us that the case is a fit one for appeal.

Now it is not every decision the correctness of which is doubtful that entitles a petitioner to a certificate. It could scarcely be expected in the vast majority of cases that the Court which passed the decree would consider its decision doubtful. It is impossible to lay down with precision in what cases a certificate should be granted under clause (*c*). At most we can say that cases in which the decision is of general importance or affects any large body of persons or threatens the religious or civil rights of any class of the community might fairly be ranged within the category in which a certificate might properly be granted. Any decision which might form part of the case-law for subsequent cases of a similar kind is not necessarily a fit one for a certificate.

What then was decided in the appeal against which the petitioner prays for this certificate? The Appeal Court (PRATT, J. C. and FAWCETT, A. J. C.), I find, decided the following points, *viz.*, (1) a right of re-sale for the purchaser's default is an implied term in every contract for the sale of land; (2) where a writing which has been materially altered, according to the principle laid down in *Suffell* v. *The Bank of England* (1), is not itself relied on as

(1) (1882) 9 Q. B. 555; 51 L. J. Q. 401; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500.

the agreement on which the plaintiff sues, but merely as the communication of the acceptance of it, such writing can be put in evidence for the purpose of proving the agreement, (3) on the pleadings, that plaintiff had set forth in his plaint the case referred to in (2).

Now I wish to safeguard myself against any expression of opinion as to the correctness or otherwise of these findings. It might be that the writing relied on in (2) as a communication of an acceptance was the acceptance itself and thereby in conjunction with the prior offer in writing formed the contract. If that were so, it might be contended with some show of reason that the writing containing the contract had been altered in a material respect and could not, therefore, be relied on by the plaintiff. This discussion is, however, really by the way. What we have to consider is whether the points raised in the case render it a fit one for a certificate. The third point turned on a construction of the pleadings in the particular case and cannot, therefore, be considered as a matter of general importance. The second point turned on the construction and effect of a particular document in negotiations for a contract and the effect of the decision on this point is restricted to the facts of this particular case. The first point does not affect any portion of the community. It merely lays down the law with regard to the vendor's right to ascertain his damages in a particular way as regards all persons who may enter into a contract for the sale or purchase of land. It does not affect any existing class or section of the community.

It is true that the respondents in the appeal were found to have altered the *Kabala*, but this cannot give a ground for a certificate to the petitioner-appellant.

I am, therefore, of opinion the petitioner has not made out a case for a certificate.

Certificate refused.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1102 OF 1912 AND 1396 OF 1912.

March 20, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Imam.

BAIDYA NATH DUTT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

IN NO. 1102.

JAWAHIR MANDAL AND OTHERS—DEFENDANTS

IN NO. 1396.

BRIJ LAL MANDER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 52—Landlord and Tenant—Suit for additional rent for increased area—Excess of land found in tenant's possession—Standards of measurement same on both occasions—Allowance for difference in systems of measurement, if to be granted.

In a suit for additional rent for excess area, where it is found that the standards of measurement were the same on both the occasions, when the land was first let out and when the excess area was discovered, and that there has been an increased area in the possession of the tenant, the Court is not entitled to allow any deduction on the ground of difference in the systems of measurement.

Lakhi Narain Sarongi v. *Sri Ram Chundra Bhunya*, 11 Ind. Cas. 212; 14 C. L. J. 146; 15 C. W. N. 921, distinguished.

Appeal from the decree of the District Judge of Bhagulpore, dated February 3rd, 1912, modifying that of the First Munsif of that place, dated April 12th, 1911.

FACTS.—The plaintiffs have brought this suit to recover arrears of rent together with cesses and interest from 1314 to 1317 at an annual rent of Rs. 387-0-6 only. In this suit, the plaintiffs claim additional rent for excess land.

The defendants plead that they hold 146 *Bighas* 4¼ *cottas* of land under the plaintiffs, but that the land has never been measured, and that the plaintiffs cannot recover any rent in addition to the rent of Rs. 321-4-9 mentioned in the *kabuliat* which they executed in favour of the plaintiff. There were other pleas which are not necessary for this report.

Upon this plea the first Court remarked as follows:—

"By the *kabuliat*, defendants stipulated to pay additional rent for excess land. The *kabuliat* further showed that 146 *bighas*, 4¼ *cottas* of land was settled with defendants at a certain rate per *bigha*. The *khewat*, Exhibit 4, showed that the defendants hold

BAIDYA NATH DUTT v. JAWAHIR MANDAL.

excess land. According to the plaintiffs the defendants have encroached upon plaintiffs' fallow land and this accounts for the increase in the area of land held by the defendants. The learned Pleader for the defendants has relied on the case reported as *Gouri Pattra* v. *H. R. Reily* (1). But that case is of little help to the defendant in the present suit. The defendant in his deposition admits that the *zemindars* previously measured this land, and in *kabuliat* the number of plots by previous measurement was given. Therefore, in the present case, there can be no doubt as to the land for which rent was paid. It is admitted by defendant that Bahor *khat* adjoins his holding and that portion of it has become filled up and culturable. I find that the defendants have included in their holding the *zemindars'* fallow land and *khas* land. It is, therefore, clear that the defendants are liable to pay additional rent for excess land.

* * * * * * * *

"I find that the defendants hold 178 *bighas* 2 *cottas* 15 *dhurs* of land under the plaintiffs and are liable to pay rent at Rs. 387-0-6 as stated in the plaint."

The defendants appealed to the District Court. They contended that there had been no proper proof of a previous measurement, or of any encroachment by the tenants, and that the identity of the standard of measurement used in ascertaining the previous and present areas had not been proved. But the District Court held as follows:

"It is clear that there was a measurement by which the areas were ascertained for the assessing of rents, and that the rent previously paid was assessed on an area so ascertained. The standard of measurement, as it appears from the *kabuliat*, is the same as that of the Cadestral Settlement. Evidence has been given to show encroachment, and it is admitted that a certain *khal* which was situated on the border of some of the lands, has been brought under cultivation. There was evidently opportunity for encroachment upon this *khal*, as well as upon other waste lands, which are mentioned in the boundaries given in the *kabuliat*. Considering the nature of the suit, I think there is sufficient basis for the assessment of additional rents.

* * * * * * * *

(1) 20 C. 579.

"Then it is urged that a deduction ought to have been given for difference in systems of measurement. In this connection the case reported as *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (2) has been cited, and I think it would be reasonable to give a deduction of 10 per cent. as was given in that case. Similar deductions are always given in cases under section 52 by the Settlement Department. The appeal should succeed on this point: in calculating the additional rent, a deduction of 10 per cent. should be allowed."

From that decision the plaintiffs appealed to the High Court.

Babu *Umakali Mukherjee* (with him Babu *Manomohun Dutt*), for the Appellants: The lower Appellate Court found as a fact that under the *kabuliat* the defendants held 146 *bighas* odd land, as per measurement which was found to be correct; and the Settlement Officer afterwards found that the area was more than that. Consequently I am entitled to get additional rent for the increased area. The standards of measurement being the same on both occasions and the tenants having opportunity to encroach upon other lands, I am clearly entitled to a decree for rent in respect of the excess land. There was no reason shown by the lower Appellate for allowing the deduction of 10 per cent. He distinguished *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (2) and cited an unreported judgment of Mr. Justice Coxe sitting singly, *Umacharan Bose* v. *Bansi Munder* (3). In that case the Court below found that the tenant was in possession of excess land but gave a certain allowance to the tenant in accordance with the practice of the Revenue Authorities. Mr. Justice Coxe held that the case must be decided in accordance with the contract by which the relations between the parties were governed and as there was nothing in that contract authorizing the allowance, they could not be granted.

Babu *Naresh Chandra Sinha*, for the Respondents: The deduction has been granted on equitable grounds. It is the practice of the Revenue Authorities to grant an allowance to cover any difference which there may be in the systems of measure-

(2) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.

(3) Second Appeals Nos. 849 and 850 of 1910, decided on 22nd May 1911.

ment. Therefore the allowance ought to be allowed.

JUDGMENT.

IN S. A. No. 1102 OF 1912.

This appeal arises out of a suit for recovery of rent for a certain area of land found to be held by the defendants in excess of the land leased to them. It appears that the defendants' tenancy was originally measured as being 146, *bighas* in area, the rent being so much a *bigha* and now at the survey operations the tenancy has been found to be 178 *bighas*. The landlords accordingly sued for increased rent under section 52 of the Bengal Tenancy Act. Everything has been found in their favour by the learned District Judge but he has allowed a deduction of ten per cent. on the ground of difference in the systems of measurement. In Appeal No. 1396 of 1912, which is a similar case, this deduction is said to have been made on equitable grounds. In granting a deduction the learned District Judge relied on the case of *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (2). But in that case there was a finding of fact which was binding on this Court in second appeal that the original measurement was not accurate, and there is no such finding of fact in the present case. Of course if the learned District Judge had found that the former measurement had not been proved to be accurate he might well have held that the alleged increase in the area had not been proved to exist. But the learned District Judge came to no such finding. He says: "It is clear that there was a measurement by which the areas were ascertained for the assessing of rents and that the rent previously paid was assessed on an area so ascertained." There is no finding in the judgment that the original measurement was inaccurate and it certainly cannot be assumed, without some proof of the fact that when a landlord has leased his land to a tenant at so much a *bigha* and has measured the land to ascertain the amount of rent, he has underestimated the area on which the rent is assessed. On the findings of the learned District Judge it appears to me that he was not entitled to interfere with the decision of the Munsif.

The appeal is accordingly allowed, the decree of the lower Appellate Court is set aside and that of the first Court restored.

The appellants will be entitled to their costs in this Court and in the lower Appellate Court.

IN S. A. No. 1396 OF 1912.

The judgment in Second Appeal No. 1102 of 1912 governs this case also except that the appellants will be entitled to their costs in the lower Appellate Court as their cross-objection in that Court failed.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3844 OF 1910.

March 19, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Walmsley.

RAM KANAI SHAHA BHUNIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHANDRA BALI DASI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Findings of fact—Erroneous view of law—Interference by High Court.

Findings of fact of a lower Appellate Court are conclusive in second appeal. But if those findings have been arrived at on an erroneous view of the law, the High Court will interfere.

One *A*, who was carrying or about to carry on a business, made over the whole of his properties, including even his homestead, to his wife, the plaintiff, by a *hibbanamah*; and it was asserted in answer to the claim of the wife that this was done either with the intention of defrauding or with the effect of defrauding *A*'s creditors. The lower Appellate Court said that, in the absence of a single word by the witnesses of *A* that the gift by him was not a *bona fide* transfer, it could not hold that it was a fraudulent transfer:

Held, that the facts to which the witnesses could depose were facts from which an inference might, or might not, be drawn upon the issue raised in the case; and the fact that they did not state in so many words that the document was fraudulent made no difference.

Held, further, that it was sufficient to show that the *hibbanamah* was executed with the intention or with the effect of defrauding creditors generally, that is, creditors whose debts were not in existence at the time of the execution of the *hibbanamah* but might subsequently accrue, and it could not be said that the *hibbanamah* was not fraudulent, because it was not devised with the intention of defrauding creditors whose debts were not in existence at the date of its execution.

Appeal from the decree of the Third Sub-Judge of Dacca, dated August 31st, 1910, reversing that of the Second Munsif of Munshigunj, dated January 29th, 1910.

RAM KANAI SHAHA BHUNIA *v.* CHANDRA BALI DASI.

FACTS.—The lower Appellate Court was of opinion that the natural inclination of the plaintiff's husband to provide for his wife and children entitled him to make under any circumstances the *hibbanamah*, even against the claims of his then or subsequent creditors, and that Court did not consider many of the chief circumstances which should be looked into in order to ascertain whether the document was a void transaction or not. The High Court in second appeal set aside the judgment of the lower Appellate Court and remanded the case to that Court for re-trial.

Babus *Jogesh Chandra Roy* and *Hem Chandra Sen*, for the Appellants.

Babu *Troylokya Nath Ghose*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—Doubtless the Judge's findings of fact are conclusive in second appeal. But if those findings have been arrived at on an erroneous view of the law applicable to them, then this Court must interfere.

This is a case in which it is alleged that the husband of the plaintiff, who was carrying on, or about to carry on, a business (which is not clear), made over the whole of his properties, including even his homestead, to his wife, the plaintiff; and it is asserted in answer to the claim of the wife that this was done, either with the intention of defrauding, or with the effect of defrauding, her husband's creditors. I have said the whole of the properties, as I bear in mind the statement in the judgment of the Munsif where he says:—"By this transaction, if done in good faith, the defendant No. 5 was going to divest himself of whatever right, title and interest he had in the joint family immoveable property, including even his share in the homestead." It is not clear, however, whether or not this *hibbanamah* included the moveable properties. I may here state with regard to the defendant No. 5, respondent, that he has died since the filing of this appeal. But the appeal has been withdrawn as against him.

The Munsif went with great care into a number of the facts of this case; and an appeal was lodged, which, in the first instance, was heard *ex parte*. Subsequently, on the respondent's application, the appeal was restored and heard in the presence of both parties. As the learned Subordinate Judge in his second judgment refers to his previous judgment, and decrees the appeal upon grounds stated in both judgments, it is necessary to read the two judgments (which are not altogether consistent) together. It does not appear to me that these judgments are satisfactory either as statements of fact or of law; and there are some statements in them which have scarcely been attempted to be supported before us. The impression left in my mind by the language of some of the passages, to which I shall refer, is that the learned Subordinate Judge did not, in deciding the case, correctly understand what the law relating to transfer to defraud creditors was. In his first judgment exception has been taken to the fact that the Judge does not find that the *hibbanamah* had been destroyed by fire. With regard to this it has been said that the point was not challenged. Then the learned Judge proceeds to say this:—"The defendants have examined only two witnesses; and they do not say a word as to plaintiff not being in possession, or that it was a fraudulent transfer. In the absence of a single word to the effect that it was not a *bona fide* transfer, I fail to see why it should be held that it was fraudulent transfer." It is obvious that the facts to which the witnesses could depose were facts from which an inference might, or might not, be drawn upon the issue raised in this case; and the fact that they did not, as the learned Judge says, state in so many words that the document was fraudulent is neither here nor there. Then the learned Subordinate Judge says that "there is absolutely no evidence that at the time of the *hibbanamah* the defendant No. 5 had any debt at all," a statement which is repeated in a subsequent part of his judgment. But in the second judgment (with which the first judgment is incorporated) he says this: "Rajani, the husband of the plaintiff, had been carrying on a business in Madanganj from before, jointly with others, and although there is no direct evidence of his being involved in debts at the time of the *hibbanamah*, there can be no doubt that either he had debts, or that he apprehended difficulties, and that on that account he felt it necessary to make the transfer." Then to revert to the first judgment, the Judge points out that the defendants Nos. 1 to 4

became the creditors of the defendant No. 5 long after the execution of the *hibbanamah*, and in his second judgment he says: "Most of the cases cited had reference to debts existing at the time of the transfer. The present defendants did not become creditors of Rajani until long after, and it cannot be said that the object of the gift was to defeat the just claims of these men."

It has been contended on behalf of the appellant that this is an incorrect statement of the law, and that the learned Subordinate Judge, in this and other passages of his judgment, appears to have thought that the *hibbanamah* was not fraudulent because it was not devised with the intention of defrauding the present defendants, whose debt was not in existence at the date of its execution; and it is contended that it is sufficient to show, on the other hand, that the *hibbanamah* was executed with the intention or with the effect of defrauding creditors generally, that is, creditors whose debt was not in existence at the time of the execution of the *hibbanamah*, but might subsequently accrue. The learned Pleader, for the respondents, has contended that by this statement and the subsequent statement in the judgment (namely, that "the business lasted till five years ago and it cannot be supposed that Rajani foresaw the necessity to borrow from these defendants some twenty years before") the learned Subordinate Judge was merely dealing with some circumstances of fact and not with any rule of law. But I cannot, on the face of this judgment, say that the passage is not capable of the construction which is placed upon it by the learned Pleader for the appellants.

Then, the learned Judge has taken exception to the reliance placed by the Munsif on three documents (Exhibits A, B and C) which, he holds, were admitted in violation of the provisions of the Code of Civil Procedure. It appears from the record before us that these documents were admitted without objection.

Then, the learned Judge says: "Much stress is laid on the fact that even the homestead was included in the gift. But I think it should be the first care of Rajani to see that his young wife and infant son were not turned out in the streets homeless." And the learned Judge seems to have been of opinion that the natural inclination of the plaintiff's husband to provide for his wife and children entitled him to make, under any circumstances, the *hibbanamah*, even against the claims of his then or subsequent creditors. The learned Judge in his judgment does not appear to have considered many of the chief circumstances which should be looked into in order to ascertain whether the document was a void transaction or not, such as an inquiry into the financial position of the plaintiff's husband at the time of the execution of the *hibbanamah*; whether it is a fact that the husband made over the whole of his properties or the bulk of them to his wife or whether, in making the *hibbanamah*, he reserved properties to meet the possible claims of his creditors, or those who might become his creditors in the course of these trading operations; and if he, whether indebted or not, contemplated, at the time of making the *hibbanamah*, a state of things which might result from his being unable to pay his just debts. Was he, in short, in a position in which the law allowed him to make this *hibbanamah* so that it could be said that the plaintiff's claim to the properties covered thereby is substantiated? These and other material circumstances to be considered do not appear to have engaged the attention of the learned Subordinate Judge. Strictly speaking, as the documents A, B and C, upon which the Munsif has laid great stress, were admitted, as I have said, without objection, the respondent would not be entitled to the order which I propose to make. As, however, the appellant has no objection and these documents were admittedly received at a very late stage of the case and as it appears to me to be doubtful whether all the facts which are material to the decision of this case have been considered I think we may give the respondent another opportunity of affording that explanation with regard to these documents which the learned Subordinate Judge holds that she has been deprived of. The Judge states in his judgment that these documents were put in evidence in order to take the plaintiff by surprise, and not to allow her to explain them away. The Pleader for the appellants has no objection to the plaintiff-respondent having the opportunity of which the learned Judge says she has been deprived.

The order, therefore, which I propose to make, is to set aside the judgment and decree of the lower Appellate Court and direct that the case may be re-heard by the Subordinate Judge, on the evidence which has already been taken and upon such evidence as the parties may give under the order which I would now make: and that order is that the plaintiff-respondent may adduce such evidence as she wishes in respect of the documents A, B and C referred to in the Munsif's judgment, and that defendants-appellants may give such further evidence as may be necessary by reason of the additional evidence given on behalf of the plaintiff. And on such additional evidence (if any) given by either, or both parties, as well as upon the evidence already on the record, the appeal will be re-heard. The costs of this appeal will abide the result of the re-hearing of the suit on appeal.

The additional evidence which is allowed to be given by the present order may be taken either by the lower Appellate Court itself, or by such other Court as it may direct.

WALMSLEY, J.—I agree.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1631 OF 1911

April 2, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

VAIKUNTARAMA PILLAI MINOR BY GUARDIAN MUTHAMMAL—DEFENDANT—APPELLANT

versus

ATHIMOOLAM CHETTIAR—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 11—Contract by minor void—Fraud—Misrepresentation—Transfer by minor's creditor—Estoppel.

Contracts by minors are void; the only ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is fraud.

Where a minor obtains money by misrepresenting his age, that amounts to fraud and he may be made to refund it. A minor who mortgaged his property representing himself to be a major is not estopped from subsequently pleading his minority.

Levene v. *Brougham*, 25 T. L. R. 265; 53 S. J. 243; *In re Jones, Ex parte Jones*, 18 Ch. D. 109; 29 W. R. 747; 50 L. J. Ch. 673; 45 L. T. 193; *Stock* v. *Wilson*, (1913) 2 K. B. 235; 82 L. J. K. B. 598; 108 L. T. 834; 20 Manson 129; 29 T. L. R. 352; and *Ex parte The Unity Joint Stock Mutual Banking Association; In re King*, 3 De G. & J. 63; 27 L. J. Bk. 33; 4 Jur. (N. S.) 1257; 6 W. R. 640; 44 E. R. 1192, followed.

The same rule has also been adopted in India.

Mohori Bibee v, *Dharmodas Ghose*, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.); *Thurston* v. *Nottingham Permanent Benefit Building Society*, (1902) 1 Ch. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135 and *Kanhai Lal* v. *Babu Ram*, 8 Ind. Cas. 888; 8 A. L. J. 1058, followed.

Holmes v. *Penny*, 3 K. & J. 90 at p. 100; 23 L. J. Ch. 179; 3 Jur. (N. S.) 80; 5 W. R. 132; 69 E. R. 1035; 112 R. R. 49, distinguished.

A. R. Krishna Chetty v. *Vellaichami Thevan*, 12 Ind. Cas. 568; 37 M. 38 at p. 44; 10 M. L. T. 385; (1911) 2 W. N. 461; 21 M. L. J. 1077, followed.

Per *Sadasiva Aiyar, J.*

Quaere:—Whether a future creditor can get rid of a viodable but real transfer under section 53 of Act IV of 1882?

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 418 of 1910, preferred against that of the Court of the District Munsif of Tinnevelly, in Original Suit No. 596 of 1906.

Mr *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *M. B. Doraisami Aiyangar*), for the Respondents.

JUDGMENT.

WALLIS, J.—This is a suit by the plaintiff on a mortgage executed by the 1st defendant during minority in favour of the third defendant who transferred it to the 4th defendant who again transferred it to the plaintiff. The transfer by the 3rd to the 4th defendant was attested by the 1st defendant after he had attained majority. Before the date of the attestation but after he attained majority, the 1st defendant executed a settlement transferring all his property to his mother and wife on behalf of his minor son, stipulating only for maintenance for himself. The District Judge has found that the settlement was intended to be operative, but that it was executed by the 1st defendant with intent to defeat and delay his creditors, and there is no ground for questioning these findings. But he has also found that the plaintiff was a person defrauded, defeated or delayed by the settlement, so as to be entitled to set it aside under section 53 of the Transfer of Property Act. From the decision an appeal has been preferred by the son, the 2nd defendant. It has been contended before us that the 1st defendant at the date of the settlement

was a debtor of the 3rd defendant for the money advanced to him on mortgage during minority, as he was bound to refund it. Where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but I think it is now settled that, in the absence of fraud, a refund cannot be ordered. This would appear to have been the rule in England even before the Infants Relief Act of 1874, which makes contracts entered into by minors void by Statute as the Contract Act does in India. In England there is an express decision of the point by the Court of Appeal in *Levene* v. *Brougham* (1), and the earlier decision of the Court of Appeal, *In re Jones, Ex parte Jones* (2) to which Sir George Jessel was a party is to the same effect. All the cases have been reviewed recently by Lush, J., in *Stocks* v. *Wilson* (3), where it is shown on an examination of all the authorities that the ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is fraud. In that case as in the earlier case of *Ex parte, The Unity Joint Stock Mutual Banking Association*; *In re King* (4), fraud was found and a return ordered. As regards Indian cases it seems sufficient to refer to the well-known decision in *Mohori Bibee* v. *Dharmodas Ghose* (5) in which their Lordships held that minors' contracts are void and not voidable and that section 65 of the Indian Contract Act has no application to them and in which they cited with approval the observations of Romer, L. J., in *Thurston* v *Nottingham Permanent Benefit Building Society* (6): "A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." That is to say in the absense of fraud, an infant is not estopped from pleading minority in answer to a suit for the return of the money advanced to him during minority. This has also been expressly decided by the Allahabad High Court in *Kanhai Lal* v. *Babu Ram* (7). The finding in the present case is that there was no fraud or misrepresentation by the minor as to his age when he borrowed on a mortgage from the 3rd defendant. Consequently he could not then have been ordered to refund, and, therefore, the 3rd defendant was not one of his creditors at the date of the settlement. Both the lower Courts, however, have held that this does not debar the plaintiff from setting aside the settlement. The District Munsif relies on the fact that the 1st defendant always treated the 3rd defendant as a creditor, endorsed payments on the mortgage after he attained majority, attested its transfer to the 4th defendant, lastly admitted the plaintiff's claim in this suit. The District Judge apparently takes the same view. Now as regards the present question, the admission of the 1st defendant during the suit cannot give the plaintiff the right to set aside the settlement as against the 2nd defendant. It has not been found, or contended before us, that the settlement was void on the ground that it was intended to defraud subsequent creditors as distinct from creditors existing at the date of the settlement, and in these circumstances it appears unnecessary to consider whether the plaintiff would be entitled as a subsequent creditor by estoppel of the 1st defendant to avoid it. The plaintiff was not creditor of the 1st defendant at the date of the settlement. There is no doubt a dictum in *Holmes* v. *Penney* (8) that where debtor makes a settlement in fraud of his creditors and pays them off and a new set of creditors stand in their places the settlement would be void against them also, but this proceeds upon the language of the Statute of Elizabeth, which is for the protection of "creditors or others," not "creditors" only, which words are not reproduced in the Transfer of Property Act, and besides the plaintiff in this case cannot

(1) 25 T. L. R. 265; 53 S. J. 243.

(2) 18 Ch. D. 109; 29 W. R. 747; 50 L. J. Ch. 673; 45 L. T. 193.

(3) (1913) 2 K. B. 235; 82 L. J. K. B. 598; 108 T. L. R. 834; 20 Manson 129; 29 T. L. R. 352.

(4) 3 DeG. & J. 63; 27 L. J. Bk. 33; 4 Jur. (N. S.) 1257; 6 W. R. 640; 44 E. R. 1192.

(5) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.).

(6) (1902) 1 Ch. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135.

(7) 8 Ind. Cas. 888; 8 A. L. J. 1058.

(8) 3 K. & J. 90 at p. 100; 26 L. J. Ch. 179; 3 Jur. (N. S.) 89; 5 W. R. 132; 69 E. R. 1035; 112 R. R. 49.

be said to stand in the place of the creditors at the date of the settlement. In these circumstances I think the plaintiff is not entitled to set aside the settlement and that the appeal must be allowed and the suit as against the 2nd defendant and the plaint second schedule property is dismissed with costs throughout. The memo. of objection is dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree. Even if the 1st defendant were estopped by some conduct of his from denying as against the 4th defendant, that he (1st defendant) owed money to the 3rd defendant on the mortgage deed, this would not create a real debt on the date when the estoppel arose. Estoppel only prevents a man from pleading the real state of facts, but does not make the false state of facts which the Court has got to assume as true (as between the estopped man and the man in whose favour the estoppel works) to become for all purposes a true state of facts. So far as the 2nd defendant was concerned, no such debt as he was bound to discharge by the obligation imposed under the Hindu law on a Hindu son really arose at any time even after the date of the settlement, by reason merely of his father's becoming estopped by the said father's conduct from denying that he owed a debt to the 3rd defendant or to the 3rd defendant's assignee (4th defendant). An estoppel cannot overrule a plain provision of law [see *A. R. Krishna Chetty* v. *Wellaichansi Thevan* (9)]. In this case, the plain statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel. The 4th defendant does not actually become a subsequent creditor or a prior creditor by reason of the estoppel, but the 1st defendant is estopped from denying that there was a prior debt due by him to the third defendant, and that estoppel works in favour of the 4th defendant and against the 1st defendant. In this view, it is unnecessary to go into the question whether a future creditor can get rid of a voidable but real transfer under section 53 of Act IV of 1882: that is a question on which I feel grave doubts whether the current of authorities is really consistent and whether the observations in some of the decisions are sound and in consonance with justice and convenience.

Appeal allowed.

(9) 12 Ind. Cas. 568; 37 M. 38 at p. 44; 10 M. L. T. 385; (1911) 2 M. W. N. 461; 21 M. L. J. 1077.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION NO. 33 OF 1912.

July 25, 1913.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

THE SINGER MANUFACTURING CO., LIMITED—APPLICANTS

versus

GOBIND SON OF KRISHIN—OPPONENT.

Hire-purchase agreement—Conditions not fulfilled—Sale.

A hire-purchase agreement is not an agreement of sale until the conditions specified therein are fulfilled.

Gopal v. *Sorabji*, 6 Bom. L. R. 871, followed.

Application for revision against the decision of the Subordinate Judge, Shikarpur.

Mr. *Nadirshah N.*, for the Appellant.

JUDGMENT.—Plaintiff in this case had given a sewing machine to the first defendant on hire-purchase agreement. Defendants made default in paying instalments and the plaintiff rescinded the agreement and sued for the recovery of his machine or its price and the balance of hire due. The Small Cause Court Judge gave the plaintiff a decree for the difference between the price of the machine and the amount of hire already paid. In doing so he appeared to have treated the agreement as one of purchase. This was an error, for the agreement is not an agreement of sale until the conditions specified therein are fulfilled—See *Gopal* v. *Sorabji* (1). In this case the conditions not having been fulfilled, agreement should have been treated simply as an agreement of hire and relief given on that footing. The error is, no doubt, an error of law and we think we are justified in interfering in this case, for this type of agreement is one frequently used and well known in the trade and it is important that it should be correctly construed by the Courts.

(1) 6 Bom. L. R. 871.

RASOOL BEE v. GULAM KASIM.

We accordingly vary the decree of the lower Court and direct the defendants to pay plaintiffs the sum of Rs. 13-7-10 and that they should either restore the machine to the plaintiffs within one month or pay them the sum of Rs. 85 for its value. Interest at 6 per cent. from the date of suit to date of payment.

Application allowed with costs.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1776 OF 1911.

February 27, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

RASOOL BEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

MADARI MAHALDAR GULAM KASIM SAHIB AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Gift—Hiba-bil-iwaz—Hiba-ba-shart-ul-iwaz—*Delivery of possession necessary.*

Gifts under Muhammadan Law, whether of the nature of *Hiba-bil-iwaz* or *Hiba-ba-shart-ul-iwaz*, are not valid without delivery of possession.

Khajoornnessa v. *Roushan Jehan*, 2 C. 184: 26W. R. 36; 3 I. A. 291, (distinguished).

A *hiba-bil-iwaz* is a gift which has been completed and for which an *iwaz* or return has been accepted. It consists of two gifts (1) the original gift and (*ii*) the reciprocal gift and both are subject to the law of gift pure and simple, and it postulates the completion of both these gifts.

A *hiba-ba-shart-ul-iwaz* is a gift the legal incident of which is that the two parties agree to make an exchange of the properties forming the subject of the two gifts and after mutual possession has been taken neither party can revoke the transfer.

Second appeal against the decree of the Court of the Subordinate Judge of Kurnool, in Appeal Suit No. 174 of 1908, preferred against that of the Court of the District Munsif of Kurnool in Original Suit No. 290 of 1907.

Mr. *H. Balakrishna Rao*, for the Appellant.

Mr. *Mahomed Ibrahim*, for the Respondent.

JUDGMENT.

SANKARAN NAIR, J.—The lands in suit belong to a mosque and were held by the plaintiffs' grandfather on its behalf. On his death his three daughters entered into an agreement for the division of produce amongst themselves with a condition, that on the failure of issue of any one of them that share should go to the rest. (Exhibit A). The plaintiffs' case is that the line of Makka Bi, one of the three sisters became extinct when her son Hayath Sahib died, and they were entitled to recover the property. That event, however, happened more than 14 years ago In order to get over the plea of limitation, the plaintiffs alleged that Karim Bi, the widow of Hayath Sahib, held the property with their consent and she has surrendered her interest (Exhibit C). The finding of the lower Appellate Court is against the plaintiffs on the point that Karim Bi held with plaintiffs' consent, and the plaintiffs' claim based on Exhibit A was, therefore, held to be barred by limitation. In second appeal the plaintiffs' claim on this ground has not been pressed on us.

But the Subordinate Judge holds that her surrender or gift, Exhibit C, is valid to the extent of her interest in the property which comes to 172/768 of the property, and he has given the plaintiffs a decree for that share. But he does not notice the fact that possession was not given, if it could be given of this fractional share; and the gift is, therefore, invalid under the Muhammadan Law. His decree, therefore, in so far as it is based on Exhibit C, cannot be supported.

The Subordinate Judge also holds apparently that the plaintiffs are entitled to recover as heirs of Karim Bi apart from Exhibit C. The answer is that the ownership was not in Karim Bi and the plaintiffs are only entitled to recover, if at all, on behalf of the mosque; and they did not sue as her heirs and this was for the obvious reason that in that case they will be bound by her mortgage in favour of the plaintiffs.

The plaintiff's claim entirely fails and the suit must be dismissed. The parties will bear their own costs throughout. This will not, it is needless to say, affect the right of the representatives of the mosque, whether plaintiffs or others, to claim possession or any other appropriate relief on its behalf.

TYABJI, J.—The plaintiffs sue for possession of certain lands. The 1st defendant

claims to be the mortgagee of these lands and sets up that Rs. 150 are still due on the mortgage to him and that he is entitled to keep possession, until he is redeemed. The 2nd defendant seems to have been made a party by an order of the Court dated 24th July 1907. No relief was claimed against the 2nd defendant but he stated in his written statement: "The plaintiffs' suit is neither just nor sustainable according to law. It is, therefore, prayed that the Court will be pleased to pass a decree dismissing the plaintiffs' suit with costs and directing that the defendants' costs be paid by the plaintiffs."

The plaintiffs support their claim in the first instance by a deed of gift, Exhibit C.

The first point taken before us was that Exhibit C was of no effect because possession of the lands had not been transferred to the plaintiffs under Exhibit C. On behalf of the plaintiffs it was argued before us that Exhibit C must be considered to be a *hiba-bil-iwaz* or a *hiba-ba shart-ul-iwaz* and that in that case transfer of possession would be unnecessary for giving effect to it. This argument proceeds on the fallacy that a *hiba-bil-iwaz* or a *hiba-ba-shart-ul-iwaz* can be completed without the possession of the subject of the gift being transferred, an argument which totally disregards the true nature of such transactions. The misconception of the law includes an omission to notice that neither a *hiba-bil-iwaz* nor a *hiba-ba-shart-ul-iwaz* consists of one disposition of property but each of them consists of at least two transactions. A *hiba-bil-iwaz* arises in a manner which may be illustrated as follows:—

A makes a *hiba* (simple gift) to *B* and completes that gift by transferring the possession of the subject of the gift (*e.g.*, a horse) to *B*; afterwards *B* makes a reciprocal gift to *A* (*e.g.*, of a book) stating that this reciprocal gift is an *iwaz* (return) for the gift of the horse made by *A* to *B*; *thirdly*, *A* accepts the second reciprocal gift of the book from *B* as an *iwaz* (return) for his original gift; *fourthly*, *B* transfers possession of the book, the subject of the *iwaz* (or return) to *A*.

It is only after all these stages have been gone through and after possession has been mutually transferred of the horse and the book but not until then, nor otherwise' that the first gift of the horse by *A* to *B* can be called a *hiba-bil-iwaz*. Thus it will be seen that a *hiba-bil-iwaz* is nothing but a gift which has been completed and for which after it has been completed an '*iwaz*' or return has been accepted. For *hiba-bil-iwaz* there have to be two complete gifts, each perfected by transfer of possession. Each of these gifts, the original gift and the reciprocal gift or *iwaz*, is subject to the same incidents of law as a *hiba* or gift pure and simple, the only distinction being that each of the two reciprocal gifts becomes irrevocable after completion: the distinction is only in the results or the legal incidents following the completed transactions. There is no room for any distinctions arising previous to the transaction being completed for a *hiba-bil-iwaz* postulates the completion of the two reciprocal gifts. The law is clearly laid down in the texts and I need only cite the following sentences from Baillie's Digest of Muhammadan Law, first Edition, page 584: "An *iwaz* is without any difference of opinion between 'our' masters a gift *ab initio*. . . . . All the conditions of gift are applicable to the *iwaz*." The nature of *hiba-bil-iwaz* is also indicated by the expression itself which means a *hiba* with a return, *i. e.*, a gift for which a return has been made.

A *hiba-ba shart-ul iwaz* is slightly different. A *hiba-ba-shart-ul-iwaz* starts with a gift. But at the time of making the gift, (*e.g.*, of a horse) the donor, *A*, makes it a condition that the donee, *B* will make a reciprocal gift (*e.g.*, of a book). Such a gift (of the horse) by *A* is nonetheless a gift, (though there is a condition annexed to it) and the gift is not valid unless possession of the horse is transferred to *B* by *A*. *B*, on the other hand, is not bound to fulfil the condition on which *A* has made the gift and if he does not fulfill it, the gift of the horse will still continue in force (assuming that it has been completed) unless *A* validly revokes it.

If, on the other hand, *B* performs the condition, and makes a reciprocal gift (*i.e.*, gives the *iwaz*) of the book to *A* and *A* accepts the book as return or *iwaz*, nonetheless the second reciprocal gift of the book is governed by the law of gifts, and is not complete

unless *B* transfers the subject of the reciprocal gift (the book) to *A*. Where all these stages have been completed, in the case of *hiba-ba-shart-ul iwaz*, the result is that *A* has transferred certain property (the horse) to *B* and *B* has transferred certain property (the book) to *A*, each by way of gift. But after these transfers have been completed by possession, subjects of the gifts and of the *iwaz* being given and taken in each case, the legal incidents in the case of a *hiba-ba-shart-ul-iwaz* are as though *A* and *B* had agreed to make an exchange of the properties forming the subjects of the two gifts, or as though *A* and *B* had reciprocally purchased from each other the subjects of the two gifts, *i.e.*, that *B* had purchased the horse from *A* and *A* had purchased the book from *B*.

The law as to *hiba-ba-shart-ul-iwaz* is also found in Baillie's Digest first Edition, pages 534 to 535, from which the following passages may be extracted. "The second kind of *iwaz* is that which is stipulated for in the contract of gift. . . . . All the conditions of gift attach to the *iwaz* in the beginning. . . . . Property is not established in it before possession; and each of the parties may refuse delivery. But after mutual possession has been taken, the effect is that of sale; hence, neither of the parties can recall what was his (*i.e.*, after "mutual possession has been taken neither party can revoke or cancel the transfer of the ownership of the articles or property mutually transferred.) Pre-emption is established by the transaction; and each of the parties may return for a fault the thing of which he took possession." It is unnecessary to refer to any reported cases, though it may be that loose dicta and unguarded statements are occasionally to be found showing that the law relating to *hiba-bil-iwaz* and *hiba-ba-shurt ul iwaz* is frequently misapprehended. I must, however, draw attention to the fact that the head-note in *Khajooroonissa* v. *Roushan Jehan* (1) is inaccurate, it seems to state as a ruling of the Privy Council what was merely a reference to an argument which was not accepted; see pages 197, 198.

The legal incidents after transfer of the property has taken place in the case of *hiba-bil-iwaz* and *hiba-ba-shart-ul-iwaz* must be distinguished from the rules in accordance with which the transactions ought to be given effect to in the first instance, or which, in other words, are required for completing the transactions.

It is, therefore, clear that the plaintiffs cannot succeed on the strength of Exhibit C without proving that they had been given possession of the properties in question.

The next ground on which the plaintiffs claim to succeed is that they are the heirs of a person referred to, in the pleadings, as Davidee Vale Shali Sahib. In the lower Courts the suit seems to have been decided on the basis that the property should devolve on the persons entitled to succeed as the heirs of the said Shali Sahib; the decree under appeal proceeds on the basis that the property must be treated as his private property and the rights of the plaintiffs have been determined accordingly.

When, however, the pleadings are referred to, I find it stated both in the plaint and the written statement of each of the defendants that the lands in question appertain to certain mosques. Under these circumstances, it is difficult to understand how the Courts should have permitted the suit to proceed on the basis that the rights of the various parties to it were to be determined as though the lands were held as private property subject to inheritance and liable to be partitioned.

I find it impossible to deal with the question as to who is entitled to the possession of the properties which are the subject-matter of the suit, on the materials now before me, having regard to the circumstances above referred to. The Advocate-General is not a party to the suit, and there is no one who can in any way protect the interests of the mosque to which the lands have been admittedly dedicated or to claim appropriate relief on behalf of the mosque, whether by appointment of *muttawali* for the purpose of taking possession of the lands or otherwise. It is obvious that these questions cannot be disposed of without its being determined what the nature of the subsisting trusts is and without having the charity properly represented before the Court. This is greatly to be regretted, as it is

(1) 2 C. 184; 26 W. R. 36; 3 I. A. 291.

obvious from the pleadings that it is the case of all the parties that gross breaches of trust have taken place. Under the circumstances, however, it is only possible to order that the suit should be dismissed.

All the parties will, however, bear their own costs throughout, for the reasons which I have indicated.

Appeal allowed and suit dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 791 OF 1912.

April 9, 1914

Present:—Mr. Justice Tyabji and Mr. Justice Spencer.

RAMASWAMI CHETTIAR—PLAINTIFF—APPELLANT

versus

SUNDARA REDDIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Consideration—Mortgage without consideration is inoperative.

A mortgage without consideration is a nullity and, therefore, inoperative. It creates no charge on the property and cannot be enforced against a subsequent purchaser.

Ranga Ayyar v. *Srinivasa Ayyangar*, 21 M. 56, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Appeal Suit No. 96 of 1911, preferred against that of the District Munsif of Srivilliputtur, in Original Suit No. 481 of 1910.

Mr. *R. Kuppusawmi Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT.—The plaintiff sued for enforcement of a mortgage, Exhibit A, as against the purchaser from the mortgagor. It has been found that there was no consideration for the mortgage. It is argued before us that the mortgage nonetheless ubsists, inasmuch as it is a registered ttansaction, and it has been shown that the transaction was a sham: that as it has not been found that there was any object for this transaction being entered into without having any effect and the charge is already created on the property, it must subsist on it when it is transferred to a purchaser from the mortgagor. *Ranga Ayyar* v. *Srinivasa Ayyangar* (1) is relied upon for these contentions. There it was said that "when a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purposes other than the ostensible one the deed was executed." But these remarks were made, where circumstances were proved showing that the intention was to pass the title to the property to the wife and daughters of the transferor in order that the next heir of the transferor, who was at enmity with him, should be prevented from inheriting the property. Further, it must be pointed out that in that case the Court was dealing with the sales. When the ownership of property is purported to be passed by means of sale and from the attendant circumstances it can be inferred that the ostensible vendor wished to benefit the transferee so that section 81 of the Indian Trusts Act does not come into operation, the case may have a very different complexion from where (as in the case before us) what is purported to be done is to create a charge on the property and there are no circumstances from which it can be inferred that a charge was intended to be created for a higher amount than the consideration which actually passed in order that the mortgagee may benefit by such charge being for the higher amount. The extent of the charge on the property would *prima facie* be measured by the actual consideration for securing which the charge was created and, when the consideration is found to be *nil*, the charge *prima facie* disappears.

We are, therefore, of opinion that on the finding that no consideration passed and in the absence of such circumstances as we have referred to, the decree of the lower

(1) 21 M. 56

Appellate Court dismissing the plaintiff's suit was right. The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1972 OF 1911.

January 15, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

MANAVIKRAMA ZAMORIN RAJA AVERGAL OF CALICUT (DIED) AND ANOTHER —DEFENDANTS—APPELLANTS

versus

R. P. ACHUTHA MENON—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 131—Recovery of sums due under periodically recurring right—Prayer for declaration, whether made or not.

Article 131 of Schedule I of the Limitation Act applies to suits brought to recover sums due under a periodically recurring right (*a*) whether there is a prayer for a declaration that the plaintiff is entitled to such a right and (*b*) whether there is no such prayer.

Second appeal against the decree of the Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 997 of 1910, preferred against that of the District Munsif of Alatur, in Original Suit No. 333 of 1909.

This second appeal coming on for hearing on the 18th and 19th days of September 1913, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance, and the material papers in the suit and upon hearing the arguments of Mr. *T. R. Ramachandra Aiyar*, for the 2nd Appellant and of Mr. *C. Madhavan Nair*, for Mr. *J. L. Rosario*, for the Respondent and the case having stood over for consideration till Friday, the 26th day of September 1913, the Court (Ayling and Tyabji, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

AYLING, J.—This was a suit for recovery of arrears of *adima* allowance for a period of eight years with interest. The District Munsif decreed the claim for three years only, holding the rest of it to be barred by limitation, and gave interest at Rs. 10 per cent. from date of demand. The Subordinate Judge held that no part of the claim was time-barred and gave a decree for the allowance at the rate fixed by the District Munsif for the full period claimed, with interest at the same rate. Against this, the defendant appeals.

The first point argued before us relates to the rate of allowance and the award of interest. In neither respect do we see reason to interfere. In our opinion the evidence on record, though meagre, in the absence of anything to contradict it, justifies the findings of the lower Courts as to the rate of allowance: and we are not disposed to interfere with the discretion of the lower Courts as to the award of interest or the rate thereof.

The only other point is that of limitation. The District Munsif held the suit to be governed by Article 115 of Schedule I of the Limitation Act, while the Subordinate Judge considers Article 131 to be the one applicable. We may say at once that, in our opinion, Article 115 (for compensation for breach of contract, etc.,) certainly cannot be applied. The *adima* allowance is described in the plaint as due to the plaintiff's *tarwad* from time immemorial: and even if we accept appellant's contention that Exhibit A is the original grant (which does not appear to be the case), it is still a case of grant, and not of contract. If Article 131 does not apply, the suit must be governed by Article 120.

The real question is, however, whether Article 131 applies: and on this point there appears to have been considerable difference of opinion in different Courts. The Article runs thus.—

131. To establish a periodically recurring right.	Twelve years.	When the plaintiff is first refused the enjoyment of the right.

In the present case it is not denied that the right to the *adima* allowance is a periodically recurring one, but Mr. Ramachandra Aiyar argues that this suit is not one for the "establishment" of the right: but for the recovery of amounts due under the right. He contends that the Article only applies to suits brought for a declaration of a periodically recurring right: and points out

that the plaint in this case contains no prayer for a declaration, but asks for a decree for payment of a specified amount, being the arrears of the *adima* allowance.

Our attention is invited to Articles 128 and 129: where a distinction is drawn between a suit for a declaration of right to maintenance, and a suit for arrears of maintenance. According to the appellant's contention the phrase used in Article 131 "to establish" is equivalent to that in Article 129 "for a declaration of the right". Respondent argues that the phrase "to eatablish" is intended to cover both classes of suits. We should be more inclined to adopt this view if the word used had been "*to enforce*".

On a consideration of the various Articles in the Schedule we should be disposed to hold Article 131 to be inapplicable: but our attention has been drawn to a series of rulings of this Court in support of the contrary view: *Ramnad Zemindar* v. *Dorasami* (1), *Alubi* v. *Kunhi Bi* (2) *Balakrishna* v. *The Secretary of State for India* (3) and *Ratnamasari* v. *Akilandammal* (4).

The first of these, *Ramnad Zemindar* v. *Dorasami*(1), calls for little remark, inasmuch as the decree which was the subject of appeal before the Court was merely one declaring the Ramnad *Zemindari* liable for a certain periodical payment, and not for any consequential relief.

In the next case, however, [*Alubi* v. *Kunhi Bi* (2)] the suit was not for a declaration of a recurring right, but for recovery of the actual amount payable thereunder, and the learned Judges said: "We think the plaintiff is entitled to recover twelve years' rent or revenue up to date of suit under Article 131 as a recurring right, and also under Article 132 as money charged on land." This is a clear expression of opinion on the point now at issue; and all that can be said is, as there was a charge in that case, and Article 132 applied, it was unnecessary for the decision of the case to consider whether Article 131 also applied.

The next case is *Balakrishna* v. *The Secretary of State for India* (3). This was a suit not for recovery of money, but "to establish plaintiff's right to certain yearly remissions and to have it declared that Government is not entitled to levy full assessment without granting those remissions". The learned Judges held that Article 120, and not Article 131, applied. They said: "Article 131 applies only to those suits in which a decree for consequential relief is asked for by virtue of the periodically recurring right, and in the present case no such relief has been asked, although the remission claimed has been refused from the year 1878. We must, therefore hold that Article 120 applies to this suit which was brought to obtain a merely declaratory decree."

This, again, is a distinct expression of opinion: though it appears to involve the somewhat surprising result that a man asking merely for a decree declaring his periodically recurring right must sue within six years under Article 120, whereas, if he asked for relief consequential on the said right, he could claim twelve years under Article 131. The starting point for limitation would presumably be the same in each case.

The last case is *Ratnamasari* v. *Akilandammal* (4). The scope of Article 131 was not in issue, but Bhashyam Aiyangar, J., in the course of his judgment appears to hold that Article 131 is not confined to a declaratory suit, but may include one "for recovery of arrears due in respect of a periodically recurring right". This remark is simply made in illustration of the learned Judge's argument on another point.

Two of these cases, *Ramnad Zemindar* v. *Dorasami* (1) and *Ratnamasari* v. *Akilandammal* (4), were considered by the Allahabad High Court in *Lachmi Narain* v. *Turab-Un-Nissa* (5), and expressly dissented from, though apparently under some misapprehension of the true effect of the earlier case. The learned Judges preferred to hold that the language of Article 131 "to establish a periodically recurring right" could not be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a periodically recurring right.

The Calcutta High Court appears to take the same view, vide *Kallar Roy* v. *Ganga Pershad Singh* (6), in which they held that

(1) 7 M. 341.
(2) 10 M. 115.
(3) 16 M. 294; 3 M. L. J. 98.
(4) 26 M. 291; 13 M. L. J. 27.
(5) 14 Ind. Cas. 505; 34 A. 246; 9 A. L. J. 297.
(6) 33 C. 998.

a suit for recovery of arrears of *malikanas* where plaintiff does not seek to enforce a charge is governed by Article 115. It is to be noted, however, that Article 131 is not specifically referred to in the judgment.

The Bombay High Court has held in *Sakharam Hari* v. *Laxmipriya Tirtha Swami* (7), that Article 131 does apply to a suit for arrears due under a periodically recurring right if brought against the person originally liable to pay.

In this conflict of rulings, and, inclining as we do to a view contrary to that taken in previous decisions of this Court, we feel constrained to refer the following question for the decision of a Full Bench:

"Does Article 131 of Schedule I of the Limitation Act apply to suits brought to recover sums due under a periodically recurring right (*a*) where there is a prayer for a declaration that the plaintiff is entitled to such a right and (*b*) where there is no such prayer?"

TYABJI, J.—I agree. Article 131 of the Limitation Act seems to me to have been meant to apply only where (in the words of the Article) "the plaintiff has been refused the enjoyment of a periodically recurring right" and he wishes to establish that such a right exists. The language of the Article does not seem to me to be appropriate to a suit for recovering sums that have become due under, or as a consequence of, such a right. Speaking with reference to the facts of this case it seems to me that the Article applies to this suit in so far as it has reference to the establishment of the right to the *adima* allowance; but that the Article does not refer to the claim for payment of the allowance already due under the right so established. The two questions are quite distinct and apart from the decisions cited by my learned brother. I should be inclined to doubt whether both were intended to be included within words which as I have said seem to me to be appropriate to only one of them.

This second appeal coming on for hearing before the Full Bench on the 5th January 1914, upon perusing the grounds of appeal, the judgment and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and the order of reference to a Full Bench and upon hearing the arguments of Mr. *T. R. Krishnaswamy Aiyar*, for Mr. *T. R. Ramachandra Aiyar*, Vakil for the 2nd Appellant, and of Mr. *J. L. Rosario*, Vakil for the Respondent, and the case having stood over for consideration till this day, the Court expressed the following

(7) 5 Ind. Cas. 869; 34 B. 349; 12 Bom. L. R. 157.

OPINION.

WHITE, C. J.—If this matter had been *res integra* I should have been disposed to hold that Article 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right. The question of the existence of the right is no doubt distinct from the question of the right to recover moneys if it is established that the right exists. It is, however, difficult to see why the period of limitation should not in both cases be the same, as it is in the case of a suit for a declaration of a right to maintenance and in a suit for arrears of maintenance. If the contention of the appellant is well-founded, there is no Article which deals specifically with the period of limitation in the case of a suit to recover moneys due under an alleged periodically recurring right. There is force in the contention that the use of the word "establish" and the fact that there is only one Article in the case of a suit with reference to a periodically recurring right, and not two as in the case of suits based on an alleged right to maintenance (see Articles 128 and 129), indicate that the Legislature intended to deal with both classes of suits in Article 131. I am not prepared to dissent from the view indicated in the Madras cases referred to in the order of reference, a view which has also been adopted by the Bombay High Court. See *Sakharam Hari* v. *Laxmipriya Tirtha Swami* (7). I would answer the question which has been referred to us in the affirmative.

SANKARAN NAIR, J.—The question is not free from doubt. But I am not prepared to differ from the decisions of this Court and I would, therefore, answer the question in the affirmative.

BALDEO DUBE *v.* SHAMDHUR PANDE.

OLDFIELD J.—I agree with the learned Chief Justice for the reasons stated by him.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2095 OF 1911.
March 6, 1914.
Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.
BALDEO DUBE—DEFENDANT No. 2—APPELLANT
versus
SHAMDHUR PANDE—PLAINTIFF—AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Discretion—Suit for declaration—Suit by remote reversioner against Hindu widow—Declaration that deed of sale by widow void against plaintiff—Widow's daughter, immediate reversioner, living—Suit, whether maintainable—Where plaintiff old man of 50, daughter aged 18, whether suit should be decreed.

A decree under section 42 of the Specific Relief Act is only discretionary and the exercise of discretion must depend upon the peculiar circumstances of each case.

A suit by a remote reversioner, for a declaration that a deed of sale executed by a Hindu widow is without any legal necessity and, therefore, void and ineffectual as against the plaintiff, is maintainable even during the life-time of the immediate reversioner, the widow's daughter.

Abinash Chandra Mazumdar v. *Hari Nath Shaha*, 32 C. 62; 9 C. W. N. 25, followed.

But where the plaintiff is, an old man of 50 and the widow's daughter, that is, the immediate reversioner, is aged 18 or 19 years, and there is no chance of the plaintiff's getting the property: the Court would be exercising a wise discretion if it dismissed the suit refusing to grant the declaration prayed for.

Appeal from the decree of the District Judge of Saran, dated June 19th, 1911, reversing that of the Second Sub-Judge of that District, dated February 15th, 1911.

Mr. *I. B. Sen* (with him Dr. *Sarat Chandra Basak* and Babu *Bipin Chandra Bose*), for the Appellant:—Bhubani Kuer is the daughter of *Musammat* Deonandi Kuer; her age is eighteen or nineteen years; after the death of Deonandi, Bhubani would succeed to the properties left by her father; she is married and has her husband living; the plaintiff being an old man has no chance of succeeding to the estate. In the plaint, the plaintiff concealed the very existence of Bhubani Kuer; the plaintiff came with a false case, and the lower Appellate Court acted wrongly in exercising its discretion in granting a decree to the plaintiff.

Babu *Kalwant Sahai*, for the Respondents:—The sale was not for legal necessity, but was a mere waste. Cited *Abinash Chandra Mozumdar* v. *Hari Nath Shaha* (1); and contended that the lower Appellate Court exercised a wise discretion with which the High Court should not interfere. The daughter and the mother are in the same camp. Referred to *Upendra Narain Myti* v. *Gopee Nath Bera* (2) and *Isri Dutt Koer* v. *Hansbutti Koerain* (3).

JUDGMENT.—This was a suit for a declaration that a deed of sale executed by one *Musammat* Deonandi Kuer was without any legal necessity and was void and ineffectual as against the plaintiff. It appears that *Musammat* Deonandi Kuer has a married daughter, aged eighteen or nineteen years, who would succeed to the property left by Deonandi's husband before the present plaintiff. The learned Subordinate Judge who tried the case refused to grant a decree. He remarks:—"It must also be borne in mind that during the life-time of Bhubani Kuer the plaintiff has no chance of getting the property, and Bhubani Kuer is aged 18 or 19 and the plaintiff is an old man of 50". From this observation it appears that the learned Subordinate Judge exercised the discretion which is given him by section 42 of the Specific Relief Act. When the case came up on appeal, the learned District Judge seems to have lost sight of the fact, that a decree under section 42 could only be granted in the exercise of his discretion. His findings in the case itself are very difficult to reconcile. In one place he says: "The plaintiff can hardly say that no consideration passed." And in another he says: "The defects in the defendant's evidence indicate that the sale is either a bogus transaction or an act of waste." It is impossible to reconcile these separate findings. But it is not, in our opinion, necessary to go into that question or to come to any

(1) 32 C. 62; 9 C. W. N. 25.
(2) 9 C. 817; 12 C. L. R. 356.
(3) 10 C. 324 (P. C.); 13 C. L. R. 418; 10 I. A. 150.

decision on the point whether the sale was good or bad. In the circumstances of the case we think that the learned Subordinate Judge exercised his discretion wisely in refusing this declaration and that the learned District Judge was not right in interfering with that exercise of his discretion and indeed seems to have overlooked that there was any question of his discretion before him. Reference has been made to the case of *Abinash Chandra Mazumdar* v. *Hari Nath Shaha* (1). All that was held in that case was that a suit of this nature was maintainable, and the learned Subordinate Judge was perfectly aware of that as appears from his judgment. The decision quoted shows that there has been considerable conflict of judicial opinion on this point, but be that as it may, the case is clearly no authority for holding that a Court cannot in the exercise of its discretion under section 42 refuse such a declaration as is asked for in this case. The exercise of such a discretion must necessarily depend upon the peculiar circumstances of each case and, therefore, the matter cannot very well be concluded by precedent.

In the circumstances of the case we think that the order of the learned Subordinate Judge was right and should be restored, but we do not allow costs in this Court.

It must be understood that this appeal is decreed because we think that in the circumstances of the case the learned Subordinate Judge exercised his discretion rightly. We express no opinion on the questions of legal necessity or of the validity of the sale.

Appeal decreed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 213 OF 1909.

March 31, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

ALAGAPPA CHETTIAR—PLAINTIFF—APPELLANT

versus

SUBRAMANIA PANDIA THEVAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Mortgagee authorized to pay off debt of mortgagor, whether "agent duly authorized" of mortgagor.

A mortgagee authorized to pay off a debt due by the mortgagor to a third person is not "an agent" of the mortgagor "duly authorized" within the meaning of section 20 of the Limitation Act, so as to keep alive the debt by payment of interest on such debt.

Linsell v. *Bonsor*, 2 Bing. (N. C.) 241; 2 Scott 399; 1 Hodges 305; 5 L. J. C. P. 40, 132 E.R. 95, followed.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 14 of 1908.

Mr. *K. Srinivasa Aiyangar*, for the Appellant.

Mr *S. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—In this case, defendants Nos. 1 and 2 executed a mortgage in favour of the 3rd defendant for Rs. 26,000. Part of the consideration was made up of Rs. 10,920 to be paid by the mortgagee to the assignors of the present plaintiff on two bonds. The mortgagee did not pay the Rs. 10,920, but nearly two years later paid the interest due on the plaint bond up to that date and made no further payment on the plaint bond. The words of the mortgage are, "The sum received by us in the matter of our having given you permission to pay off the said bonds and obtain the return of the same is Rs. 10,920." The Subordinate Judge was of opinion that the mortgagee was not an agent authorized to make any payment for the mortgagors because in his opinion it was optional for him to do so. Even if it was optional and not obligatory still he would nonetheless be authorized to pay. The question, however, arises whether nearly two years after the date of the mortgage he was authorized to pay the interest on the bond up to that date so as to keep alive the mortgagors' liability to their creditor. We think that though the mortgagee had authority to pay off the debt in full he, had no authority to make a pure payment of interest as such so, as to bring the case within section 20 of the Indian Limitation Act. We think that in this case, as in *Linsell* v. *Bonsor* (1), the agent exceeded his authority.

This appeal is dismissed with costs.

Appeal dismissed.

(1) 2 Bing. (N. C.) 241; 2 Scott 399; 1 Hodges 305; 5 L. J. C. P. 40; 132 E. R. 95.

NASIRUDDIN v. SAYADUR RAHMAN.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 4093 OF 1910.

February 21, 1913.

Present:—Justice Sir Asutosh Mookerjee Kt. and Mr. Justice Beachcroft.

NASIRUDDIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAYADUR RAHMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Arts. 136, 137 —*Sale certificate—Amendment—Jurisdiction of Court to amend sale certificate—Suit as representative of auction-purchaser for recovery of possession—Plaintiff to prove possession of judgment-debtor at date of sale—Symbolical possession, effect of.*

A Court has an inherent jurisdiction to amend a sale certificate which incorrectly describes the property actually sold.

Bujha Roy v. *Ram Kumar Pershad*, 26 C. 529; 3 C. W. N. 374; *Saddo Kunwar* v. *Bansidhar*, 23 A. 476; A. W. N. (1901) 156; and *Mammod* v. *Locke*, 20 M. 487, relied upon.

Where a plaintiff sues for recovery of possession as the representative-in-interest of the purchaser at a sale in execution of a rent decree, the suit must be commenced within 12 years from the date when the judgment-debtor is first entitled to possession, under Article 137 of the second Schedule of the Limitation Act of 1877, if the judgment-debtor was out of possession at the date of the sale. On the other hand if the judgment-debtor was in possession at the date of the sale, the suit must be commenced within twelve years from the date when the sale becomes absolute, under Article 138.

It is upon the plaintiff to prove whether or not the judgment-debtor was in possession at the date of the sale; and he does not discharge the burden merely by proof that the judgment-debtor was in possession at some time antecedent to 12 years before the suit.

Mohima Chunder Mozumdar v. *Mohesh Chunder Neogi*, 16 C. 473; 16 I. A. 23, relied upon.

A delivery of symbolical possession is effective as against the judgment-debtor, but it would not be operative as against a stranger to the suit.

Jogobundhu Mitter v. *Purnanund Gossain*, 16 C. 530, followed.

Appeal from the decree of the District Judge of Purneah, dated the 1st September, 1910, setting aside that of the Munsif of Purneah, dated the 21st March 1910.

Babu *Jogendra Nath Mookerjee* and *Biswanath Sen*, for the Appellants.

Mr. *Zahid* and Moulvi *Nuruddin Ahmed*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the first party defendants in a suit for declaration of title to immoveable property and for recovery of possession thereof. The plaintiff claimed a title by purchase from the purchaser at a sale in execution of a decree for arrears of rent, held on the 8th February 1898. The sale was confirmed on the 13th April following, and the present suit was commenced on the 8th April 1909. The appellants dispute the title of the purchaser at the execution sale and plead that the suit is barred by limitation. These objections were overruled by the District Judge and a decree was made in favour of the plaintiff. In the present appeal that decree has been assailed on two grounds, namely, *first*, that upon a construction of the proceedings antecedent and subsequent to the sale it should be held that the purchaser did not acquire any title to the property now in dispute, and *secondly*, that the question of limitation has been erroneously decided, as in substance all the burden of proof on the question of possession has been thrown upon the defendants.

In so far as the first ground is concerned, it has been stated to us that in the schedule of the plaint of the suit for rent three holdings were mentioned and that in the sale proclamation boundaries were reproduced in respect of these holdings presumably from the plaint. But it has been argued that as the sale certificate, as originally drawn up, did not mention the third property the title to which, is now in controversy, the subsequent amendment thereof, as the result of which the property was included, does not vest a title in the auction-purchaser. We are of opinion that there is no substance in this contention. It has been found as a fact that three holdings were sold and that by a mistake of the officer who conducted the sale it was recorded at the time that only two properties had been sold, with the result that the description of these two properties alone was inserted in the sale certificate as originally drawn up. Subsequently, on the 31st July 1899 upon an application of the auction-purchaser the Court amended the sale certificate and a description of the third property was also inserted therein.

It has been argued that the Court had no authority to amend the sale certificate, and in support of this proposition reliance has been placed upon the decision in the case of *Rajah Rughoo Nundun Singh Bahadoor* v. Mr. *Robert Wilson* (1). That decision,

(1) 23 W. R. 301.

however is of no assistance to the appellants, as it merely lays down that a Court is not legally competent to make an *ex parte* order amending a sale certificate granted under the provisions of the Code of Civil Procedure. If an order for amendment had been made *ex parte* the judgment-debtor would be entitled to contend that it ought to have been made in his presence. The appellants, however, are not representatives of the judgment-debtor. In fact they claim under hostile title. It is, therefore, immaterial to enquire whether the order for amendment made on the 21st July 1899 was or was not made with notice to the judgment-debtor, who, at any rate, has not taken exception to the propriety of that order. We find on the other hand, that on the 19th August 1899, possession was without objection by the judgment-debtor delivered to the auction-purchaser by the Court on the strength of the certificate as amended.

It has been finally contended that the Court had not, under any circumstances, an authority to amend the sale certificate. This proposition is clearly unsustainable. The cases of *Bujha Roy* v. *Ram Kumar Pershad*(2) *Saddo Kunwar* v. *Bansidhar* (3) and *Mammod* v. *Locke* (4) show that sale certificates have been amended repeatedly by the Courts of this country, and that a Court has an inherent jurisdiction to amend a sale cerificate which incorrectly describes the property actually sold. Indeed it was not disputed by the learned Vakil for the appellant that, as pointed out by their Lordships of the Judicial Committee in the case of *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall* (5), a sale certificate is not conclusive evidence upon the question as to the property which has been sold, and merely furnishes statutory evidence on the point; or, as was explained in the cases of *Ramachandra* v. *Hazi Kassim*(6) and *Balwant Babaji Dhondge* v. *Hirachand Gulabchand Gular* (7), it is open to the parties to show that the sale certificate does not exactly describe what was actually sold or that the property sold is different from the property described in the sale certificate. In the case before us the Court below have found upon an examination of the proceedings antecedent and subsequent to the sale that what was intended to be sold and what was actually sold is the property now in dispute. We, therefore, hold that the title of the plaintiff to the property has been established, and the first ground cannot be sustained. In so far as the second ground is concerned, the judgment of the District Judge is, in our opinion, open to criticism. The plaintiff instituted this suit for recovery of possession as representative-in-interest of the purchaser at a sale in execution of the rent decree. If the judgment-debtor was out of possession at the date of the sale, under Article 137 of the second Schedule of the Limitation Act, the suit must be commenced within 12 years from the date when the judgment-debtor is first entitled to possession. On the other hand, if the judgment-debtor was in possession at the date of the sale, under Article 138 the suit must be commenced within 12 years from the date when the sale becomes absolute. It was, therefore, incumbent upon the plaintiff to prove whether or not the judgment-debtor was in possession at the date of the sale. The District Judge has not come to any specific finding on this point. He has pointed out that in 1883 Mosaheb Ali, the former tenant, was in possession of the land now in dispute. He has also found that the defendants were in possession in 1900. From these two facts, he has drawn the inference that the possession of the appellants may be presumed to have continued till 1899 when the sale took place. This clearly is not sound in law. As was pointed out by their Lordships of the Judicial Committee in the case of *Mohima Chunder Mozumdar* v. *Mohesh Chunder Neogi* (8), the burden is upon the plaintiff to establish possession within 12 years of the suit and he does not discharge the burden merely by proof that he was in possession at some time antecedent to 12 years before the suit. The Court must consequently find upon the evidence, whether the judgment

(2) 26 C. 529; 3 C. W. N. 374.
(3) 23 A. 476; A. W. N. (1901) 156.
(4) 20 M. 487.
(5) 14 M. I. A. 496 at p. 523; 20 E. R. 871.
(6) 16 M. 207.
(7) 27 B. 334; 5 Bom. L. R. 217.

(8) 16 C. 473; 16 I. A. 23.

debtor was or was not in possession at the time of the sale.

We may further point out that the Courts below were not right in holding that as possession had been delivered to the auction-purchaser on the 19th August 1899, that is, within 12 years of the commencement of the suit, no question of limitation can arise. That delivery of possession was symbolical and it was, no doubt, effective as against the judgment-debtor, but as pointed out in the case of *Joggobundhu Mitter v. Purnanund Gossami* (9) it would not be operative as against a stranger to the suit. The second ground must, therefore, prevail. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that he may re-consider the question of limitation, which will be the only point for him to deal with.

Costs will abide the result.

Appeal allowed: Case remanded.

(9) 16 C. 530.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 161 TO 163 OF 1912.

February 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar.

T. S. RAMASAMI AIYANGAR, OFFICIAL RECEIVER OF RAMNAD—PETITIONER

versus

PAVADAI CHETTY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 8—Suit instituted by insolvent after adjudication of insolvency—Receiver, whether can continue such suit.

After a person has been adjudicated an insolvent he has no right to institute a suit for recovery of debts which had become legally vested in the Receiver; nor can the Receiver continue such a suit under Order XXII, rule 8.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of the Subordinate Judge of Negapatam, in Insolvency Appeals Nos. 1097, 1099 and 1098 of 1911 respectively, in Second Civil Suit Appeals Nos. 990, 1051 and 993 of 1911, respectively.

Mr. *T. Narasimha Aiyangar*, for the Petitioner.

Mr. S. *Muthiah Mudaliar*, for the Respondents.

JUDGMENT.—The lower Court rightly held that the Receiver's petition under Order I, rule 10, should not be allowed as the suit would have been barred if instituted on the date of his application. *Subbaraya Iyer v. Vaithinatha Iyer* (1).

I am asked to treat the Receiver's petition as one filed under Order XXII, rule 8, that is, as a petition expressing the consent of the Receiver to continue the suit filed by the insolvent's authorized agent.

But the insolvent was not legally entitled after he had been adjudicated an insolvent (and after a Receiver had been appointed for his properties including the debts due to him) to bring a suit for recovery of one of those debts which had become legally vested in the Receiver and divested from the plaintiff. Such a suit brought by a man who had no right of suit cannot be continued by the Receiver under Order XXII, rule 8, and it is only a suit brought by a person who had a right of suit when he brought it that could be continued by the Receiver on the plaintiff's becoming insolvent afterwards.

I dismiss this petition with costs. Similar orders are passed in Civil Revision Petitions Nos. 162 and 163 of 1912, except that there will be no order as to costs as respondents do not appear.

Petitions dismissed.

(1) 5 Ind. Cas. 931; 33 M. 115; 7 M. L. T. 155.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3215 OF 1910.

February 6, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KASHI DAS GOSAIN—PLAINTIFF—APPELLANT

versus

CHAITHRU PATRAS URAON—DEFENDANT—RESPONDENT.

Transfer—Sale or Gift—Ostensible sale for no consideration—Gift—Test to be applied—Intention of parties.

KASHI DAS GOSAIN *v.* CHAITHRU PATRAS URAON.

In the case of a transfer where there was no gift, but an ostensible sale for no consideration, and the transfer was, in essence, never intended to take effect, the test to be applied is, was the transaction intended to transfer title? If it was intended to be operative, the mere fact that the payment of consideration was postponed would not affect the validity of the transaction; on the other hand, if the operation of the transaction was intended to be postponed till the consideration money had been paid, the transfer would become complete and operative only upon such payment. The essence of the matter is consequently the intention of the parties.

Ismail Mussajee Mookerdum v. *Hafiz Boo*, 33 C. 773; 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137 (P. C.); 33 I. A. 86, referred to.

Appeal from the decree of the Judicial Commissioner of Chota Nagpur, dated August 15th, 1910, affirming that of the Munsif of Gumla, dated January 27th, 1910,

FACTS.—This is an appeal on behalf of the plaintiff in a suit for recovery of possession of a half-share of village Tintanagar on the basis of title by purchase. The property originally belonged to one Parmanand and was sold by him on the 16th March 1904 to the third and fourth defendants, Monohar and his son Bhikhari. On the 16th February 1905, the third defendant transferred to the plaintiff a half-share of the village; the consideration mentioned was a pre-existing debt which at the time amounted to Rs. 900. On the 5th July 1907, the third and fourth defendants executed a conveyance in favour of the first two defendants; they dealt with the property as if it had not been previously transferred to the plaintiff and the consideration was stated to be Rs. 1,632. The Courts below have dismissed the suit on the ground that the plaintiff had failed to prove that there was any consideration for his purchase.

The plaintiff appealed to the High Court.

Babus *Bipin Bihari Ghose*, (Junior) and *Hari Har Prosad Singh*, for the Appellant.

Babu *Kulwant Sahay*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—[After stating facts his Lordship observed:—]

On behalf of the plaintiff, it has been contended in this Court that he has an enforcible title, notwithstanding the fact that there was no consideration for his purchase; and in support of this view reliance has been placed upon the cases of *Achal Ram* v. *Kazim Husain Khan* (1) and *Baij Nath Singh* v. *Paltu* (2). It has been argued in substance that in a case of sale of immoveable property, non-payment of purchase-money does not prevent the transfer of ownership from the vendor to the purchaser and that the purchaser, notwithstanding such non-payment, can maintain a suit for possession of the property. This principle, in our opinion, has no application to the present case, because it has been found by the Courts below that the pre-existing debt mentioned as consideration for the transfer to the plaintiff had no existence, and the transfer was in essence fictitious. In these circumstances, the appellant has been constrained to argue that the transfer might have been intended to take effect by way of gift. But there is no room for such a hypothesis in this case, and consequently the decision of the Judicial Committee in *Ismail Mussajee Mookerdum* v. *Hafiz Boo* (3), to which reference has been made, has no application. In that case, the transfer was deemed operative as a gift, and the relationship between the parties, namely, that of mother and daughter, showed that the theory of a gift might be supported on the ground of natural affection. It is clear, however, that in the case before us there was no gift, there was an ostensible sale for no consideration and the transfer was, in essence, never intended to take effect. In a case of this description, the test to be applied is, was the transaction intended to transfer title? If it was intended to be operative, the mere fact that the payment of consideration was postponed would not affect the validity of the transaction; on the other hand, if the operation of the transaction was intended to be postponed till the consideration money had been paid, the transfer would become complete and operative only upon such payment. The essence of the matter is consequently the intention of the parties, and, in the present case, the Courts below have held, on the facts disclosed, that there was no

(1) 27 A. 271; 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197; 32 I. A. 113 (P. C.).

(2) 30 A. 125; 5 A. L. J. 96; A. W. N. (1908) 38.

(3) 33 C. 773; 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.).

intention on the part of the third defendant to transfer the property to the plaintiff.

The result is that the decree of the Judicial Commissioner is affirmed and this appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 88 OF 1913.

March 20, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

CHATHAPURAM GRAMAM VAIDYANATH AIYAR—PETITIONER—APPELLANT

versus

P. S. RAMASAMI AIYAR, RECEIVER OF RY. R. M. COMPANY—RESPONDENT.

Insolvency petition—Purchaser of judgment-debt due to creditor—Entitled to be entered as creditor.

A purchaser of a judgment-debt due to an insolvent creditor is entitled to have his name entered in the schedule of the creditors of the insolvent.

Appeal against the order of the District Court of South Malabar, in Civil Miscellaneous Petition No. 606 of 1912 in Insolvency Petition No. 3 of 1890.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *A. Narayana Sarma*, for the Respondent.

JUDGMENT.—The petitioner claims to have acquired the debt due by the insolvent by purchase at a Court auction in a suit in which the insolvent's creditor was the judgment-debtor. If this be so, he is entitled to an order from the Court giving leave to the Receiver to substitute his name in the schedule of the creditors' names in respect of the debt due to the creditor in substitution for the creditors' name, *In re Frost and Frost; Ex parte The Official Receiver and Frost* (1). We do not consider that the question whether on the facts of the case the Receiver is entitled to set off any debt due by the creditor to the insolvent has been satisfactorily dealt with. In this connection it will have to be considered whether as represented to us, the debt was so brought to

(1) (1899) 2 Q. B. 50; 68 L. J. Q. B. 663; 80 L. T 26; 47 W. R. 512; 6 Manson 194.

sale in a suit by the second mortgagee—the insolvent being only the third mortgagee—and was sold and purchased by the petitioner free of all the mortgages.

We accordingly set aside the order and remand the case to the lower Court for disposal according to law. The costs will be costs in the cause.

Order set aside: Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2149 OF 1910.

February 3, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

SUKIRA NAINAR *alias* SUBRAMANIA NAINAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

VIRASAWMI PILLAI—PLAINTIFF—RESPONDENT.

Ejectment suit—Burden of proof.

In an ejectment suit the plaintiff must prove his title; but when he produces a title-deed which *prima facie* proves his title, the onus shifts to the defendant to show that the title-deed does not represent the true state of the facts of the case.

Hari Ram v. *Rajcoomar Opadya*, 8 C. 759; *Mookto Keshee Debee* v. *Anundo Chunder Chattopadhya*, 2 C. L. R. 48, distinguished.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 15 of 1910, preferred against the decree of the District Munsif of Tirukoilur, in Original Suit No. 539 of 1908.

FACTS.—The facts of the case are fully set out in the judgment of the District Munsif. They are briefly as follows:—The case put forward by the 1st to 5th defendants is that the suit land as alleged by the 1st to 5th defendant was originally purchased under Exhibit C out of their family funds and the sale-deed was taken in the names of 6th defendant and Ramasami Nainar jointly. It is alleged by the 1st defendant tha the latter never had any beneficial interest in the land; the land purchased could only be irrigated from the Valandai canal, but that was not a source from which the owners of the land were entitled to claim water as of right, but as Ramasami Nainar owned 10 *cawnies* of land

in Valandai, for which he was entitled to get water from the Valandai canal, and he was an influential man in Valandai, his name was, therefore, inserted in the sale-deed as one of the purchasers so that he might use his influence to help the 1st to 6th defendants' family in taking water from the Valandai canal to irrigate the land purchased under Exhibit C, without disputes being raised by the other persons entitled to get water from that canal for the irrigation of their lands.

At the time the sale-deed (Exhibit C) was executed, Ramasami Nainar was on friendly terms with the 1st to 6th defendants' family.

Ramasami Nainar never got any beneficial interest under the document, Exhibit C. And none of the lands covered by it were divided at the time of the partition between himself and his brothers.

It is further admitted that the daughter of Ramasami Nainar was married to the 4th defendant and has been put away by him. And further the 6th defendant has fallen out with the defendants Nos. 1 and 4.

In the partition lists III and IIIa, which were drawn up when the members of the defendants' family divided their property and which were all signed by the 6th defendant, the whole of the property purchased under Exhibit C is treated as belonging to the family of the 1st to 6th defendants.

Ramasami Nainar never paid any *kist* for any of the lands purchased under Exhibit C. Ramasami Nainar now sold the land purchased under Exhibit C to plaintiff under Exhibit A by leasing it for *varam*.

The plaintiff brought a suit for ejectment which was dismissed by the District Munsif but decreed by the District Judge. The defendants appealed to the High Court.

The High Court remanded the suit to the District Judge for fresh findings with the following order:

"I entirely concur in the District Munsif's finding on the various issues, and I find, *firstly*, that Ramasami Nainar was never the owner of any portion of the properties conveyed under Exhibit C, *secondly*, that the plaintiff never had any title to the suit land at any time, as his vendor Ramasami Nainar never had a title to the same."

Mr. *T. Narasimha Aiyangar*, for the Appellants.

Mr. *K. B. Ranganadha Aiyar*, for the Respondent.

This second appeal and the memorandum of objections coming on for hearing on Tuesday the 12th day of November 1912 the Court (Benson and Sundara Aiyar, JJ.) delivered the following

JUDGMENT.—The District Munsif found that Ramasami Nainar was only a *benamidar* and that the real purchaser under Exhibit C was the 6th defendant. In arriving at that conclusion he took into consideration the conduct of the parties showing that the property was not treated as belonging to Ramasami and that, on the other hand, it was treated as belonging to defendants Nos. 1 to 6. He relied also on Ramasami's own evidence showing that he did not assert his alleged right under Exhibit C by taking possession. Paragraphs 10 and 11 of the District Munsif's judgment refer to these important circumstances. The Judge was wrong in considering that these circumstances were irrelevant. The question being whether the 6th defendant had any title to the properties which he could validly convey, everything showing that both he and defendants Nos. 1 to 6 regarded them as belonging solely to the latter must be important. With regard to the payment of the price of the properties the District Munsif refers to circumstances showing that the endorsements on Exhibits D and E are suspicious. The Judge has not referred to them. It is argued that as the defendants are in possession, the onus of proving his vendor's title should have been thrown on the plaintiff and *Hari Ram* v. *Raj Coomar Opadhya* (1) and *Mookto Keshee Debee* v. *Anundo Chunder Chattopadhya* (2) are relied on. It is, no doubt, true, as pointed out in these cases, that a plaintiff suing in ejectment on the ground that he was dispossessed must prove his title. But when he produces a title deed which *prima facie* proves his title we cannot say that the Judge was wrong in holding that it would then lie on the defendant to prove that the title-deed did not represent the true state of the facts of the case. The fact that the apparent purchaser

(1) 8 C. 759.
(2) 2 C. L. R. 48.

did not care to assert his title or to obtain possession for a long time would support the plea that the title did not really pass to him. As evidence has been adduced by both sides in this case, the lower Court will have no difficulty in arriving at the right conclusion independently of the question of onus. We must ask the District Judge to submit revised findings on the evidence on record on the questions whether Ramasami was the owner of the whole or any portion of the properties at the date of Exhibit A and whether plaintiff had a subsisting title at the date of suit. One month will be allowed for the submission of the findings and seven days for filing objections.

This second appeal and the memorandum of objections coming on for final hearing after the receipt of the finding from the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and accordingly reversing the decree of the lower Appellate Court, restore that of the District Munsif with costs in this and the lower Appellate Court.

The memorandum of objections is dismissed.

Decree reversed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1409 OF 1912.

April 20, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

SAWAN SINGH—DEFENDANT—APPELLANT

versus

MOTHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (u)—Punjab Courts Act (XVIII of 1884), s. 40—Order of remand—Appealable only when appeal competent from such order, if it were itself a decree—No appeal from order of remand involving questions of fact only—Certificate appeals not covered—Custom—Question as to applicability of agricultral custom to particular person—Question of existence of custom.

An appeal would lie under clause (*u*), rule 1 of Order XLIII, from an order remanding a case where the party aggrieved by the order would have the right of appeal, if the Appellate Court, instead of making the order of remand, passed a decree in that very proceeding reversing the decision of the first Court. In other words, the test in any given case is whether an appeal would lie from the decree of the Appellate Court if the order of remand made by it were itself treated as a decree and not a mere order within the meaning of section 2 of the Civil Procedure Code.

Under the combined operation of the provisions of Order XLIII, rule 1 (*u*), Civil Procedure Code, and section 40 of the Punjab Courts Act there can be no appeal to the Chief Court from a Divisional Judge's order of remand under Order XLI, rule 23, Civil Procedure Code, if that order is based upon a finding of fact only.

The certificate appeals under section 40 of the Punjab Courts Act stand on a peculiar footing, and such appeals do not fall within the purview of the second part of clause (*u*) of rule 1 of Order XLIII, Civil Procedure Code.

The question as to the applicability of agricultural custom to a particular person is a question regarding the existence of a custom.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 1st June 1912, reversing that of the Subordinate Judge, 2nd class, Ferozepore, dated the 31st January 1911, dismissing plaintiffs' claim.

Sardar *Kharak Singh*, for the Appellant.

Mr. *Santanam*, for the Respondents.

JUDGMENT.

CHEVIS, J.—(*March* 23, 1914.)—In this suit certain collaterals of Amir sue for a declaration that the alienations effected by him have been made without necessity and consideration, and should not affect their reversionary rights.

One of the pleas raised by the alienee was that Amir was not governed by agricultural custom but had full power of alienation. This formed the subject of the first issue. The first Court decided this issue against the plaintiffs and dismissed the suit. The learned Divisional Judge reversed this decision, holding that Amir was governed by agricultural custom and could not alienate ancestral land except for necessity. So the Divisional Judge remanded the case under Order XLI, rule 23, for decision on the merits. The alienee appeals to this Court from the order of remand. The case was referred by me to a Division Bench as I was doubtful whether such an order was appealable.

Order XLIII, rule 1 (*u*), lays down that an appeal lies from an order of remand under Order XLI, rule 23, "where an appeal

would lie from the decree of the Appellate Court."

Turning to section 105 of the Civil Procedure Code we see that, save as otherwise expressly provided, no appeal shall lie from any order made by a Court, but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. But the section then goes on to provide specially for the case of orders of remand, stating that if such orders are appealable the party aggrieved must appeal at once and cannot dispute the order later on in appeal from the final decree. So in every case the correctness of an order of remand may be disputed; if, however, the order is appealable it must at once be challenged by appeal, but if it is not appealable it may be questioned in appeal from the final decree.

Now, I think, we have to consider what interpretation should be placed on the words in Order XLIII, rule 1 (*u*), "where an appeal would lie from the decree of the Appellate Court."

My own opinion, formed after careful consideration, is that the decree here referred to means *such final decree as might be passed by the Appellate Court.* Now if that decree be regarded as *based on the order of remand* we have a good working rule, *e. g*, let us suppose that in the present case the first Court to whom the case is remanded finds on the merits that the alienation was wholly without necessity and on appeal by the alienee the Divisional Judge concurs, and so the final decree of the Divisional Judge is in favour of the plaintiffs. Then, but for the provisions of section 105 (2), the alienee could appeal to this Court, and could urge in his grounds of appeal that the order of remand was incorrect, and that it should have been held that the alienor was not governed by agricultural custom. But section 105 (2) lays down that where the order of remand is appealable the party aggrieved must attack it at once in appeal, and cannot wait to attack it in appeal from the final decree. The right of appeal exists in either case; the only difference is as to the time at which the right is to be exercised. The matter may perhaps be put in other words. The first Court has disposed of the case on a preliminary issue, and the Appellate Court has reversed the decision on that issue and remanded the case for decision on the other issues. Let us, however, suppose that, though the first Court found that the suit must fail on the first issue, it had taken all the evidence and recorded findings on the remaining issues. Then the Appellate Court would have no need to remand the case at all, and would be able to pass a decree. From that decree, (unless it were a decree dismissing the suit *in toto*) the defendant would have a right to appeal, but he could appeal only on certain grounds specified in section 40 of the Punjab Courts Act. He could appeal on a question of law, but not on a question of fact. With certificate from the Divisional Judge he could appeal on a point of custom. So I think the test to be applied may be stated thus: if this order of remand were part of a judgment leading up to a final decree, could the party against whom this order is passed appeal from the decree on the ground that this particular part of the judgment is contrary to law or custom or is otherwise incorrect?

The conclusion at which I have arrived is that if an order of remand deals solely with questions of fact it is not appealable; if it deals with points of law or custom it is appealable. In certain cases it may be appealable on grounds of error or defect in procedure, but no such question arises here.

That the Legislature intends to allow appeals from orders of remand simply on questions of fact I do not for a moment believe. On this point I would refer to *Noimollah Pramanick* v. *Grish Narain Moonshee* (1) and *Venganaayyan* v. *Ramasami Ayyan* (2). I am aware that a different view is held in *Khalas* v. *Kalyan Singh* (3), but the law of second appeal in this Province has since been brought into line with the law in other parts of India so that the argument based on anomaly referred to on page 253 of the latter ruling now has full force in the Punjab. I believe it is intended to put such orders on exactly the same

(1) 8 C. 674.
(2) 19 M. 422; 4 M. L. J. 263.
(3) 109 P. R. 1887.

footing as appellate decrees and to make them appealable on precisely the same grounds.

But the present case is one in which the question is as to the applicability of agricultural custom to a particular person. This seems to me a question regarding the existence of a custom (*viz.*, a custom whereby the alienor cannot, without the consent of his collaterals, alienate his ancestral land freely). If the appeal were one from an appellate decree this question could not be gone into on appeal without a certificate from the Divisional Judge. And as I think the law has placed appeals from orders of remand on precisely the same footing as appeals from appellate decrees, I think we should require a certificate in this case from the Divisional Judge. It is true that section 40 of the Punjab Courts Act, which deals with such certificates, relates only to appeals from appellate decrees, but even this section does not (as I read it) give the Divisional Judge the *power* to give certificates, for the simple reason that giving a certificate is not a matter which would be illegal even without any provision of law. So I do not think the Divisional Judge would be in any way acting illegally if he were to give a certificate for appeal on a point of custom from an order of remand.

In the present case I would adjourn proceedings to give the appellant an opportunity of applying to the Divisional Judge for a certificate. If the Divisional Judge sees fit to give a certificate then I think the appeal should be heard, and not otherwise.

It is now much more than 30 days since the order of remand was passed, but I have no doubt the Divisional Judge would, in the peculiar circumstances of the case, not raise any difficulties on this point.

SHAH DIN, J.—(*April* 7, 1914).—I regret that I am unable to agree in my learned colleague's view that an appeal lies in this case under Order XLIII, rule 1 (*u*), of the Civil Procedure Code from the Divisional Judge's order of remand, provided that the appellant obtains from the Divisional Judge a certificate under section 40 (3) of the Punjab Courts Act (Act XVIII of 1884, as amended by Act I of 1912) regarding the question of custom involved in the preliminary point on which the decision of the Court of first instance has been reversed by the Divisional Judge.

The circumstances under which the present appeal has been preferred to this Court are fully set forth in the judgment of my learned colleague. In the Court of first instance the parties joined issue on the question whether Amir, a Muhammadan, by caste *Chhimba*, whose alienations of ancestral land are in dispute in this case, was governed by his personal law or by the agricultural custom generally prevailing in this Province, according to which his power of disposition in regard to ancestral immoveable property was restricted. The first Court held that it had not been proved that Amir was governed by agricultural custom and that his power of alienation was restricted as alleged and it dismissed the suit of Amir's collaterals accordingly. On appeal the learned Divisional Judge came to a contrary conclusion, holding that in matters of alienation Amir was bound by the custom of agricultural tribes and that he could not alienate his ancestral land without legal necessity. He accordingly accepted the appeal and remanded the case for re-decision under Order XLI, rule 23, Civil Procedure Code.

The present appeal has been filed by the plaintiffs from the Divisional Judge's order of remand, under Order XLIII, rule 1 (*u*), of the said Code, and the question for decision is whether under the provisions of the rule and Order just cited an appeal lies to this Court from the Divisional Judge's order of remand. According to rule 1 (*u*) of Order XLIII an appeal lies from "an order under rule 23 of Order XLI remanding a case where an appeal would lie from the decree of the Appellate Court;" and it is clear that the order of the Divisional Judge remanding this case to the Court of first instance is appealable to this Court only if it can be affirmed that an appeal would lie from his decree in this case. The right construction of the words "where an appeal would lie from the decree of the Appellate Court" as used in clause (*u*) of rule 1 of the Order under consideration appears to me to be a matter of some difficulty, and it is not easy to lay down a rule which would govern all conceivable cases falling within the purview of the clause in question. I am disposed to

think that in this connection it would probably be a reasonable test to lay down that an appeal would lie under the said clause (*u*) from an order under rule 23 of Order XLI remanding a case where the party aggrieved by the order of remand would have the right of appeal if the Appellate Court, instead of making the order of remand, passed a decree in that very proceeding reversing the decision of the first Court. In other words, the test in any given case is whether an appeal would lie from the decree of the Appellate Court if the order of remand made by it were itself treated as a decree and not a mere order within the meaning of section 2 of the Civil Procedure Code. I do not think that the word "decree" in clause (*u*) means "such *final* decree as might *ultimately* be passed by the Appellate Court," taking the words "final decree" to mean the decree which might be passed by the Appellate Court on an appeal preferred to it by the aggrieved party from the decree passed by the first Court after the order of remand. *Prima facie* it is impossible to adopt a test of this kind in order to determine definitely, upon an appeal being preferred under Order XLIII, rule 1 (*u*), from an order of remand, whether the aggrieved party has the right of appeal or not; and it is easy to conceive cases in which the adoption of this rule would defeat what I take to be the intention of the Legislature. I agree with my learned colleague that under the combined operation of the provisions of Order XLIII, rule 1 (*u*), Civil Procedure Code, and section 40 of the Punjab Courts Act there can be no appeal to this Court from a Divisional Judge's order of remand under Order XLI, rule 23, Civil Procedure Code, if that order is based upon a finding of fact only. Under section 588 (28) of the old Civil Procedure Code of 1882, read with the Punjab Courts Act as it stood before it was amended by Act I of 1912, an unqualified right of appeal was allowed on questions of fact as well as on questions of law, according to the rulings of this Court [*Khalas* v. *Kalyan Singh* (3) and *Maha Ram* v. *Ram Mahar* (4) (page 2 last paragraph)]; but with the enactment of rule 1 (*u*) of Order XLIII of the new Civil Procedure Code and with the recent amendment of the Punjab Courts Act the law on this point has been changed; and under the law as it now stands findings of facts embodied in the Appellate Court's decision on the preliminary point in a case cannot be questioned upon an appeal under Order XLIII, rule 1 (*u*), Civil Procedure Code, for the simple reason that such findings cannot be disturbed on an appeal from the decree of the Appellate Court. But the decree which we have to look to in this connection is the decree which the Appellate Court would be supposed to pass instead of making the order of remand on an appeal from the first Court's decision on the preliminary point, and not the "final decree" which the Appellate Court might ultimately pass on an appeal preferred to it from the decree of the first Court subsequent to the order of remand. A simple illustration will suffice to make my meaning clear. Suppose in the present case the first Court had decided that the plaintiffs had no *locus standi* to sue because they had failed to prove that they are the collaterals of Amir, and it had on this ground dismissed the suit. Suppose that on the plaintiffs' appeal the Divisional Judge were to decide that the plaintiffs are the collaterals of Amir: upon this finding, which would be one of fact on a preliminary point, the Divisional Judge would reverse the decision of the first Court and remand the suit under rule 23 of Order XLI, Civil Procedure Code, for a decision on the merits. Would the defendants have a right of appeal from the order of remand to this Court under Order XLIII, rule 1 (*u*), Civil Procedure Code, seeing that the decision of the Divisional Judge on the preliminary point simply involved the decision of a question of fact and not of a question of law or custom? The answer to this question must be in the negative, although upon the trial of the case on the merits it might be found that various questions of law and custom (*e g.*, questions of estoppel, of Amir having or not having an unrestricted power of alienation, and of legal necessity, etc.), were involved in the case, and, therefore, a second appeal to this Court might lie under section 40 of the Punjab Courts Act from the final decree passed by the Divisional Judge on appeal from the second decree of the Court of first instance. Now let us

(4) 1 P. R. 903 (F. B.); 1 P. L. R. 1903.

take the converse case. Suppose the decision of the first Court was one dismissing the suit, on the ground that it was barred by limitation (assuming that the question of limitation decided was a pure question of law) or on the ground that the matter in dispute was *res judicata* between the parties, and suppose that on appeal the Divisional Judge were to hold that the suit was not barred by the law of limitation or by the rule of *res judicata* and were to remand the case for a fresh decision on the merits. Under Order XLIII, rule 1 (*u*), Civil Procedure Code, an appeal would, in my opinion, lie to this Court from the order of remand, inasmuch as an appeal would lie if the order of remand, which involved the decision of questions of law, were treated as a decree finally disposing of the suit, although after the remand the first Court might dispose of the suit only on facts, in which case on an appeal being preferred to it, the Appellate Court would also have to record findings of fact only and dispose of the appeal on that basis. From the "final decree" of the Appellate Court, based as it would be only on findings of fact, there would be no appeal to this Court; and yet in the view that I take of rule 1 (*u*) of Order XLIII, Civil Procedure Code, an appeal would lie to this Court from the Appellate Court's order of remand because the preliminary point involved questions of law and the decision on it would be open to second appeal if the order appealed from were a decree and not a mere order.

Applying to this case the test laid down above, it seems to me that an appeal would lie to this Court from the Divisional Judge's order of remand if the appellant who is aggrieved by the said order had an unqualified right of appeal from the decree of the Divisional Judge in the event of that officer passing a decree in this very proceeding instead of making an order of remand. In order to see whether he would have an unqualified right of appeal, we have to look to the special provisions of section 40 of the Punjab Courts Act, and looking to that section we find that, since the question involved in the preliminary point on which the decision of the first Court has been reversed by the Divisional Judge is, not a question of law, but a question of custom having the force of law, the appellant would have the right of appeal to this Court only if he were to obtain from the Divisional Judge a certificate in terms of sub-section (3) of section 40. If the Divisional Judge had passed a decree in this case instead of making the order of remand in question, the appellant would clearly not have been able to appeal to this Court without applying for and obtaining a certificate as aforesaid; the certificate might or might not have been granted by the Divisional Judge and, therefore, the appellant would not have had an unrestricted right of appeal to this Court. It is clear, therefore, that all that the appellant could predicate of his right of appeal, at the time when he filed the present appeal from the Divisional Judge's order of remand, was that an appeal might lie from the decree of the Appellate Court, and this, in my opinion, is not sufficient to confer on him a right of appeal from the order of remand in question under Order XLIII, rule 1 (*u*), Civil Procedure Code. In order to claim that right the appellant should have been in a position to affirm definitely, when he filed his present appeal, that, upon the grounds urged by him, an appeal would lie under all circumstances from the decree of the Appellate Court.

My learned colleague is of opinion that the appellent is entitled to appeal to this Court from the Divisional Judge's order of remand if he can obtain from that officer a certificate in terms of sub-section (3) of section 40 of the Punjab Courts Act. With all deference, I am unable to agree in this view. Section 40 aforesaid only relates to a second appeal to this Court from a decree passed in appeal by any Court subordinate to this Court, and the provisions of sub-section (3) of that section have no application whatever to an appeal from an order of remand such as the one under consideration in this case. It seems to me that when Order XLIII, rule 1 (*u*), Civil Procedure Code, was enacted by the Indian Legislature, it did not contemplate the contingency of an appeal lying to this Court from the decree of a lower Appellate Court upon the production by the appellant of a certificate such as is referred to in section 40 (3) of the Punjab Courts Act, which section was enacted by the Punjab Courts (Amendment)

Act of 1912. The only provisions relating to appeals which the Legislature had apparently then in mind were those contained in sections 100 to section 102, Civil Procedure Code. The certificate appeals (if the expression may be allowed) in this Province stand on a peculiar footing; and I do not think that such appeals really fall within the purview of the second part of clause (*u*) of rule 1 of Order XLIII, Civil Procedure Code. Be that, however, as it may, it seems to me that we are not justified, for the purposes of a case of this kind, in reading the word "decree" in sub-section (3) of section 40 of the Punjab Courts Act as if it included an "order" as defined in section 2, Civil Procedure Code. To read the word "decree" in the said sub-section in this sense would, in my opinion, lead to anomalous consequences when we bear in mind the two provisos to sub-section (3) and also the provisions as to limitation contained in section 43 of the same Act. The first proviso to sub-section (3) says "that an application (for a certificate) under sub section (3) of the section shall not be received after the expiration of 30 days from the date on which the decree of the lower Appellate Court was passed * * * * *." As in the present case no decree has been passed by the lower Appellate Court, the limitation of 30 days as laid down in the proviso just cited would not apply to an application for a certificate by the aggrieved party. Next, suppose that the aggrieved party were to apply for a certificate and that his application were to remain pending for more than 90 days, what would be the result? Under section 43 of the Act the period of limitation for an appeal from an order of remand, such as the one before us, is 90 days from the date of the order, and that section draws a clear distinction between a "decree" and an "order". Under the second proviso to sub-section (3) of section 40 the time during which the application under that sub-section has been pending must be excluded in computing the period for an appeal under sub-section (1), which clearly means an appeal from a "decree", and not an appeal from an "order"; and it follows that in a case where a person aggrieved by an order of remand desires to appeal therefrom to this Court and makes an application for a certificate on a question of custom involved in the preliminary point, the time during which his application remains pending cannot be excluded in computing the period of limitation prescribed for the appeal under sub-section (1) (*c*) of section 43. The period of appeal in such a case might, therefore, expire before a certificate is granted to the aggrieved party by the Appellate Court. These anomalous results can only be avoided if the word "decree" used in section 40 is read throughout as meaning indiscriminately a decree or an order; and I must say that, in my opinion, there is no warrant whatever for such a construction. My learned colleague is prepared to place this construction upon the word decree used in the aforesaid section and he further thinks that the Divisional Judge can grant a certificate on the question of custom involved, although the appeal to this Court is only from an order and not from a decree, and is not, therefore, covered strictly by the wording of sub-section (3) of section 40 aforesaid. According to him, section 40 "does not give the Divisional Judge the power to give certificates (even in cases where decrees are passed), for the simple reason that giving a certificate is not a matter which would be illegal even without any provision of law." So, (says my learned colleague) "I do not think the Divisional Judge would be in any way acting illegally if he were to give a certificate for an appeal on a point of custom from an order of remand." My own view is that since, according to sub-section (3) of section 40, an aggrieved party who is desirous of appealing to this Court from an appellate decree regarding the validity or existence of any custom, has the right to apply to the Appellate Court that passed the decree for grant of a certificate, that Court has, by necessary implication, the power to give or to refuse to give the certificate applied for, and, therefore, the express conferment of such power on the Appellate Court would have been superfluous, just as it would have been superfluous to enact a rule in Order XLV of the Civil Procedure Code expressly empowering the High Court to grant a certificate for permission to appeal to His Majesty in Council. But the case

is entirely different when we have to deal with an appeal from an order of remand preferred under Order XLIII, rule 1 (*u*), Civil Procedure Code. Section 40 (3) of the Punjab Courts Act does not in terms apply to such an appeal; the party aggrieved by the order of remand cannot claim the right under the said section to apply to the Appellate Court for a certificate on a point of custom involved in the preliminary point; and as the Appellate Court has not, by necesssary implication, the power to grant a certificate to such an applicant, it would be perfectly within its rights in declining to adjudicate upon the application submitted to it.

My conclusion is that no appeal lies to this Court from the Divisional Judge's order of remand in this case, because it cannot be affirmed definitely that an appeal would lie from the decree of the Divisional Judge. The appellant could only appeal from the decree of the Divisional Judge upon the question of custom involved in the preliminary point if he obtained a certificate from that officer under section 40 (3) of the Punjab Courts Act, but that section relates only to second appeals from decrees, and not to orders such as the one appealed from in this case, and the appellant has, therefore, no right to apply to the Divisional Judge for a certificate as if the order appealed from were a decree, nor has the Divisional Judge the power to grant him the certificate, if one were applied for. I would, therefore, dismiss this appeal. I may note here that it has not been disputed before us by either side that the point on which the decision of the first Court was reversed by the Divisional Judge was a preliminary point within the meaning of Order XLI, rule 23, Civil Procedure Code, and that the order of remand made by the Divisional Judge is correct in form.

As there is a difference of opinion between us on a point of law, I would, if my learned colleague agrees, submit the case to the Hon'ble the Chief Judge with a request that the point may be referred to a third Judge for decision. The point of law may be stated as follows:

Does an appeal lie to this Court under Order XLIII, rule 1 (*u*), Civil Procedure Code, from the Divisional Judge's order of remand in this case on the appellant producing a certificate from the Divisional Judge under sub-section (3) of section 40 of the Punjab Courts Act? Does the sub-section in question apply to orders of remand made under Order XLI, rule 23, Civil Procedure Code, as well as to decrees?

CHEVIS, J. (*April* 18, 1914).—Having read the opinion of my learned brother, and given further consideration to the case, I have changed my former opinion as regards the question whether the appellant can apply to the Divisional Judge for a certificate. The provisions of section 40 (3) of the Punjab Courts Act certainly apply only to appeals from appellate decrees; I have never thought or said otherwise. Apart from section 40 (3) there is no provision of law regarding certificates, and I now think we should take it that such certificates can be given only for the purpose of lodging an appeal from an appellate decree. I agree, therefore, with my learned brother that the appellant cannot ask the Divisional Judge for a certificate. I venture to think that in all other respects there is no material difference between us, and that there is, therefore, no longer any necessity for reference to a third Judge. I would, if my learned brother agrees, hold that the order of remand in the present case is not open to appeal under Order XLIII, rule 1 (*u*), and I would dismiss this appeal with costs.

SHAH DIN, J. (*April* 18, 1914).—In view of the fact that my brother Chevis has now agreed with me that no appeal lies to this Court from the Divisional Judge's order of remand, and that the appellant cannot ask for or obtain a certificate from the Divisional Judge under section 40 (3) of the Punjab Courts Act, there is no longer any necessity for a reference to a third Judge. I agree in dismissing the appeal with costs, and it is dismissed accordingly.

Appeal dismissed.

ALAMELUMANGATHAYARAMMAH *v.* NAMBERUMAL CHETTY.

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

CIVIL SUIT NOS. 418 OF 1912 AND 126 OF 1913.

March 11, 1914.

Present:—Mr. Justice Sankaran Nair.

IN NO. 418 OF 1912.

ALAMELUMANGATHAYARAMMAH—PLAINTIFF

versus

C. NAMBERUMAL CHETTY AND ANOTHER—DEFENDANTS.

IN NO. 126 OF 1913.

C. NAMBERUMAL CHETTY—PLAINTIFF

versus

ALAMELUMANGATHAYARAMMAH—DEFENDANT.

Hindu Law—Re-union—Difference of joint Hindu family and re-united family pointed out—Burden of proving re-union—Jewels made for ladies of family out of family funds—How far family property—Presumption.

Re-union depends upon the intention of the parties as well as on the properties being constituted into joint family property. After a re-union the subsequent interest of the members in the re-united family would not be the same as if they had originally remained undivided. It would depend upon the properties which they bring into the common stock and in a subsequent partition the shares will be proportionate to the properties originally united.

The position of the members who re-unite is not the same as that of the members of a joint Hindu family. In the one case it is co-parcenary, they are joint tenants. In the other case they are tenants-in-common. Before partition the property goes by survivorship. After re-union the case is one of succession, though the persons who might take the property as heirs after re-union are not the same as those who would take if they were divided and there had been no re-union.

The burden of proving re-union is on the persons who set up re-union.

When it is found in a Hindu family that jewels were made from family funds for the use of a lady and it is also found that she alone has been using them and it is further proved that when other ladies came into the family, they had similar jewels made for their use and they have been using those particular jewels, such jewels form their separate property and are not the family property.

In the absence of rebutting evidence, the presumption is that the jewels belonged to the ladies who alone have been using them.

IN C. S. NO. 418 OF 1912.

Messrs. *C. Venkatasubramiah* and *C. P. Ramasawmy Iyer*, for the Plaintiff.

Mr. *V. Masilamani Pillai*, for the Defendants.

IN C. S. NO. 126 OF 1913.

Mr. *V. Masilamani Pillai*, for the Plaintiff.

Messrs. *C. Venkatasubramiah* and *C. P. Ramasawmy Iyer*, for the Defendant.

JUDGMENT.—The dispute is between Alamelumanga Thayarammah, the widow of Seshachelam Chetty, and Namberumal Chetti and Vedavalli Thayaramma, the brother and the sister of the deceased. It relates to certain jewels, some of which are now in the possession of Alamelumanga Thayaramma, and the others are in the possession of Vedavalli Thayaramma. Alamelumanga Thayaramma's case is that both these sets of jewels are her *stridhanam* and belong to her. She says that all of them were in her possession and two days before her husband's death some of them were secretly removed by Vedavalli Thayaramma in collusion with Namberumal Chetty and she seeks to recover possession of them in Civil Suit No. 418 of 1912 filed by her. As to the other jewels, Namberumal Chetty says that they, along with the other jewels, for the recovery of which Alamelumanga Thayaramma sues, were made out of family funds and formed the family property and that on the death of Seshachelam Chetti, he became solely entitled to them and he seeks to recover their possession from Alamelumanga Thayaramma.

Before proceeding to discuss the evidence of title, I shall briefly refer to the question whether Seshachelam Chetti and Namberumul Chetti were divided or undivided. It forms the subject of an issue in the suit filed by Namberumal Chetti. In 1881, the family consisted of Seshachelam Chetti, his three brothers, Kanna Chetti, who is a witness in this case, Chella Pillay Chetti, Namberumal Chetti and their father. The father and Seshachelam Chetti, who alone among the sons had attained the age of majority, sold a house which formed the only family property. They received from the vendee Rs. 1,120 which formed their 2/5th share and the vendee retained in his hands the balance of Rs. 1,680 which he undertook to pay to the three minor sons on their attaining majority. Each of them was to be paid his separate share. Pending that payment, the vendee was to pay interest on that amount into the hands of the

father for the maintenance of these minor sons. It is also proved that each son, as he attained his majority, received his share of Rs. 560. Kannan Chetty on attaining majority left the family, if there was a family. It is not suggested that he is or was at any time a member of the family. These facts are consistent only with partition among the members of the family and their subsequent conduct confirms that view. The further question is raised whether there was a re-union afterwards, at any rate, so far as Chella Pillai Chetti, Namberumal Chetti and Seshachelam Chetty are concerned. The father and Seshachelam Chetty seem to have carried on a shroff's business. When Chella Pillai Chetty attained majority and received his share, he seems to have paid over that money to his brother and helped him in carrying on the business. Namberumal Chetty too on receipt of his share paid it into the business. All the time Namberumal Chetty and Chella Pillai Chetty were minors, there could be no re-union; because re-union depends upon the intention of the parties as well as on the properties being constituted into joint family property. What Seshachelam Chetty's properties amounted to at the time Namberumal Chetty put his money into the business does not appear: because after a re-union, if there was one, the subsequent interest of the members in the re-united family would not be the same as if they had originally remained undivided. It would depend upon the properties which they bring into a common stock and in a subsequent partition the shares will be proportionate to the properties originally united. Seshachelam must have increased his share by that time, because subsequent events show that the business was comparatively a prospering one. The accounts themselves do not show that it must have been a joint family business as distinguished from a partnership. It is quite as consistent with the one as with the other. If, therefore, I have to decide the question whether there was a re-union, I should be inclined to hold that the evidence does not show that there must have been a re-union, and the burden of proof is of course, on the persons who set up a re-union. I shall only add a few words as to the accounts that are put in. I am satisfied that all the accounts have not been put in because the accounts put in certainly seem to indicate that these transactions must find place in other books and I am not, therefore, disposed to rely very much on these accounts. I shall not dwell upon it further, because I do not think it necessary to come to a final decision on the question whether there was a re-union or not, because the question to be determined has reference to the ownership of the jewels, and all that was argued was that if there was a re-union, then there would be a presumption that these jewels must have been made out of common funds and that they, therefore, form joint family property. Of course, as I said before, the position of the members who re-unite is not the same as that of the members of a joint Hindu family. In the one case it is co-parcenary. They are, if I may say so, joint tenants. In other cases they are tenants-in common. Before partition the property goes by survivorship. After re-union the case is one of succession, though the persons who might take the property as heirs after re-union are not the same as those who would take if they were divided and there had been no re union. I am not aware that the question has been decided that in the case of a family composed of members who are re-united, the same presumption as to family ownership applies as in the case of a co-parcenary. However, I do not think it necessary to come to any conclusion on that point.

[The learned Judge dealt with the question as to the possession of jewels and their removal and gave the following finding: "I have very little doubt that Alamelumanga Thayaramma was in possession of all these jewels at the time of her husband's death. **** I have no hesitation in accepting Alamelumanga Thayaramma's evidence as to the way in which she lost possession of these jewels."]

Whether the jewels that are in dispute in Civil Suit No. 418 of 1912 as well as the jewels in Civil Suit No 123 of 1913 were in law in the possession of Alamelumanga Thayaramma or of the family, she had been undoubtedly using them. With reference to one of the jewels, *vanki*, No. 6 in Civil Suit No. 418 of 1912, there is the evidence of Namberu-

mal Chetty that his wife also had been using it; but with reference to the other jewels he does not give similar evidence. There is the evidence of the sister no doubt that she as well as Namberumal Chetty's wife had been using these jewels; but I am not prepared to believe that evidence, because Nambreumal Chetty's wife had other jewels. Whether they belonged to her solely or whether they belonged to the family makes no difference, so far as this question is concerned. She had other jewels for her own use and it is not likely, therefore, that she would have used the plaint jewels, and the fact that Namberumal Chetty does not give evidence on that point against the plaintiff's case with reference to the use of the jewels, is almost conclusive. I, therefore, have no hesitation in holding that the plaintiff had been using them. I am equally satisfied that they were made for the use of the plaintiff, because at the time they were made there was no other lady in the family who was in need of them. Namberumal Chetty married his wife only after most, if not all, of the jewels in question were made. We have, therefore, these facts about which I feel no doubt that the jewels were made for the use of Alamelumanga Thayaramma and that Alamelumanga Thayaramma alone had been wearing them. There is also the fact proved that Namberumal Chetty's wife, the only other lady in the family, had other jewels of about the same value for her use. Namberumal Chetty states no doubt that some of these jewels were given to her by her own mother. That stands only on his own testimony unsupported by any other evidence, and I am not disposed to accept that evidence; but even if it is true, I do not think it would make much difference.

When we find in a Hindu family jewels made —I will assume for this purpose from family funds—for the use of a lady and when we find that she alone has been using them and it is also proved that when other ladies came into the family, they had similar jewels made for their use and they have been using those particular jewels, then the law is, that such jewels form their separate property and they are not family property. If there should be some evidence to show that the same jewels which were being used by one lady were also used by the other lady, or they were kept in the possession of one person in the family for the benefit of and for being handed over to the others for using them, the presumption arising from use and possession will be rebutted. In the absence of such rebutting evidence, the presumption certainly is that the jewels belonged to the ladies who alone have been using them. There are many cases to that effect decided by Mr. Justice Benson and myself on the appellate side on appeals from this side of the High Court.

In this case the only evidence adduced on behalf of Namberumal Chetty and Vedavalli Thayaramma is that they were made some time after the marriage and could not have been, therefore, given to Alamelumanga Thayaramma at the time of her marriage. Assuming that it is so, that would make no difference, because it is conceded that there was one, and that a very valuable jewel—the diamond *kammal*—which was made some years after the marriage and given to her and that that was admittedly her *stridhanam*. The fact that some of these jewels were made subsequently, in my opinion, makes no difference, even if it is proved; but, as I said, I am not satisfied that the accounts can be relied upon in order to show that these were the jewels which were made on the occasions referred to in the accounts. As to the actual gift itself of the jewels to the plaintiff, there is a conflict of evidence as to whether these jewels or any of them were given to her at her marriage. Many of the jewels that are spoken to are jewles which are likely to be given to a woman at the time of her marriage and plaintiff's evidence appears to me to be more reliable than the evidence of Namberumal Chetty and his witnesses.

On the whole I come to the conclusion, therefore, that these jewels formed Alamelumanga Thayaramma's *stridhanam* property and I accordingly pass a decree in her favour in Civil Suit No. 418 of 1912, as prayed for with costs. I dismiss Civil Suit No. 126 of 1913 with costs.

Civil Suit No. 418 *of* 1912 *decreed.*

Civil Suit No. 126 *dismissed.*

HAR NARAIN *v.* HAR PRASAD.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1326 OF 1912.

April 8, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

HAR NARAIN—DEFENDANT—APPELLANT

versus

HAR PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Subsequent mortgagee redeeming prior mortgage—Intention to keep prior mortgage alive.

Where a simple mortgagee of certain property paid a prior mortgagee of a portion of the property but the mortgagor and not the simple mortgagee took possession of the portion thus redeemed:

Held, that the intention of the simple mortgagee was not to keep alive the prior mortgage for his benefit.

Second appeal from the decision of the Subordinate Judge of Agra, dated 8th July 1912.

FACTS.—This is a suit on foot of a mortgage dated 4th of July 1872. It appears that the mortgagor had executed a bond in favour of one Janki Prasad in 1891 for Rs. 116, out of which Rs. 100 were left with the latter to pay off a usufructuary mortgage of February 6th, 1866. Janki Prasad brought a suit for sale. The property was put for sale and was purchased by the defendant, Har Narain, on 20th November 1909. He now contends that he has priority over the plaintiffs by reason of Janki Prasad having discharged the earlier mortgage of 1866. Both the Courts below decreed the suit.

Mr. *S. K. Dar*, for the Appellant:—Har Narain can hold up the prior usufructuary mortgage as a sheild. It must be presumed that he intended to keep the prior mortgage alive inasmuch as it was to his benefit to do so. What has to be looked to is the intention and intention has to be gathered from the benefit likely to accrue. He relied on *Baldeo Parshad* v. *Uman Shankar* (1), *Mamraj* v. *Ramjilal* (2), *Tulsa* v. *Khub Chand* (3).

[BANERJI, J., referred to *Muhammad Sadiq* v. *Ghaus Mohammad* (4)].

Mr. *Benode Behary*, for the Respondent, was not heard in reply.

JUDGMENT.—The only question in this appeal which arises out of a suit for sale upon a mortgage is whether the appellant has priority over the plaintiffs. The mortgage in favour of the plaintiffs' predecessor-in-title was made on the 4th of July 1872. In 1891 the mortgagor executed a simple mortgage in favour of one Janki Prasad for Rs. 116. The property hypothecated in that mortgage was the property comprised in the earlier mortgage of 1872 and some other property.

Out of the consideration for the mortgage of 1891 Rs. 100 was left in the hand of Janki Prasad for payment of a still prior usufructuary mortgage of 1866. This mortgage was discharged out of the consideration for the mortgage of 1891. Janki Prasad brought a suit upon his mortgage, obtained a decree and in execution thereof caused the property mortgaged to him to be sold and the appellant Har Narain purchased it. He contends that he has priority over the plaintiffs by reason of Janki Prasad having discharged the earlier mortgage of 1866. It has been held by this Court in several cases and also by their Lordships of the Privy Council that the question in a matter of this kind is one of intention, *i.e.*, whether it was the intention of the parties that the prior mortgage should be kept alive for the benefit of the subsequent transferee of the property who discharged it. In the absence of clear and express evidence the presumption will be that the intention was to keep up the prior mortgage for the benefit of the transferee. In the present case, however, it seems to us that the intention, so far from being that of keeping up the prior mortgage, was to extinguish it. The prior mortgage of 1866 was a usufructuary mortgage. Janki Prasad took a simple mortgage which included other property, and as soon as the prior mortgagee was paid up the mortgagor and not Janki Prasad took possession of the mortgaged property, so that it cannot be said that he stepped into the shoes of the prior usufructuary mortgagees. Under these circumstances the appellant is not entitled to claim priority over the plaintiffs and this appeal must fail. We accordingly dismiss it with costs including fees on the higher scale. We extend the time for payment to six months from this date.

Appeal dismissed.

(1) 4 Ind. Cas. 810; 32 A. 1; 6 A. L. J. 987.
(2) 5 Ind. Cas. 177; 7 A. L. J. 15.
(3) 13 A. 581; A. W. N. (1891) 193.
(4) 7 Ind. Cas. 200; 7 A. L. J. 914; 33 A. 101.

SIVARAMA PILLAI v. VEERAPPA PILLAI.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 8 OF 1913.

March 12, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Oldfield.

M. J SIVARAMA PILLAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

V. VEERAPPA PILLAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 31, 33 (1)—Suit for restitution of conjugal rights—Proof of marriage—Presumption—Minor wife—Execution against parents.

In a suit for restitution of conjugal rights very strict proof of marriage is essential; but in the absence of proof to the contrary only the general evidence of marriage is sufficient to justify the presumption that all the necessary marriage ceremonies were performed.

Surjamoni Dasi v. *Kalikanta Das*, 28 C. 37; 5 C. W. N. 195; *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar*, 12 C. 140, distinguished.

The new Civil Procedure Code has abolished imprisonment as one of the modes of executing a decree for restitution of conjugal rights, but still a Court can pass an effective decree: and where the wife is a minor her parents can be directed to hand her over to her husband and in case of their default or failure to show sufficient cause therefor, execution can proceed against their persons as well as property.

Ajnasi Kuar v. *Suraj Prasad*, 1 A. 501, distinguished.

Appeal against the decree of the Madras City Civil Court in Original Suit No. 281 of 1912.

Mr. *V. N. Kuppa Row*, for the Appellants.

Mr. *S. Duraisami Aiyer*, for the Respondent.

JUDGMENT.—It is argued first that the City Civil Court Judge should have granted the adjournment asked for by defendants on 10th January 1913. We gave them a special opportunity to satisfy us that their absence, and particularly that of 1st defendant, on that date was unavoidable. But his affidavit now produced does not convince us that it was, or that in view of his conduct throughout the case his deliberate intention was not to protract the proceedings. We, therefore, cannot interfere with the decision on this ground.

On the merits exception has been taken to the learned Judge's finding against defendant's objection to the marriage between plaintiff and 3rd defendant on the ground that the necessary ceremonies were not completed. The foundations for that finding were plaintiff's general evidence that all the essential ceremonies were performed and the absence of any evidence to contradict it; and it is alleged that they were insufficient, because strict proof of the marriage being necessary, the learned Judge should have found, *firstly*, what the particular ceremonies essential to a valid marriage were, and, *secondly*, whether each was performed. The decision in *Surjamoni Dasi* v. *Kalikanta Dasi* (1) has been relied on in support of this contention; and, no doubt, the head-note of that case supports it. We do not think, however, that the proposition thus generally stated can be reconciled with the only authority cited in the judgment, which is in point, or that the intention was to enunciate it as of general application and without reference to the pleadings and findings then before the Court.

We observe with due respect that the effect of the only authority referred to, which was in point as dealing with a claim for restitution of conjugal rights, and not with a question of inheritance *Brindabun Chandra Kurmokar* v. *Chandra Kurmokar* (2) appears to have been misapprehended. For that decision was wrongly referred to as based on the materials before the Court independently of or concurrently with the presumption arising from the evidence of the celebration of a marriage, since the presumption was in fact regarded as outweighing the finding against the validity of the marriage, based on the absence of evidence of the performance of one ceremony. The weight of the latter of these two cases as a departure from the opinion of the same Court in the earlier is consequently impaired.

Next the judgment in *Surjimoni Dasi* v. *Kalikanta Das* (1) contains no full statement of the pleading, in which the validity of the marriage was denied, or regarding the course of the trial. It does, however, indicate that the parties differed as to the particular ceremonies essential to a valid marriage and realised the necessity for

(1) 28 C. 37; 5 C. W. N. 195.
(2) 12 C. 140.

proof of them, the insufficiency of the lower Court's finding being the basis of this part of the decision. The finding of the first Appellate Court is extracted in the judgment, and it did not deal definitely with the matter in contest. That of the Court of first instance is summarised; and, though we must respectfully express our inability to reconcile the references to it with the learned Judge's conclusion, it is material that it was rejected also on the ground that the trial was defective. The case before us can be distinguished on the ground that defendants must be taken to have declined at the trial to dispute the necessity for particular ceremonies and that the Court's general finding was, therefore, justified by the pleadings and the course of the proceedings.

The plaint in the present case alleged generally that the marriage between the plaintiff and the 3rd defendant took place in accordance with law and custom. The written statement contained a general denial that the necessary ceremonies had been fully completed. On 7th October 1912, when issues were framed, the 1st defendant, 3rd defendant's father and guardian *ad litem*, was called on to file a further written statement within two weeks as to what ceremonies were left unperformed. This he did not do. He was also in another connection called on to appear on 21st October 1912 in person. When the case was taken up on 28th October 1912, he was examined and said "I do not know who was the priest, who officiated at the marriage or what his caste was. I cannot say what the other ceremonies of marriage were, which were not performed in this case. The *tali* tying ceremony took place." Clearly, when 1st defendant made these statements, he had had full warning that he would have to specify the omitted ceremonies. It was reasonable for the learned Judge to call on him to do so in order that time might be saved and plaintiff's evidence might be restricted to essential points; and we cannot dismiss his failure from consideration. At the next hearing he was absent and his Pleader withdrew from the case. A decision in plaintiff's favour was accordingly given on his evidence alone, his witnesses (including, it is said, the officiating priest) not being examined. The finding under consideration is general, but it is in terms of that evidence, that all the marriage ceremonies were duly performed. We hold that after 1st defendant's implied refusal to place the necessity for and performance of particular ceremonies in issue, nothing more specific was possible or necessary. This objection to the decision, therefore, fails.

The next contention is that the decree should have included a direction under Order XXI, rule 33 (1), forbidding execution against 3rd defendant by her detention in prison. Such a direction was not asked for at the trial. It can still be given by the lower Court. And no special circumstances have been brought to our notice which render it advisable that that we should give it now.

First and 2nd defendants complain next of the injunction in the decree, requiring them to deliver 3rd defendant into the custody of plaintiff within a month, urging that, though she is a minor and during the trial admittedly was under their control, they should not be liable to commitment for disobedience to an order, which could not be enforced against her, and which owing to her recalcitrance or to other causes beyond their control they may be unable to obey. The injunction, they concede, would not be open to objection, if it merely restrained them from preventing plaintiff obtaining possession of her. The authorities cited in support of this are *Lall Nath Misser* v. *Sheoburn Pandey* (3) and *Gatha Ram* v. *Moohita Kochin* (4). In the first case the ground of the decision is not clearly stated, and it was observed that an injunction against the person detaining the minor wife would in any case have been unjustifiable, when there was no decree against the minor herself. In the second the relevant portion of the decision was *obiter* and dealt directly only with enforcement of the decree against the wife, not the other defendants, who were detaining her. Both cases were decided with reference to section 200, Act VIII of 1859, the Code then in force, which might be supposed to have authorised the view that restitution decrees were merely declara-

(3) 20 W. R. 92.
(4) 23 W. R. 179; 14 B. L. R. 298.

tory because it made no separate provision for their execution. It is possible that it was in consequence of the views expressed in those cases that in Act IX of 1877 explicit provision was made in section 260 for the enforcement by imprisonment or attachment of property of decrees in such suits and in section 259 for the similar enforcement of those in suits for the recovery of a wife. In the present Code the reference to suits for recovery of a wife has been omitted from Order XXI, rule 31, and the provision for enforcement of decrees in restitution suits in rule 32 is qualified by rule 33, conferring discretion on the Court to refuse to enforce them by imprisonment. The result is that since 1877 the law has included explicit provision for the enforcement of such decrees without restriction of its applicability in the case either of the wife or other defendants. And accordingly the passing of a decree enforceable against the latter being contemplated, and the only question remaining being as to its form, we conceive that it should be framed in the most effective manner possible. The form of injunction proposed by defendants was considered in *Ajnasi Kuar* v. *Suraj Prasad* (5) and it was held that a person, who allowed the wife to reside in her house, did not infringe it. The wife in that case was of full age, and, no doubt, on that account no more stringent injunction would have been appropriate. Here, the possession of a minor being in question, there was no reason why the lower Court should not frame its injunction, as it has done, in a more effective way to secure to plaintiff the relief it was decreeing. It is not suggested that 1st and 2nd defendants will have to comply with the decree by delivering 3rd defendant to him in Burma, where he is employed, or anywhere except at their home on his demand. If they are unable to do so, they will have an opportunity of showing that the cause was beyond their control, before execution issues against them or their property. We do not consider that the decree was framed wrongly with reference either to the law or the circumstances of the case and we, therefore, confirm it in this respect.

The remaining ground of appeal argued is against the order directing defendants to pay all plaintiff's costs notwithstanding that a portion of his claim, separately valued at Rs. 220, for the recovery of certain property was withdrawn. Clearly defendants should not have been made liable for the Court-fee on this amount, and the decree must be modified to exempt them from liability in respect of it. The appeal is allowed to this extent, but is dismissed in other respects. Defendants will pay plaintiff's costs. The time within which they must deliver the 3rd defendant to the plaintiff is extended to one month from the date of any demand he may make after this judgment.

Appeal allowed.

(5) 1 A. 501.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 134 OF 1913.
March 31, 1914.
Present:—Justice Sir George Knox, Kt.
BOHRA MOTI RAM AND ANOTHER—PLAINTIFFS—APPLICANTS
versus
LAL KHAN *alias* LALA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 75—Instalment bond—Waiver.

A bond payable by instalments contained the provision that in default of payments on due dates the whole amount with interest shall be payable:

Held, that the creditor was not compelled to sue for the whole amount on default of any one instalment only and was, therefore, competent to sue for any instalment due within the period of three years.

Civil revision against the order of the Small Cause Court Judge of Agra, dated 14th July 1913.

FACTS.—The plaintiffs brought a suit for recovery of Rs. 250 due on an instalment bond in the Court of Small Causes at Agra. The bond was dated 11th September 1908

and was for Rs. 200 payable by six monthly instalment of Rs. 25 each, and in default thereof the whole money was payable in a lump sum with interest at Rs. 2 per cent. per mensem. The plaintiffs alleged that two instalments were paid and endorsed on the bond. The Judge of the Small Cause Court held that as the payment did not appear in the handwriting of the defendant, it did not save limitation under section 20 of the Indian Limitation Act. As Article 75 was not set up in the plaint, the plaintiffs could not, therefore, take advantage of waiver. The learned Judge holding this view dismissed the claim without entering into other questions. The plaintiffs applied under section 25 of the Small Cause Courts Act in the High Court.

Mr. *S. K Dar*, for the Applicants. He relied on *Ajudhia* v. *Kunjal* (1).

Pandit *Mohan Lal Sandal*, for the Respondents, contended that the plaintiffs came with the allegation that two instalments were paid which the Judge did not believe and their case was not that of waiver. They came with a false case. He cited *Abinash Chandra Bose* v. *Bama Bewa* (2).

He further contended that the High Court on the revisional side did not interfere under section 25 of the Small Cause Courts Act on the question of limitation. He referred to *Sarman Lal* v. *Khuban* (3), *Sarman Lal* v. *Khuban* (4).

The Court referred to *Shankar Prasad* v. *Jalpa Prasad* (5), *Maharaja of Benares* v. *Nand Ram* (6).

Mr. *S. K. Dar* was not heard in reply.

ORDER.—This is an application under section 25 of the Small Cause Courts Act asking this Court to set aside the decree of the Court below and to decree the suit with costs. According to the plaint on which the suit was instituted the defendant was a judgment-debtor against whom a decree for a large sum of money had been passed. The decree was compromised and the plaintiffs say that they accepted from the respondent a bond for the sum of Rs. 200 payable by instalments. They say that two of the instalments have been paid and that nothing has been paid on account of the remaining six instalments. They accordingly brought this suit for recovery of the amount due under the six instalments. The respondents denied execution of the bond and set up a further plea that limitation barred the suit. The Court of Small Causes did not come to any conclusion on the first point; but held that the suit was time-barred. From the tenor of the judgment the Court below appears to have overlooked the principle laid down in *Shankar Prasad* v. *Jolpa Prasad* (5) re-affirmed in the *Maharaja of Benares* v. *Nand Ram* (6). The former case, it is true, relates to a decree payable by instalments. But the principle contained in that was expressly accepted and acted upon in the latter case which was the case of a bond payable by instalments. I hold that the plaintiff's suit was not time-barred, and setting aside the decree of the Court below, I send the case back to that Court with an order directing it to put the case again to its number on the list of undecided suits and dispose of it on the other pleas raised according to law. Costs will follow the event.

Decree set aside; Suit remanded.

(1) 30 A. 123; 5 A. L. J. 72; A. W. N. (1903) 36.
(2) 4 Ind. Cas. 17; 13 C. W. N. 1010.
(3) 16 A. 476; A. W. N. (1894) 183.
(4) 17 A. 422; A. W. N. (1895) 112.
(5) 16 A. 371; A. W. N. (1894) 115.
(6) 29 A. 431; 4 A. L. J. 336; A. W. N. (1907) 139.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 223 AND 289 OF 1911.

January 20, 1914.

Present:—Mr. Justice Miller and Mr. Justice Tyabji.

KACHI YUVA RANGAPPA KALAKKA THOLA UDAYAR—APPELLANT IN No. 223 OF 1911 AND RESPONDENT IN No. 289 OF 1911.

versus

KULANDAI AYAL—RESPONDENT IN No. 223 OF 1911 AND APPELLANT IN No. 289 OF 1911.

Limitation Act (XIV of 1859), Art. 129—Hindu Law—Impartible estate—Widow of junior

member—Right to be maintained out of estate—Member cannot bind his heirs by his compromise—Nature of widow's maintenance—Facts to be considered, when allowing arrears—Denial—Burden of proof.

The widow of a junior member of the family of a holder of an impartible estate is entitled to maintenance out of the impartible property.

It is at least doubtful whether such member can bind by a compromise his heirs to receive a particular amount as maintenance out of the impartible estate in lieu of such rights as they might have independently of his right to receive maintenance for his life.

The widow's maintenance is properly such allowance as may keep her in a suitable condition of comfort, whereas the maintenance of a male member of a joint family represents at least to some extent his interest in the property of the family.

In fixing the rate of arrears of maintenance to be paid to a widow it is not improper to take into consideration the fact that the widow, during all the time she received no maintenance, did not borrow money, had no difficulty in obtaining all the comforts which she required, delayed long to demand maintenance and would be receiving a lump sum.

Under Article 129 of the Limitation Act, where there has been no denial, there is no bar, and the person pleading the bar of the Article must prove the denial.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in Original Suit No. 9 of 1910.

Mr. *S. Sreenivasa Aiyangar*, for the Appellant.

Mr. *K. Sreenivasa Aiyangar*, with him Mr. *R. Rangasami Aiyangar*, for the Respondent.

JUDGMENT.—It is claimed for 1st defendent that the suit is barred by limitation on the ground that plaintiff's right to receive maintenance from the Zemindar was denied more than twelve years before the date of the plaint. It is on the 1st defendant to prove this denial and, in our opinion, he has failed. We agree with the Subordinate Judge that the four witnesses examined on the 1st defendant's side are untrustworthy and the story which they tell seems to us to be improbable. Eliminating that evidence there remains only the fact that no maintenance has been paid to plaintiff at any time since her husband's death and the plaintiff's allegation in Exhibit U that when the Zemindar was asked to provide for her, he promised to arrange—a statement in paragraph 12 of the plaint is relied on as an admission of the alleged denial, but it does not amount, in our opinion, to an admission of the denial of a right to receive maintenance. The evidence is insufficient to prove that the right was denied.

The alleged denial not being proved there is no room for the application of Article 129 of the first Schedule of the Limitation Act, and accepting the view presented on behalf of the 1st defendant that that Article is the specific Article applicable to a suit for future maintenance there is no bar because there has been no denial.

The 1st defendant contends that the plaintiff as widow of a junior member of his family is not entitled to maintenance out of the Zemindari. It having been decided in this Court that junior members of the family of the holder of an impartible estate are entitled to maintenance out of the impartible property, there is no reason why their widows should not also be entitled to maintenance. The decision of this Court in *Therumal Rao Sahib* v. *Arni Rangasawmy* (1) shows that the juniors are to be considered as members of a joint family of which the senior is also a member. Accepting that as the principle on which the decision is to be based, we can hardly refuse to treat the case of the widow as though she were the widow of a member of a joint family and on that footing to admit her right to maintenance.

A further contention is that the plaintiff cannot claim maintenance from the Zemindar, because her husband in compromising a suit in which he claimed Zemindari accepted by his guardian an allowance of Rs. 750 a month for himself and his two brothers, and agreed to give up any claim to succeed to the Zemindari.

We think it unnecessary to say more on this point than that this allowance charged on certain villages of the Zemindari is clearly, on the construction of Exhibit III, nothing more than a maintenance allowance for the three brothers and that the compromise did not operate to give the plaintiff's husband a separate ownership of any part of the Zemindari descendible to his heirs except by a division of the estate, and that was clearly not intended even if it could be effected. It is at least doubtful whether the plaintiff's husband

(1) 15 Ind. Cas. 412; 23 M. L. J. 79; (1912) M. W. N. 790; 12 M. L. J. 245.

could bind his heirs to receive a particular amount as maintenance out of the Zemindari in lieu of such rights as they might have independently of his right to receive maintenance for his life. The compromise does not, therefore, stand in the way of the plaintiff's claim.

There remains for consideration the question of the amount to which the plaintiff is entitled. The 1st defendant does not quarrel with the Subordinate Judge's decree so far as it relates to maintenance falling due after the suit, but the plaintiff in a cross-appeal challenges it as making insufficient provision for her wants.

As regards arrears, the 1st defendant attacks the decree on the ground that arrears ought not to be awarded at the same rate as future maintenance, it not having been shown that the plaintiff was, as she alleged, obliged to borrow money to maintain herself.

As regards the amount of maintenance, though we are disinclined to interfere with the discretion of the Subordinate Judge, we think that the allowance he has made should in a way be adjusted by a decrease in the rate at which arrears are to be paid and an increase in the rate of future maintenance. In 1845, a lady in this family received only Rs. 40 a month, but having regard to the increased cost of living to which the Subordinate Judge refers, to the more than proportionate increase in the income of the Zemindar, to the fact that the plaintiff's husband was allowed Rs. 250 a month, we do not think that an allowance of Rs. 80 a month exceeds what is required to maintain the plaintiff in circumstances suitable to her position and for the maintenance after the suit. We shall modify the decree accordingly. But in regard to the arrears it has to be remembered that the plaintiff is a widow and not entitled to any share or interest in the property of her husband's family: the widow's maintenance is properly such allowance as may keep her in a suitable condition of comfort, whereas the maintenance of a male member of a joint family represents at least to some extent his interest in the property of the family. We think, therefore, that it is not improper to take into consideration the fact that the plaintiff has not shown that during the twelve years in which she received nothing from the Zemindar, she had to borrow money or had any difficulty in obtaining all the comforts which she required. She allowed one year's allowance to be barred by limitation, a fact which suggests that her need of money was at least not extreme. We have to consider also the fact that she is now to receive in a lump sum the allowance which she has for so long delayed to demand, and on the whole we think that a sum of Rs. 6,000, *i.e.*, slightly more than Rs. 40 a month, is as much as she ought now to be given. We modify the decree accordingly and confirm it in other respects. As regards costs in the lower Court the plaintiff will receive proportionate costs on the amount we have allowed her and 1st defendant will bear his own costs. In this Court the 1st defendant will pay plaintiff's costs of the Appeal No. 223 of 1911 and of the Appeal No. 289 of 1911, the parties will bear their own costs.

Decree modified.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 197 OF 1913.

March 3, 1914.

Present:—Mr. Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

CHAS. R. COWIE & Co.—APPELLANTS

versus

W. H. A. SKIDMORE—RESPONDENT.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 40—*Poverty and other sufficient cause—Burden of proof—"Some part thereof," meaning of.*

When a judgment-debtor is arrested and brought before a Court the burden is on him to prove that from poverty or other sufficient cause he is unable to pay the amount of the decree or if that amount is payable by instalments, the amount of the instalment due.

A Court should refuse to direct a release of a judgment-debtor under Order XXI, rule 40 of the Civil Procedure Code, if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, as the case may be, and has refused or neglected to do so.

The words "some part thereof" in rule 40 (2) (*d*) of Order XXI refer to decrees for payment of money generally and not only to instalment decrees.

CHAS. R COWIE & CO. *v.* W. H. A. SKIDMORE.

Mr. *Mc'Donnell*, for the Appellants.
Mr. *Bijapurkar*, for the Respondent.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The appellants obtained a decree against the respondent on the 6th January 1913 for Rs. 2,870 and costs. Two abortive attempts were made in May and July to execute this decree by applications for the arrest and imprisonment of the judgment-debtor and on the 13th November last another application was made to the same effect. This time the judgment-debtor was arrested and brought before the learned Judge on the Original Side who passed the following order:—"The judgment-debtor states that he is and has been since the passing of the decree unable to pay the debt. Mc'Donnell for judgment-creditor states that he could get evidence to show that the judgment-debtor has during the last 12 months been in a position to pay a portion of the decree and that he is not in a position to bring evidence to show that he was able to pay his debt in full under Order XXI, rule 40 (1). I order the release of the debtor as the decree was payable by instalments." This order is appealed against and it is urged that the learned Judge on the Original Side erred in ordering the respondent's release. Order XXI, rule 40 (1), is as follows: "Where a judgment-debtor . . . . . is brought before the Court after being arrested in execution of a decree for the payment of money and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be." Appellant's Counsel urges that the burden of proof lay on the respondent to prove that he was unable from poverty or other sufficient cause to pay the amount of the decree and quotes an Upper Burma case *Bhaimia Ahmed Ismailjee* v. *Kadir Set* (1) in support of such contention. I am of opinion that he is right. The case is one that comes both under section 102 and section 106 of the Evidence Act. The law allows imprisonment to recover debt and *prima facie* the judgment-debtor was liable to be committed. It was for him to traverse that liability by proving poverty or other sufficient cause. Moreover, such reasons would be especially within his knowledge and so section 106 is applicable.

(1) U. B. R. (1897-01) 279 (Civ.).

It is further urged that the learned Judge erred in ordering the release of the judgment-debtor as the decree was not payable by instalments. Order XXI, rule 40 (2), says: "Before making an order under sub-rule (1) the Court may take into consideration any allegation of the decree-holder touching any of the following matters;

(*a*) ...
(*b*) ...
(*c*) ...
(*d*) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, means of paying it;
(*e*) ..."

The learned Judge was apparently of opinion that as the decree was not payable by instalments and as the decree-holders could not prove that, since the date of the decree, the judgment-debtor could have paid the amount of the decree *in full*, he was entitled to be released. This seems to be reading into Order XXI, rule 40 (2), when construing its meaning with reference to Order XXI, rule 40 (1), the following meaning, namely, that if the amount of the decree is not payable by instalments but payable in one lump sum, the decree-holders have to prove that since the date of the decree the judgment debtor could have paid the *whole* amount before they can ask the Court to take his refusal or neglect to do so into consideration—that it is only in the case of a decree payable by instalments that the Court can take into consideration his refusal or neglect to pay a portion of the decree, the portion apparently to be the amount of the instalment due when he has since the date of the decree had the means to do so. I do not read the sub-sections in this way. I read their meaning to be as follows: When the judgment-debtor is arrested and brought before the Court it is open to him to prove to the Court that from poverty or other sufficient cause he is unable to pay the amount of the decree, or if that amount is

payable by instalments the amount of the instalment due. If he can do so, the burden of proof lying on him and the decree-holders being given the opportunity of proving the contrary, the Court can order his release. *But* before doing so the Court can take into consideration any of the acts of bad faith set out in sub-rule (2), whether the decree is payable in *one lump sum* or by *instalments*. Sub-rule (2) refers to sub-rule (1) generally, and I cannot read into sub-rule (2) the meaning that portions of the words in clause (*d*) of it are only to refer to portions of words in sub-rule (1). To read such a meaning into the section would mean that, if a decree was passed against a judgment-debtor for Rs. 5,000 and the decree-holder could prove that since it was passed he had been able and was able to pay Rs. 4,950 he would not be able to get him committed as he could not prove that the judgment-debtor could pay the remaining Rs. 50.

This, in my opinion, was never meant, and, in my opinion, the ordinary meaning to attach to sub-rule (2) (*d*) is that if the decree-holder can prove that since the passing of the decree the judgment-debtor has had the means to pay the amount of the decree, whether it is payable in one lump sum or by instalments, in whole or in part, the Court can take into consideration such fact before passing an order under sub-rule (1).

It is urged by respondent's Counsel that all witnesses should have been produced by the decree-holder when the judgment-debtor was produced before the Court. That seems unreasonable, as the decree-holder is not in a position to tell when a judgment-debtor will be arrested, especially if he is trying to evade arrest, and he may not be able to collect his witnesses at a minute's notice Order XXI, rule 40 (3), provides for such a situation as it gives the Court power, while any of the matters in sub-rule (2) are being considered, to order the judgment-debtor to be detained in the civil prison or leave him in the custody of an officer of the Court, or release him on his furnishing security to the satisfaction of the Court for his appearance when required by the Court.

The question remains as to what should be done. I would set aside the order of the learned Judge on the Original Side and direct that on application by the decree-holder he do again secure the attendance of the judgment-debtor or attempt to do so, and that if such attendance be secured, he do proceed to dispose of the case in accordance with the procedure indicated by me in this order.

I would give the appellants their costs in this appeal, fixing their Advocate's fee at three gold *mohurs*.

TWOMEY, J.—I agree that we should construe the words "some part thereof" in rule 40 (2) (*d*) in their general sense, and not as referring only to the case of a decree payable by instalments. Reading sub-sections (1) and (2) together I think the intention is clearly that even if the debtor succeeds in satisfying the Court that he is unable to pay the full amount of the decree (or instalment as the case may be), the Court should nevertheless refuse to direct his release if the judgment-creditor shows that the debtor has been in a position to pay a *substantial* part of the decretal amount (or instalment as the case may be) and has refused or neglected to do so. For such refusal or neglect is an act of bad faith only less in degree than a similar refusal or neglect in respect of the whole amount due. Sub-section (2) (*d*) in its ordinary grammatical meaning permits the Court to take into account the minor as well as the major act of bad faith, and it would, in my opinion, be unreasonable to interpret the clause otherwise. I, therefore, concur in the proposed order.

Order of release set aside.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 762 OF 1911.
March 30, 1914.
Present:—Mr. Justice Shah Din and Mr. Justice Chevis.
GUJAR—DEFENDANT—APPELLANT
versus
AULIYA AND OTHERS—PLAINTIFFS, ABDUL KARIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Transfer of reversionary rights by some reversioners to another reversioner, validity of—Acquiescence — Waiver — Assignment — Relinquishment — Reversioner suing for pre-emption, whether debarred from contesting validity of alienation—Necessity—

GUJAR *v.* AULIYA.

Reversioner only bound to pay amount paid by original vendee for necessity—Immaterial what pre-emptor might have paid in respect of alienation—Deed of relinquishment by some reversioners in favour of others—Tantamount to assignment—Valid.

All that was decided in *Tata* v. *Abdullah Khan*, 66 P. R. 1897 (F. B.) was that among agriculturists governed by customary law a reversioner of a deceased male proprietor, whose widow is in possession of his estate, cannot transfer his reversionary rights to a stranger so as to engraft the latter into the family and to enable him to contest any alienations made by the widow to the prejudice of her husband's reversioners. The Full Bench ruling is no authority for the proposition that one reversioner of a deceased male proprietor is legally incapable of transferring his rights of succession to another reversioner.

By bringing a suit for pre-emption in respect of an alienation by a widow, a reversioner must be taken to have admitted that the alienation was legally valid, and his sons are bound by their father's recognition of the validity of the alienation.

Although a pre-emptor might have paid a larger amount before obtaining possession of the land alienated by a widow, a reversioner in a suit challenging the validity of the alienation cannot be called upon to pay to the said pre-emptor more than what was advanced by the original vendee to the widow for a necessary purpose.

Where some of the reversioners of a male proprietor executed a deed of relinquishment of their shares in favour of the other reversioners in consideration of the latter having undergone much trouble and expense in connection with a declaratory suit which they had successfully fought in respect of an alienation by the widow of the said male proprietor:

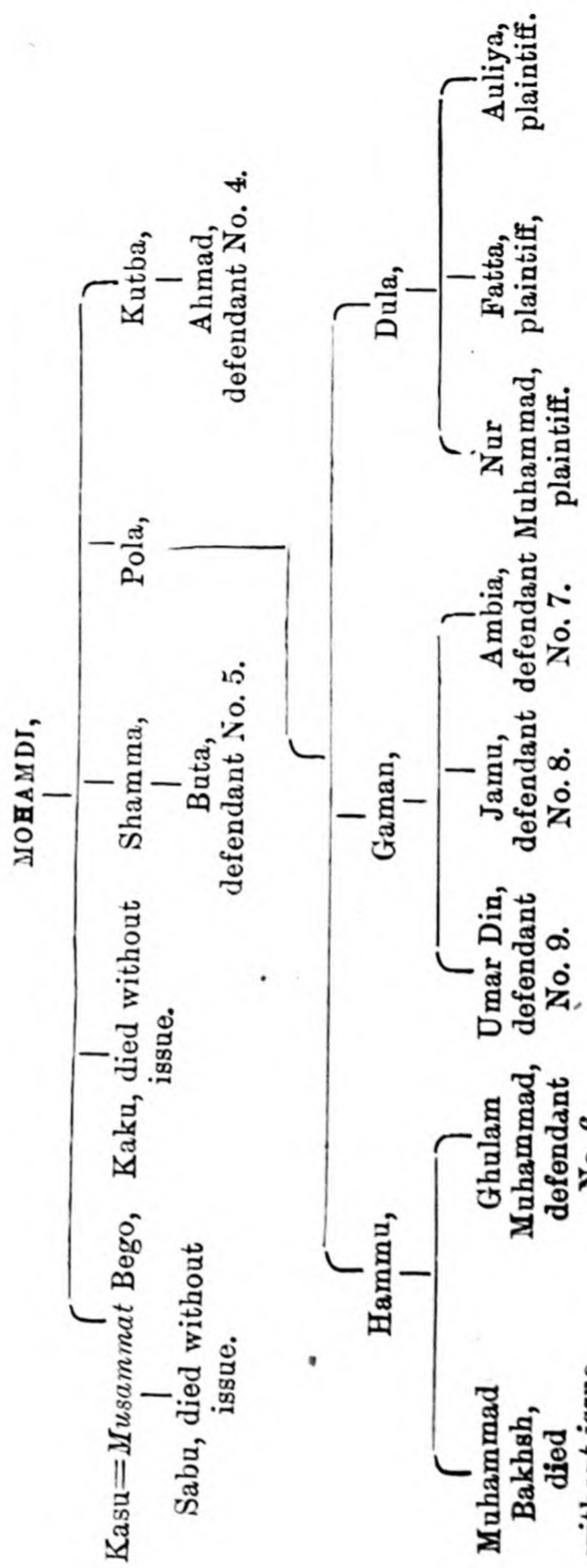
Held, that the deed was in effect and must be treated as a deed of assignment of reversionary rights, and since the assignment was made by some of the reversioners in favour of the remaining reversioners, it was a perfectly valid assignment.

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 16th day of March 1911, varying that of the Subordinate Judge, 1st class, Jullundur, dated the 26th day of July 1910, decreeing claim on payment of Rs. 522.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Mr. *Fazl-i-Hussain*, for the Respondents.

JUDGMENT.—The following pedigree-table will explain the relationship of the parties:—



On the 11th April 1904 *Musammat* Bego, widow of Kasu, sold the land which had come to her from her husband to her brother's son, Abdul Karim, for Rs. 1,445-8. This sale gave rise to three suits:—

(1) A suit brought by Dula, son of Pola, on the 7th March 1905, for a declaration that the sale in question shall not affect his reversionary rights. He obtained a decree on the 10th June 1905 on a confession of judgment by *Musammat* Bego and the vendee Abdul Karim, the sale being declared wholly void as regards the plaintiff Dula's rights of reversion.

GUJAR *v.* AULIYA.

(2) On the 15th February 1905 Ram Singh, father of defendants Nos. 2 and 3 in the present litigation, sued the vendor and the vendee for pre-emption in respect of the land sold.

(3) Gamun, son of Pola, a reversioner of *Musammat* Bego, also brought a similar suit for pre-emption.

Each pre-emptor obtained a decree for half of the land sold on the 15th June 1905, the price of the land being fixed at Rs. 940. Gamun did not pay the money into Court in accordance with the decree and so his suit stood dismissed; the rival pre-emptor, Ram Singh, paid the entire amount and obtained possession of the whole land.

On the 17th August 1905 all the reversionary heirs of Kasu, including Gamun, who, as we have seen, had obtained a decree for pre-emption but had allowed it to lapse, executed a deed of release of their reversionary rights in favour of Dula. The deed specifies in detail the several shares of the reversioners and goes on to say that since Dula has undergone much trouble and expense in connection with the declaratory suit which he has successfully fought in respect of the sale of the 18th April 1904 by *Musammat* Bego, the executants have relinquished their reversionary rights in Kasu's land in favour of Dula, and on the death of *Musammat* Bego, Dula shall be entitled to take possession of the land as sole owner thereof.

Musammat Bego died in August 1909, and in October 1909 Dula brought the present suit against Abdul Karim, the vendee from the widow, and the sons of Ram Singh, defendants Nos. 2 and 3, for possession of the land left by the widow, at the same time impleading the other reversionary heirs as *pro forma* defendants. Dula plaintiff died in November 1909, and his sons were brought on the record as plaintiffs in his place. The Subordinate Judge decreed the suit conditional on payment by the plaintiffs of Rs. 522, holding that legal necessity for Rs. 522 had been established and that the sale by *Musammat* Bego in 1904 was only valid to the extent of that sum. On appeal the learned Divisional Judge has held that Gamun, son of Pola, by bringing his suit for pre-emption in respect of *Musammat* Bego's sale of the land in question had admitted the validity of that sale, that he had no rights left in the land at the time when he joined with the other reversioners in executing the deed of release in favour of Dula on the 17th August 1905, and that, therefore Dula could not claim to succeed to Gamun's 1/9th share of the land in the present litigation. With regard to the remaining 8/9th share of the land, the learned Judge was of opinion that Dula's sons were entitled to possession thereof, not on the strength of the deed of release of the 17th August 1905 executed by the other reversionary heirs in favour of Dula, but on the ground that the estate had fallen into possession on the death of the widow, and the said reversionary heirs, who are all parties to the suit, had actually relinquished their own rights in favour of Dula's sons, which is tantamount to a transfer of those rights to the latter. Accordingly, the Divisional Judge passed a decree in favour of the plaintiffs for possession of 8/9ths share of the land on payment of 8/9ths of the sum of Rs. 522.

In further appeal by defendant No. 3 his learned Advocate has contended (1) that the sale of the 18th April 1904 was made by the widow for full consideration and legal necessity, and should, therefore, be upheld; and (2) that in any event the sons of Dula are not entitled to claim in this suit more than their own 1/9th share of the land in their capacity of Kasu's reversioners. On the other hand, the plaintiffs, the sons of Dula, have filed cross-objections urging that the Divisional Judge has erred in disallowing the claim to the extent of 1/9th share of the property in dispute.

The plaintiffs' cross-objections can be disposed of in a few words. By bringing a suit for pre-emption in respect of the sale of 1904 by *Musammat* Bego, Gamun must be taken to have admitted that that sale was legally valid; and since the pre-emptor, Ram Singh, by reason of his decree of the 15th June 1905, stepped into the shoes of the original vendee, Abdul Karim, Gamun had no rights of inheritance left in the subject-matter of the sale which he could transfer in favour of Dula by the deed of release, dated the 17th August 1905. Apart from the said deed of release, since Gamun's sons, who claim through Gamun, are bound by their father's recognition of the validity of the sale by the widow, they had no rights in the property in dispute at the time of the

institution of the suit, and no relinquishment of any alleged rights on their part in favour of Dula's sons can avail the latter. We, therefore, agree with the Divisional Judge in holding that the suit of the plaintiffs as regards the 1/9th share of the land must fail.

We now come to the defendants' appeal. The first contention advanced by the appellant's Advocate is clearly untenable and was not seriously pressed by him. Both the Courts below have concurred in holding that legal necessity for the sale by *Musammat* Bego existed only to the extent of Rs. 522, the rest of the sale consideration being absolutely fictitious. The soundness of this concurrent finding is not disputed before us, and it follows that although Ram Singh, father of defendants Nos. 2 and 3, had to pay Rs. 940 before obtaining possession of the land as a pre-emptor, the plaintiffs in the present suit cannot be called upon to pay to them more than what was advanced by the original vendee, Abdul Karim, to *Musammat* Bego for a necessary purpose.

The second contention of the appellant's Advocate is that the plaintiffs-respondents are only entitled to claim in this suit their own 1/9th share of the land in dispute and not the shares which belong to the other reversionary heirs of Kasu, who have been impleaded as defendants and have not been joined as co-plaintiffs in this litigation. It is contended that the deed of release, dated the 17th August 1905, cannot be regarded as a deed of transfer of reversionary rights by the executants of that deed in favour of Dula, and that, therefore, it could not confer on Dula any title to the land in suit after it had fallen into possession on the death of *Musammat* Bego. The learned Divisional Judge has held that the deed in question was one of transfer of reversionary rights, but he was of opinion that, according to *Tota* v. *Abdulla Khan* (1), the transfer of reversionary rights by the executants of the deed in favour of Dula was invalid, and, therefore, Dula acquired no rights in the land in suit on the strength of that deed. The appellant's Advocate has conceded that the Full Bench ruling does not apply to a case where some of the reversioners, entitled to succeed under customary law to the estate of a male proprietor on the death of his widow, transfer their reversionary rights to another reversioner, and he admits that to that extent the decision of the Divisional Judge against the plaintiffs, so far as their rights are based on the deed of the 17th August 1905, is erroneous. All that was decided in *Tota* v. *Abdulla Khan* (1) was that among agriculturists governed by Customary Law a reversioner of a deceased male proprietor whose widow is in possession of his estate cannot transfer his reversionary rights to a stranger so as to engraft the latter into the family and to enable him to contest any alienations made by the widow to the prejudice of her husband's reversioners [see also on this point *Jawala Sahai* v. *Ram Singh* (2)]. The Full Bench ruling is no authority for the proposition that one reversioner of a deceased male proprietor is legally incapable of transferring his rights of succession to another reversioner; and the fundamental principle of the Customary Law, which was appealed to in the Full Bench case, is in no way violated by such a transfer of the reversionary rights as we are considering in the present case. The widow, *Musammat* Bego, was in possession of the usual life-estate only by way of maintenance, and it is difficult to percieve any reason why the reversioners of her husband who had a present right to succeed to his estate on the widow's death should not have had the power to transfer that right to one of their own number, thereby vesting him with a title to their shares of the estate, if and when it should fall into possession on the death of the widow. The deed of the 17th August 1905, though it purports to be a deed of relinquishment, is in effect and must be treated as a deed of assignment of reversionary rights, and since the assignment was made by some of the reversionary heirs of the husband of *Musammat* Bego in favour of Dula, who was also a reversioner, it was, we consider, a perfectly valid assignment.

Azizullah Khan v. *Ahmad Ali Khan* (3),

(1) 66 P. R. 1897 (F. B.).

(2) 2 Ind. Cas. 954; 67 P. R. 1909; 98 P. W. R. 1909; 133 P. L. R. 1909.

(3) 7 A. 353; A. W. N. (1885) 54.

which has been relied upon by the appellant's Advocate in support of his argument that the plaintiffs-respondents are not entitled to sue for more than their own 1/9th share of the land, is clearly distinguishable from the present case. There the plaintiffs, who were three Muhammadan brothers and who were suing not only for their own shares under the Muhammadan Law but also for the shares of their three sisters who were impleaded as defendants in the case, relied merely upon the admission of the latter, made in the course of the suit, that their brothers (the plaintiffs) had instituted the suit for the whole estate with their knowledge and permission. The sisters had made no assignment of their rights of inheritance to their brothers prior to the suit being instituted; and it was held that the plaintiffs could not sue for more than their own shares inasmuch as the sisters could not, by an admission or consent of the kind relied on by the plaintiffs in the course of the suit, convey the right or delegate the authority to the plaintiffs to sue for more than their own proper shares in the property. The decision of this Court in Civil Appeal No. 57 of 1900, reported as *Basanta* v. *Indar* (4), is also not applicable to the circumstances of the present litigation. It was held in that case that the right of succession of collateral heirs to the estate of a Punjab agriculturist is not a single indivisible right, so as to give each collateral a cause of action for the whole, and that, since the share of each heir is capable of exact determination, the true principle is that the right of each plaintiff depends upon his own title, and upon that title alone. It will be observed that in that case the reversioners, who had not sued, had made no assignment of their reversionary rights prior to the suit in favour of the reversioner who had sued; and that the claim of all those reversioners was held to have been barred by limitation and by their assent to the adoption of the defendant, who was in possession of the property of the last male owner as his adopted son. These facts serve to distinguish that case from the present case, in which the execution of a deed of assignment of reversionary rights by the reversionary heirs who have not sued but who are defendants in the suit, coupled with their admission in the course of the suit that they had already transferred their reversionary rights for valid consideration in favour of the plaintiffs, who are also reversionary heirs of the deceased proprietor themselves, entitles the plaintiffs, in our opinion, to sue for possession of not only their own shares but also of the shares of the said reversioners.

For the reasons given, we maintain the decree of the Divisional Judge and dismiss both the appeal and the cross-objections with costs.

Appeal dismissed.

(4) 51 P. L. R. 1903.

CALCUTTA HIGH COURT.
CIVIL RULE No. 861 OF 1913.
February 2, 1914.
Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.
ABDUL AZIZ AND OTHERS—PETITIONERS
versus
TAFAJADDIN—AUCTION-PURCHASER—PEARY MOHUN ROY—DECREE-HOLDER AND KOHILUDDIN FAKIR AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTIES.

Civil Procedure Code (Act XIV of 1882), *s.* 311—*Civil Procedure Code (Act V of* 1908), *O. XXI, r.* 90—*Landlord and tenant—Non-transferable occupancy holding—Transfer of portion of holding—Sale of holding in execution of rent-decree—Application by transferee for reversal of sale, if maintainable—Transfer of entire holding and that of portion, distinction between.*

A transferee of a portion of a non-transferable occupancy holding is entitled to apply, under rule 90 of Order XXI of the Civil Procedure Code, for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords.

Azgar Ali v. *Asaboddin Kazi*, 9 C. W. N. 134, relied upon.

Kunja Behari Mandal v. *Sambhu Chandra Roy*, 8 C. W. N. 232, *Benodini Dasi* v. *Peary Mohun Haldar*, 8 C. W. N. 55, *Omar Ali* v *Basir-ud-din Ahmad*, 7 C. L. J. 282, *Jugal Mohini Dasi* v. *Srinath Chatterjee*, 7 Ind. Cas. 477; 12 C. L. J. 609, *Tarak Das Pal Chowdhury* v. *Harish Chandra Banerjee*, 16 Ind. Cas. 977; 17 C. W. N. 163; 16 C. L. J. 548, *Brahamdeo Narain Singh* v. *Ramdown Singh*, 17 Ind. Cas. 125; 16 C. L. J. 139 and *Gadadhar Ghose* v. *The Midnapore Zemindari Co. Ltd.*, 17 Ind. Cas. 126; 16 C. L. J. 141, referred to.

Srimati Nissa Bibi v. *Radha Kishore Manikya*, 11 C. W. N. 312, *Prosunno Kumar Middar* v. *Bama Charan*, 3 Ind. Cas. 461; 13 C. W. N. 652 and *Nalini Behary Roy* v. *Fulmani Dasi*, 13 Ind. Cas. 487; 15 C.L.J. 388; 16 C. W. N. 421, distinguished.

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If a tenant has transferred his entire holding, which is not transferable, and has surrendered possession to the transferee, he has in essence abandoned the holding. The tenancy has terminated and the landlord has become entitled to re-enter. On the other hand, if a portion only of the holding has been transferred, even though the holding be non-transferable, there is no forfeiture. The tenancy still subsists and the landlord is entitled to look to his tenant for payment of rent.

Kabil Sardar v. *Chander Nath Nag Chowdhury*, 20 C. 590, *Durga Prosad Sen* v. *Doula Gazee*, 1 C. W. N. 160 and *Sheikh Gozaffur Hossein* v. *Dablish*, 1 C. W. N. 162, relied upon.

Distinction between section 311 of the old Code of Civil Procedure and rule 90 of Order XXI of the present Code pointed out.

Rule against the order of the Sub-Judge of Khulna, affirming that of the Third Munsif of Bagirhat.

FACTS.—The landlords of a non-transferable occupancy holding obtained a decree for rent against the recorded tenant, and had it sold by auction. The petitioners had previously purchased a portion of the holding and had also taken a mortgage of another portion; the two portions thus transferred to the petitioners do not cover the entire holding. The petitioners applied to have the sale set aside on the grounds mentioned in rule 90 of Order XXI of the Civil Procedure Code. To this the objection was taken that they were not competent to make the application inasmuch as they were not persons whose interests were affected by the sale. Both the Courts below have given effect to his objection and dismissed the application. The petitioners obtained this Rule.

Babu *Haripada Chatterjee*, for the Petitioners.

Babu *Brojalal Chakravarty*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order of the Court of first instance, affirmed on appeal by the Subordinate Judge, by which an application presented by the petitioners under Rule 90 of Order XXI of the Code of Civil Procedure has been rejected on the ground that they had no *locus standi* in the matter. The circumstances under which the application was made are not disputed, and may be briefly recited. The landlords obtained a decree for rent against the recorded tenant of a non-transferable occupancy holding and had it sold by auction on the 14th September 1911. The petitioner had previously purchased a portion of the holding and had also taken a mortgage of another portion; the two portions thus transferred to the petitioners do not cover the entire holding. The petitioners applied to have the sale set aside on the grounds mentioned in rule 90 of Order XXI. To this, the objection was taken that they were not competent to make the application inasmuch as they were not persons whose interests were affected by the sale. The Court of first instance gave effect to this objection on the strength of the decision of this Court in the case of *Prosunno Kumar Middar* v. *Bama Charan Mondal* (1) and dismissed the application. On appeal by the applicants, the Subordinate Judge has confirmed the order of the original Court. He has held that there is a conflict of judicial opinion upon this question and that he is bound to follow the latest decision in the reports. This order is now assailed before us and it is argued that the erroneous view taken by the Court of first instance as to the true scope of Rule 90 of Order XXI has led that Court to refuse to exercise a jurisdiction vested in it by law. In our opinion, there is no room for serious controversy that the order of the Court of first instance as confirmed by the lower Appellate Court is erroneous and must be set aside.

The most serious mistake into which the Court of first instance has fallen is that there is a diversity of judicial opinion upon this question. The cases have been analysed before us and they show that there is no decision which supports the view taken by the Courts below; whereas there are several decisions which support the contention of the petitioners. No useful purpose could be served by a detailed analysis of the judicial decisions mentioned by the Subordinate Judge, as they were decided with reference to statutory provisions which have no application to the case before us. We may state briefly that the case of *Azgar Ali* v. *Asaboddin Kazi* (2) indicates that in circumstances not distinguishable from those of the present case, it was held that under section 311 of the Code of 1882, a transferee of a portion of a non-transferable occupancy holding was entitled to apply for reversal

(1) 3 Ind. Cas. 461; 13 C. W. N. 652.
(2) 9 C. W. N. 134.

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of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords. In three other cases, namely, *Kunja Behari Mondal* v. *Sambhu Chandra Roy* (3) *Benodini Dassi* v. *Peary Mohan Haldar* (4) and *Omar Ali Majhi* v. *Moonshi Basir-ud-din Ahmad* (5), the right of such a purchaser to apply to have the sale set aside under section 310A of the Code of 1882 was affirmed. In two other cases, *Jugal Mohini Dasi* v. *Srinath Chatterjee* (6) and *Tarak Das Pal Chowdhury* v. *Harish Chandra Banerjee* (7), the right of such a transferee to make an application under sub-section 3 of section 170 of the Bengal Tenancy Act was upheld. In two other decisions, *Brahamdeo Narain Singh* v. *Ramdown Singh* (8) and *Gadadhar Ghose* v. *The Midnapore Zemindary Co. Ltd.* (9), the position was supported that a transferee of this description was entitled to maintain a suit to set aside a fraudulent decree which, if not set aside might be executed and might prejudice his position. The Subordinate Judge was undoubtedly in error when he held that some of the cases mentioned did not support the contention of the petitioners. If the present case had arisen under the Code of 1882, there is no question that the decision to which we have referred would have supported the contention of the petitioners. The Subordinate Judge was equally in error when he held that there are three later decisions which negative the contention of the petitioners, namely, *Srimati Nissa Bibi* v. *Radha Kishore Manikya* (10); *Prosanna Kumar Middar* v. *Bama Charan* (1) and *Nalini Behary Roy* v. *Fulmani Dasi* (11); he overlooked the very material circumstance that in each of these cases, the entire holding has been transferred. In the first case, it was held that the transferee of a transferable occupancy holding was the representative-in-interest of the tenants and was entitled to apply under sections 244 and 311 of the Code of Civil Procedure of 1882 to have the sale set aside. There is a dictum in the judgment to the effect, that if the holding were non-transferable the transfree could not be treated as a representative. This view was followed in the case of *Prasanna Kumar* v. *Bama Charan* (1), while in the case of *Nalini Behari Roy* v. *Fulmani Dasi* (11) the question related to the position of a transferee of an entire non-transferable holding under sub-section 3 of section 170 of the Bengal Tenancy Act. The distinction between the position of a transferee of a portion of a holding and of an entire holding is fundamental and has been overlooked by the Courts below. If a tenant has transferred his entire holding which is non-transferable and has surrendered possession to the transferee, he has in essence abandoned the holding. The tenancy has terminated and the landlord has become entitled to re enter. On the other hand, if a portion only of the holding has been transferred, even though the holding be non-transferable there is no forfeiture. The tenancy still subsists and the landlord is entitled to look to his tenant for payment of rent. *Kabil Sardar* v. *Chander Nath Nag Chowdhury* (12), *Durga Prasad Sen* v. *Doula Gazee* (13) and *Sheikh Gozaffur Hossein* v. *Dablish* (14). It is plain, therefore, that if the Code of 1882 applied to the present case, as the Subordinate Judge assumed that it did, the petitioners would be entitled upon elementary principles as also on well-established authorities, to maintain the application under section 311 of the Code of Civil Procedure. But the Subordinate Judge has overlooked that by the Legislation of 1908, a fundamental alteration has been made in the law. In section 311 of the Code of 1882, it was provided that the decree-holder or any person, whose immoveable property has been sold in execution, may apply to the Court to set aside the sale on the ground of material irregularity in publishing or conducting it. It was ruled by a Full Bench of this Court in the case of *Paresh Nath Singha* v. *Nabogopal Chattopadhya* (15), with reference to section 310A, that the expression 'any person whose immoveable pro-

(3) 8 C. W. N. 232.
(4) 8 C. W. N. 55.
(5) 7 C. L. J. 282.
(6) 7 Ind. Cas. 477; 12 C. L. J. 609.
(7) 16 Ind. Cas. 977; 16 C. L. J. 548; 17 C. W. N. 163.
(8) 17 Ind. Cas. 125; 16 C. L. J. 139.
(9) 17 Ind. Cas. 126; 16 C. L. J. 141.
(10) 11 C. W. N. 312.
(11) 13 Ind. Cas. 487; 16 C. W. N. 421; 15 C. L. J. 388.
(12) 20 C. 590.
(13) 1 C. W. N. 160.
(14) 1 C. W. N. 162.
(15) 29 C. 1.

perty is sold' includes every person who has an interest in the property, whether qualified, partial, or absolute, provided such interest is affected by the sale. In the present Code, rule 90 provides that where immoveable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it. If we contrast this with the language used in rule 89, we find that there is remarkable variance between the two rules. Rule 89 contemplates an application by persons either owning the property which has been sold in execution or holding an interest therein by virtue of a title acquired before such sale. It is improbable that this divergence in language is merely accidental. The expression "a person whose interests are affected by the sale" has obviously a wider import than the expression 'a person holding an interest in the property sold.' It is not difficult to imagine cases in which the interests of a person may be affected by an execution sale, though it may be difficult to maintain that he has an interest in the property sold. Under these circumstances, we are of opinion that the rule formulated in rule 90 of Order XXI of the Code of 1908 has a wider scope, and is of a mere comprehensive character than the rule laid down in section 311 of the Code of 1882 and that the present case falls within the scope of rule 90.

The result is, that this Rule is made absolute and the orders of the Courts below set aside. The case will be remitted to the Court of first instance for investigation on the merits. The petitioners are entitled to their costs throughout the present proceedings. We assess the hearing fee in this Court at 3 gold *mohurs*.

Rule made absolute.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1493 OF 1913.

January 15, 1914.

Present:—Justice Sir Asutosh Mookerji, Kt., and Mr. Justice Beachcroft.

NARENDRA NATH DEY—PLAINTIFF—PETITIONER

versus

BROJESWARI DASI AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), Sch. II, para. 4, sub-cl. (1); para. 5 cl. (b) sub-cl. (ii)—Arbitration — Arbitrator—Non-submission of award within time fixed by Court—Neglect or refusal—Appointment of second arbitrator without discharging first—Validity of reference—Agreement by parties to be bound by opinion of majority—Omission of Court to record that fact, effect of—Invalidity of reference to arbitration.

Where an arbitrator does not submit his award within the time fixed for filing it, his authority to submit the award lapses and it may be held that he has refused or neglected to act within the meaning of Schedule II, paragraph 5, clause (*b*), sub-clause (*ii*) of the Civil Procedure Code.

Therefore, if another arbitrator is appointed without formally discharging the first arbitrator, the validity of the award of the second arbitrator cannot be questioned on the ground that the arbitrator was appointed without jurisdiction.

Where the parties have agreed to be bound by the opinion of the majority of arbitrators, the omission of the Court to record the fact in the order of reference does not invalidate the reference to arbitration.

Futteh Singh v. *Gango*, 4 W. R. 4, *Thakoor Das Chuckerbutty* v. *Ramjeeban Chuckerburty*, 14 W. R. 150, *Muhammad Abid* v. *Muhammad Asgur*, 8 A. 64; A. W. N. (1886) 82 and *Garupathappa* v. *Narasingappa*, 7 M. 174, distinguished.

Rule against the order of the First Additional District Judge of 24-Perganahs.

Babus *Biraj Mohun Mojumdar* and *Hari Bhushan Mookherjee*, for the Petitioner.

Babus *Manmatha Nath Mukherji*, for the Opposite Parties.

JUDGMENT.—We are invited in this Rule to set aside a decree based on an award made by a majority of arbitrators appointed in a pending suit. The legality of the award has been questioned on two grounds.

It has been contended in the first place that the arbitrators, with whose award we are now concerned, were appointed, although the matter had been previously referred to another arbitrator who had not been formally discharged. In support of this objection reliance has been placed upon Schedule 2, paragraph 5, clause (*b*), sub-clause (*ii*) of the Code of Civil Procedure, in which it is pro-

vided that where an arbitrator refuses or neglects to act or becomes incapable of acting, any party may serve the other party with a written notice to appoint an arbitrator. In the case before us, it appears that the time within which the arbitrator first appointed was directed to submit his award had expired before the appointment of the second set of arbitrators. Consequently his authority to submit an award had lapsed and it may under these circumstances well be held that he had refused or neglected to act. The validity of the award cannot consequently be questioned on the ground that the arbitrators were appointed without jurisdiction.

In the second place it has been contended that the reference to arbitration was void, because the Court had failed to comply with the provisions of paragraph 4 of Schedule II of the Code of Civil Procedure. Sub-clause (*i*) of that paragraph provides that "where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion amongst the arbitrators, (*a*) by the appointment of an umpire; or (*b*) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or (*c*) by empowering the arbitrators to appoint an umpire; or (*d*) otherwise as may be agreed between the parties, or if they cannot agree, as the Court may determine." Here the matter was referred to three arbitrators, and there was no provision made in the order of reference for a difference of opinion amongst them. The case consequently falls apparently within the scope of paragraph (4). But it has been pointed out that although the order of reference did not provide for any difference of opinion amongst the arbitrators, the parties in their submission had explicitly agreed that in the event of a difference of opinion amongst the arbitrators, the opinion of the majority was to prevail. The question consequently arises, whether where, as here, the parties have agreed to be bound by the opinion of the majority of arbitrators, the omission of the Court to record the fact in the order of reference invalidates the reference to arbitration. The question must clearly be answered in the negative. It has not been contended and, in our opinion, upon a plain reading of paragraph 4, it cannot be reasonably contended, that it is open to the Court to make an order in this behalf different from what has been agreed upon between the parties in their submission. Paragraph (4) clearly implies that clause (*d*) is to be read along with the three preceding clauses. If it is so read, the four clauses taken together obviously mean that the Court shall provide in the order for a difference of opinion by the appointment of an umpire or by declaring that the decision of the majority shall prevail or by empowering the arbitrators to appoint an umpire or in such other manner as may be agreed upon between the parties. It is only when the parties cannot agree or have not come to an agreement, that the Court is at liberty to determine what direction should be given. In the present instance, as already explained, the parties had agreed that the decision of the majority should prevail. All that remained for the Court to do was merely to embody in the order of reference a direction that the decision of the majority would, in the case of a difference of opinion, prevail. The omission to embody that direction in the order, which it was obligatory upon the Court to do, cannot affect the validity of the order. Reliance was placed upon the cases of *Futteh Singh* v. *Gango* (1) *Thakoor Dass Chuckerbutty* v. *Ramjeebun Chuckerburty* (2); *Muhammad Abid* v. *Muhammad Asghar* (3) and *Gurupathappa* v. *Narasingappa* (4), in support of the proposition that where the order of reference does not embody a direction as to the mode in which decision is to be given when there is a difference of opinion amongst the arbitrators, the whole proceeding is thereby invalidated. These cases, however, are clearly distinguishable, because in each of these cases there was not only an omission by the Court to provide for a difference of opinion in its order of reference, but there was also no agreement between the parties as to what would happen in the event of a difference of opinion. In the case before us, there was an agreement between the parties on this point. In our opinion, therefore, there is no force in the contention of the petitioner.

The result is that the order of the Court below is affirmed and this Rule is discharged with costs. We assess the hearing-fee at three gold *mohurs*.

Rule discharged.

(1) 4 W. R. 4.
(2) 14 W. R. 150.
(3) 8 A. 64; A. W. N. (1886) 82.
(4) 7 M. 174.

SURANGINI DASI *v.* NEKARADDI MULLICK.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1122 OF 1913.
November 26, 1913.
Present:—Justice Sir Asutosh Mookerji, KT., and Mr. Justice Beachcroft.
SURANGINI DASI—PLAINTIFF—PETITIONER
versus
NEKARADDI MULLICK AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Bengal Tenancy Act (Act VIII B. C. of 1885*), s.* 153 *proviso—Suit for rent—Registration—Burden of proof—District Judge exercising appellate jurisdiction—High Court's power of revision—Jurisdiction—Bengal Land Registration Act (VII B. C. of* 1876*), s.* 78*—Civil Procedure Code (Act V of* 1908*), s.* 115.

The burden of proving that the plaintiff cannot sue for arrears of rent without her name being registered under the Bengal Land Registration Act is upon the defendant.

The jurisdiction of a District Judge under section 153 of the Bengal Tenancy Act is of revisional and not of appellate character. Therefore, where a District Judge acting under that section fails to consider whether the primary Court had exercised a jurisdiction not vested in it or had acted in the exercise of its jurisdiction illegally or with material irregularity and treats the matter before him as in substance an appeal from the decree of the primary Court, he, in essence, acts illegally and with material irregularity in the exercise of his jurisdiction and the High Court will be justified to interfere with his orders.

Rule, under section 115 of the Civil Procedure Code, 1908, against an order of the District Judge of Nadia.

Babu *Probodh Chandra Mukerjee*, for the Petitioner.

Babu *Atul Krihsna Roy*, for the Opposite Parties.

JUDGMENT.—We are invited in this Rule to set aside an order passed under the proviso to section 153 of the Bengal Tenancy Act. The petitioner sued to recover Rs. 15 as arrears of rent from the defendants. The suit was tried by a Judicial Officer specially empowered by the Local Government to exercise final jurisdiction under section 153. From the judgment of the Court of first instance, it appears that the only substantial defence to the claim was that the relationship of landlord and tenant did not exist between the parties. The Court decided the point in favour of the plaintiff and gave her a decree for the amount claimed. In the written statement the defendants had raised the objection that as the plaintiff had not got her name registered under the provisions of the Bengal Land Registration Act of 1876, she was not entitled to a decree for rent under the provisions of section 78. There is no trace, however, of this objection in the judgment of the Court of first instance and it is improbable that if the objection had really been urged at the trial it could have been overlooked. The defendants subsequently applied to the District Judge to revise the order of the Court of first instance under the proviso to section 153. The only point urged before the District Judge was the objection under section 78 of the Land Registration Act, and he held that as the plaintiff had not proved that her name had been registered, her suit was not maintainable. In this view, the District Judge reversed the decision of the Court of first instance and dismissed the suit. We are not invited to set aside this order.

It is plain that the ground upon which the suit has been dismissed was not urged at the trial in the Court of first instance. It is equally clear that the burden was upon the defendants to establish that the property in respect of which rent was claimed was of such a nature that it was incumbent upon the plaintiff to have her name registered under the provisions of the Land Registration Act. No such evidence was given on the side of the defendants. Under these circumstances the conclusion is inevitable that the decision of the Court of first instance was correct and has been improperly reversed.

It has been argued, however, on behalf of the opposite party that this Court has no jurisdiction to interfere with the order of the District Judge. We cannot accede to this contention. The proviso to section 153 lays down that the District Judge may call for the record of any case in which a Judicial Officer specially empowered has passed a decree or order to which the section applies, if it appears that the Judicial Officer has exercised a jurisdiction not vested in him by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of his jurisdiction illegally or with material irregularity, and may pass such order as the District Judge thinks fit. It has not been contended that the Court of first instance had no jurisdiction to entertain the suit, the only possible suggestion is that the Court acted in

the exercise of its jurisdiction illegally or with material irregularity. But we have already held that the Court did not act either illegally or with material irregularity. It has been argued, however, that as the District Judge is competent to pass such orders as he thinks fit, it is not open to this Court to intefere in the exercise of its revisional jurisdiction. But it is plain that the District Judge did not really consider whether the primary Court had exercised a jurisdiction not vested in it or had acted in the exercise of its jurisdiction illegally or with material irregularity. On the other hand, he seems to have treated the matter before him as if it were in substance an appeal from the decree of the original Court. Under these circumstances, we hold that the District Judge had in essence acted illegally and with material irregularity in the exercise of his jurisdiction, which was of revisional and not appellate character, and it is thus competent to this Court to interfere with his order.

The result is that this Rule is made absolute, the order of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both in this Court and in the Court of the District Judge. We assess the hearing-fee in this Court at one gold *mohur*.

Rule made absolute.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1175 OF 1911.

March 30, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

NARAIN DAS—DEFENDANT—APPELLANT

versus

MANGHA RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, rule 2 (1)—Cause of action—Vendee in consideration of sale undertaking by deed to deliver certain things at once and to pay balance by instalments—Default in respect of both promises—Single contract—One cause of action—Separate contract after deed in respect of delivery of things—Different causes of action—Plaintiff not bound to sue for specific things.

Defendant bought a certain thing from plaintiff for a sum named, and undertook by a written deed to liquidate that sum in a specified way, that is to say, (*i*) by making over at once certain things as worth one half of the price fixed and (*ii*) by paying the other half on a specified day. Apparently *at the time of the writing of the deed*, such a thing as breach in respect of (*i*), was not contemplated, while a penalty was provided for breach in respect of (*ii*):

Held, that this was a single contract, and in the absence of a new contract thereafter entered into with respect to (*i*), default having taken place both as to (*i*) and (*ii*) before the institution of a suit on the basis of the deed, there was only one cause of action within the meaning of Order II, rule 2 (1), Civil Procedure Code; but if subsequent to the deed there was a new separate contract as to (*i*), namely, that it was to be an obligation to which a new liability was attached, that is, liability to pay interest, causes of action as to (*i*) and (*ii*) would be different.

Held, further, that the plaintiff was not barred in case of default as to (*i*) from suing for the specific things. The original arrangement was, no doubt, made for the defendant's convenience, but it would be unreasonable to hold that plaintiff after waiting for years should be debarred from recovering their price in cash.

First appeal from the decree of the District Judge, Montgomery, dated the 31st July 1911, decreeing plaintiff's claim for Rs. 3,999 out of Rs 5,134.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The main facts in this case are not disputed and may be stated thus:—

Mul Chand had four sons—the two minor plaintiffs, Narain Das, defendant, and another. There had been quarrels in the family and he, therefore, effected a separation, assigning to each son debts due to himself to the amount of Rs. 4,500 ($\frac{1}{4}$th of the total Rs. 18,000). The plaintiffs remained joint under Mul Chand's guardianship and so were entitled to Rs. 9,000 worth of debts, and Mul Chand for them sold their rights in these claims to Narain Das defendant for Rs. 4,500, and in connection with this transfer a deed was executed and registered—Exhibit P-7, page 12, paper book—the consideration moving from Narain Das being thus described:—"*As regards Rs.* 2,250, the following things already given (so it is stated in the deed)—a shop in lieu of Rs. 1,000, mortgage of certain land Rs. 500, cash Rs. 150, ornaments Rs. 600; and *as regards the remaining Rs.* 2,250, a promise to pay half in *Har Sambat* 1962, and half in

Katak Sambat 1962—on default to be liable for Rs. 4,500 instead of Rs. 2,250."

This document is dated 4th April 1905, the last day of *Sambat* 1961, and was registered next day, which was the first day of *Sambat* 1962, being 24th *Chet*. For convenience sake, I will call the first Rs. 2,250 as detailed above Rs. 2,250 A, and the second Rs. 2,250 B.

Three and half years passed and then plaintiffs brought a suit on 20th November 1903 against Narain Das for Rs. 4,500 in connection with Rs. 2,250B. In that plaint they alleged that default had been made and so claimed the liquidated sum, basing the claim on the registered deed aforesaid, and to this plaint they added three *notes*, with the second of which we are not concerned. In the other two *notes* they adverted to Rs. 2,250 A, asserted that defendants had never given them possession of the shop and mortgaged land, intimated that a separate suit would be brought for them, asserted further that defendant had "taken back" the Rs. 150 cash and Rs. 600 worth of ornaments and had entered this transaction in Mul Chand's *bahi* and intimated that as to those and other items a suit would be brought on the *bahi*.

Defendant resisted the claim, and as to the first *note* said that, if plaintiffs had any claim as to shop and land, it should be included in that suit. The Court passed no orders on this point, but proceeded to frame issues on the case before it and to dispose of the suit. It held that out of Rs. 2,250 B defendant had paid one sum of Rs. 900 in this "account", that in the circumstances Rs. 500 was reasonable penalty for breach and thus plaintiff should have a decree for Rs. 1,850. On appeal the Divisional Judge held clearly that, while defendant claimed that he had paid Rs. 900 twice, only one payment of Rs. 900 on 29th *Chet Sambat* 1962 had been proved, but he seemed to be of the opinion (or he said so by oversight) that this was a payment against the *second* instalment of Rs. 2,250B. That Court upheld the substantive decree as passed; and when the case came up here Shah Din, J.,* did the same, only pointing out that the Divisional Judge was apparently in error in stating that one sum paid on 29th *Chet Sambat* 1962 was paid against the second instalment, the alleged payment against that instalment being one of *Har Sambat* 1962. The Hon'ble Judge did not, as I read it, rule, that Rs. 900 was paid twice, but merely gave his opinion that the payment of 29th *Chet Sambat* 1962 regarding which alone there was documentary evidence, could hardly have been on account of the *second* instalment. The correction of this error of the lower Appellate Court did not lead to any alteration of the decree.

Meantime plaintiffs on 5th April 1911 had instituted their present claim in connection with Rs. 2,250 A *plus* another item Rs. 735, the total claim being:—

On the ground that no part of the items making up Rs. 2,250A had reached them ...	2,250 0 0
Interest at Rs. 1 per cent. per mensem ...	2,149 0 0
On book account ...	735 0 0
TOTAL	5,134 0 0

Defendant pleaded time-bar, section 11 and Order II, rule 2, Civil Procedure Code; that the suit should have been for the specific articles in Rs. 2,250 A and not for money; that the sum of Rs. 735 was not due from him; that the Rs. 900 payment not allowed for in the previous suit should be allowed to defendant in this case; and that no interest should be added to the claim as it was never promised.

On the issues thus joined the findings were.

(*a*) No time-bar;

(*b*) No bar under section 11 or Order II, rule 2, Civil Procedure Code;

(*c*) That plaintiffs can sue on the *bahi* entry, page 11, paper-book—which regulates "the parties' rights and liabilities," and plaintiffs are not confined either by it or by the registered deed, to suit for the specific articles mentioned in the detail of Rs. 2,250A;

(*d*) That out of Rs. 735 the defendant is only liable for Rs. 75 which is stated in the *bahi* entry, page 11, paper-book, to be on account of interest on Rs. 2,250; this Rs. 2,250 the Court apparently takes to mean Rs. 2,250 A;

(*e*) That only one payment of Rs. 900, already allowed for in previous suit, is

* C. A. No. 594 of 1911, decided 5th February 1912.

proved, and so no credit for that sum can be given to defendant here;

(*f*) That it is proved by evidence that defendant promised to pay interest and so Re. 1 per cent. per mensem should be allowed.

A decree was, therefore, passed in favour of plaintiffs for Rs. 3,999 made up thus:—

Principal item	Rs.	2,250 0 0
Out of (*d*) above	,,	75 0 0
Interest on these two items	,,	1,674 0 0

Defendant has appealed against this decree and we have heard arguments and have seen the records of this and of the previous suit. Of the grounds of appeal Nos. 1, 7, 8 and 9 have been expressly given up, and section 11, Civil Procedure Code, is no longer pleaded. There remain the following contentions on the part of the defendant-appellant:—

(*i*) The suit should have been for specific articles;

(*ii*) Rs. 900 not allowed for in previous suit was paid against Rs. 2,250A;

(*iii*) Interest not admissible;

(*iv*) Order II, rule 2, Civil Procedure Code, bars the suit.

No cross-appeal or cross-objections have been put in, plaintiffs acquiescing in the dismissal of the claim for the major part of the Rs. 735 item.

It is convenient to take the last contention first. The law is clear enough. Defendant bought a certain thing from plaintiffs for a sum named, and undertook to liquidate that sum in a specified way, that is to say, by making over at once (this I take to be the meaning of the past tense used in connection with Rs. 2,250A) certain things taken as worth Rs. 2,250 and by paying Rs. 1,125 in *Har Sambat* 1962 and Rs. 1,125 in *Katak Sambat* 1962. Apparently *at the time of writing of the deed*, Exhibit P-7, such a thing as breach in respect of Rs. 2250A was not contemplated, while a penatly, as already stated was provided for breach in respect of Rs. 2,250B. This was a single contract and, *if no new contract was thereafter entered into*, then at the date of the previous suit, default having taken place (according to plaintiffs) both as to Rs. 2,250A and Rs. 2,250 B, there would be, in my opinion, only one cause of action, as the phrase is used in Order II, rule 2 (1), Civil Procedure Code. No doubt, if plaintiffs had sued before *Har Sambat* 1962, in respect of Rs. 2,250A omitting claim in respect of Rs. 2,250B, a later suit in respect of Rs. 2,250 B would not have been barred by this rule; but plaintiffs waited until both defaults had taken place, and there is ample authority for the view that in these circumstances they would be bound to sue for all reliefs then open to them, *i.e.*, to include Rs. 2,250A in the suit. But plaintiffs' case is that there was a new and separate contract as to Rs. 2,250A, namely, that it was to be an obligation to which a new liability was attached, that is, liability to pay interest, and, in my opinion, this case has been made out. If the *bahi* entry at page 11 of the paper-book, written on the day of the registration of the deed aforesaid be read, it will be seen that it includes an item Rs. 75 on account of interest on Rs. 2,250. The lower Appellate Court took this to mean interest on Rs. 2,250A, and this seems to me obviously correct, for no breach had occurred as to Rs. 2,250B at that time and there is no allegation on either side that any interest was payable on any promise made in connection with Rs. 2,250 B. The effect of the entry is that defendant agreed in advance to pay interest on Rs. 2,250A, an agreement that finds no place in the deed, and this partial proof of a new agreement is re-inforced by the evidence of P. W. No. 2. That witness, no doubt, talks of interest on "unpaid instalments," but the phrase evidently means "unpaid items," and not the instalments of Rs. 2,250 B.

Turning to (*i*), I hardly think defendant can insist upon this. The purchase-price was Rs. 4,500 and this is one-half of it. It is contended that defendant offered all these things but that plaintiffs refused to take them. This I cannot find proved, and it is most improbable. The original arrangement was, no doubt, one made for defendant's convenience; but it would be unreasonable to hold that plaintiffs, after waiting for years, should be debarred from recovering their price in cash.

The allegation in (*ii*) is not to my mind established on the record. Defendant ha

not proved the double payment of Rs. 900 in the only ways in which such payments can satisfactorily be proved, *i. e.*, by the production of regular books of account or by receipts in the hand of plaintiffs' guardian. Had there been two payments of Rs. 900 each, we may be sure that a shrewd man of business like defendant, who was by no means on good terms with his father, would have taken particular care to secure evidence of the transactions. He did take care as regards one payment—see page 11, paper-book—but none at all as to the other. No doubt, in the previous case Shah Din, J., seems to have given him credit for a payment in *Har*, but it seems clear to me that Rs. 900 was only paid once and defendant has had the benefit of it and he cannot reap a double benefit merely because there has been some obscurity as to the time when that one payment was made.

Lastly I can see no sufficient reason for not allowing fair interest; and I would dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 949 OF 1913.

April 24, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

BALWANT SINGH—DECREE-HOLDER—APPELLANT

versus

CHET SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Mortgage decree—Execution—Satisfaction of part of decree.

B obtained a decree on foot of a mortgage against *T* and *L*. In execution of another decree *T*'s share in the property was put up for sale; *B* applied that half of the money due under his decree was a charge on *T*'s property which was being put up for sale. *B* himself purchased *T*'s property:

Held, that under the circumstances *B*'s decree must be deemed to have been satisfied to the extent of one-half.

Execution second appeal from the decision of the District Judge of Agra, dated 25th April 1913.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Mangal Prashad*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are somewhat complicated; but those really essential admit of being briefly stated.

There were two brothers, Tori Singh and Lachman Singh, who executed a number of mortgages of different dates both jointly and severally. The appellant before us is a mortgagee under an unregistered deed of 1891. He brought a suit upon his mortgage, in which he obtained a decree on the 16th of September 1910. In the meantime certain persons, Chet Singh and others, had brought a suit against Tori Singh and his sons on a registered deed of 1896, in which they obtained a decree on the 5th of February 1908 for the sale of Tori Singh's half share in the same property which was involved in the decree obtained by the appellant Balwant Singh. When Tori Singh's share was about to be put up for sale under this decree, Balwant Singh joined with certain other persons in applying to the Court to notify certain charges on the property sought to be put up for sale. By order of the Court it was notified, on Balwant Singh's own application, that half of the money due to him under his decree of September the 16th, 1910, was a charge on Tori Singh's property which was being put up for sale. Under these circumstances Balwant Singh himself purchased. He is now claiming to bring to sale the rest of the property involved in his decree, that is to say, the half share of Lachman Singh, for the full amount of his mortgage-debt. Both the Courts below have held that by purchasing Tori Singh's half share under the circumstances above stated Balwant Singh must be held to have accepted satisfaction of half of his decree. They have allowed execution in respect of the other half share only. In appeal to this Court Balwant Singh relies on the principles laid down in *Nand Kishore* v. *Raja Hari Raj Singh* (1) and *Bohra Thakur Das* v. *Collector of Aligarh* (2). We have carefully considered the arguments addressed to us. In our opinion both these cases are distinguishable. The point in the present case is that Balwant Singh's mortgage

(1) 20 A. 23 at p. 33; A. W. N. (1897) 163.
(2) 28 A. 593; 3 A. L. J. 439; A. W. N. (1903) 150.

had merged in the decree, and although this was a decree against Tori Singh and Lachman Singh jointly, under which the shares of both were jointly and severally liable for the full amount of the decree. Balwant Singh himself moved the Court to notify that he desired to treat Tori Singh's half share, which was being put up for sale, as liable for the half of his decree. When he himself purchased the property put up for sale under such notification, we think the view taken by the Court below is correct that Balwant Singh must be held thereby to have accepted satisfaction of his decree to this extent. We dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 298 OF 1911.

March 27, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice N. Chatterjea.

HEMENDRA NATH ROY—DEFENDANT—APPELLANT

versus

UPENDRA NARAIN ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Digwari tenure in Birbhum—Nature of tenure—Government's approval of heir—Sanction of Government, whether solely matter for executive authorities—Power of Civil Court to interfere—Power of Government to supersede heir of Ghatwal, though fit person.

A Digwari tenure in Birbhum is similar to a Ghawatli tenure.

These tenures are hereditary, though not governed by the ordinary rules of inheritance, and are subject to the condition of the Government's approval of the heir.

Nilmoni Singh Deo v. *Bakranath Singh*, 9 C. 187 at p. 207; 9 I. A. 104, relied upon.

Held, per *Fletcher, J.*—"Sanction" in its ordinary signification means prior approval and implies a power to disapprove. It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post.

Approval of Government of the office of Digwar is a matter solely for the Executive Authorities.

The Civil Courts cannot interfere to re-instate a Ghatwal who has been dismissed by the Police authorities from the land which he formerly held as Ghatwal.

Debee Narain Singh v. *Sree Kishen Sein*, 1 W. R. 321 and *Secretary of State* v. *Poran Singh*, 5 C. 740, relied upon.

Therefore, the Courts cannot interfere in favour of a person who has never been in fact appointed as a Ghatwal.

Held, per *N. Chatterjea, J.*—Where a Ghatwal is dismissed and has no male member of the family fit to be appointed at the time of his dismissal, there is a forfeiture of the tenure as far as his family is concerned, because the estate cannot remain in abeyance for the benefit of the heir who may be subsequently born. And where in such a case, a stranger to the family is permanently appointed in his place, a subsequently born son of the dismissed Ghatwal on the death of the latter and after the tenure has passed to another family cannot claim it on the ground that it is his hereditary tenure.

Jogendra Narain Singh v. *Kali Charan Roy*, 9 C. W. N. 663, explained and distinguished.

The Government cannot disapprove of the heir of a Ghatwal or withhold its sanction upon any ground it likes and apart from the question whether he is a fit and proper person.

Debee Narain Singh v. *Sree Kishen Sein*, 1 W. R. 321 and *Secretary of State* v. *Poran Singh*, 5 C. 740, distinguished.

Consequently the heir of a Ghatwal, although fit, cannot be superseded by a stranger.

Appeal from the decree of the Sub-Judge of Bankura, dated March 24th 1911.

Dr. *Rash Behary Ghosh*, Babus *Jogesh Chandra De*, *Jyotish Chandra Sarkar* and *Srish Chandra De*, for the Appellant.

Mr. *S. P. Sinha*, Babus *Dwarkanath Chakravarti*, *Lalit Mohan Ghose*, *Karunamoy Ghose*, *Sarat Chandra Das* and *Jyotish Chandra Hazra*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the defendant No. 1 against the judgment of and decree passed by the learned Subordinate Judge of Bankura, decreeing the plaintiffs' suit.

The present dispute relates to the office of Digwar of the Ghat Burra in the Pergannah Mahisara in the District of Bankura and the *ghatwali* lands held therewith.

Neither the origin of the Jagir nor the precise time at which it was created is known; but it appears that as far back as 1771, corresponding with 1178 B. S., the villages of which it was composed were held by Jagirdars who paid to Government $\frac{2}{3}$rds of the annual value thereof as revenue and retained the other $\frac{1}{3}$rd as remuneration for the services under which the Jagir

was held. The villages included in the Jagir were permanently settled as part of the Zemindari of which the defendant No. 3 is the Zemindar. In fixing the Government revenue at the time of the Decennial Settlement the lands included in the Jagir were assessed at the 2/3rds then payable by the Jagirdar to the Government and the $\frac{1}{3}$rd retained by the Jagirdar in lieu of services formed no part of the assets of the Zemindari in respect of which the Government revenue was fixed.

The above statement I take from the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1). That decision of their Lordships was with reference to the nature of the estate taken by the heir of a deceased Ghatwal in lands situate in the same Zemindari and Pergannah as the present and the statement is based on a report of Lalla Kanji, Tehsildar of Pachit, made on the 8th of July 1799. This same report is a portion of the evidence in this case, being marked Exhibit K.

Their Lordships also found in that case that the Jagirdar before them was not one of the Ghatwals referred to in the report of Lalla Kanji as being subordinate to and paid by the Digwars out of their Jagirs; "for they were paid by the $\frac{1}{3}$rd of the *Malguzari* which they were allowed to retain as compensation for their services."

It is clear, therefore, that the holding of the Jaghirdar in that case corresponds very closely to the Digwari holding in the present case.

Excluding the report of Lalla Kanji the earliest document that we have in the present case is a document called a Hukumnama, Exhibit I (14), dated the 23rd of May 1847. This document is addressed to Adwaita Charan Rai (grandfather of the defendant No. 1) and Gour Mohun Rai (ancestor of the defendant No. 8), the then Digwars of the Burraghat, informing them that they were not entitled to make a gift or Permanent Settlement of the lands but that they could only grant *pottahs* limited to the period of their incumbency. The next document we have is the *Isamnabisi* for the year 1849 (Exhibit D). The eighth column thereof is headed "In what year, what date, what person, in whose place and in what capacity appointed temporarily or permanently" and in column 7 these remarks appear which obviously ought to have been placed in column 8: "In the year 1221 Aditya Rai was appointed in place of Madan Rai who was dismissed. Gour Mohan Rai was appointed on the 25th of *Bhadra* 1238 in place of his deceased father Anand Rai." On the 20th February 1855 one Bistu Das Baistab presented a petition to the Magistrate charging the then Digwars with neglect of duty and other improper conduct. The Magistrate appears to have summoned the Digwars before him for—on the 10th of May 1855—there is an order of the Joint Magistrate of Bankura dismissing Kartick Rai from the post of Sardar Ghatwal and warning Muktaram Rai (who had succeeded Gour Mohan Roy) to be more careful in the discharge of his duties in the future. The order of the Joint Magistrate concluded in these words: "that notification be duly served in the Sadder and Mofassil for attendance of candidates for the post." Accordingly we find that the Joint Magistrate on the 21st of June 1855 (Exhibit 92) appointed Rasik Lal Upadhya as Sardar Ghatwal in place of Kartick Rai. Rasik Lal, however, held the post for a very short time; for it having been brought to the notice of the Commissioner that Rasik Lal was a relative of the *Nazir* of the Criminal Court at Bankura and that his appointment was in breach of an order passed by the Superintendent of Police, the Commissioner directed the Joint Magistrate of Bankura to dismiss Rasik Lal and appoint some other person in his place.

On the 14th of April 1856 the Joint Magistrate of Bankura appointed Rajaram Rai, grand-uncle of the plaintiff, in the place of Rasik Lal, the dismissed Sardar Ghatwal. It appears from a petition, Exhibit I (19), of Manjur Ahmed, Sub-Inspector of Police, addressed to the Superintendent of Police and dated 18th of July 1869, that the Sub-Inspector reported that Kartick had rendered important services to the Police in a criminal case and suggested that Kartick

(1) 9 C. 187 at p. 207; 9 I. A. 104.

should be appointed in place of "the suspended Sardar Mohendra Narain Rai. So that he will be useful (torn) in the (illegible) case of Pergannah Mahisara while public duty will be satifactorily discharged." The Superintendent of Police forwarded this petition to the Magistrate endorsing thereon: "Forwarded to the Magistrate, who is kindly requested to inform the undersigned if there is any serious objection to his being re-employed."

The Magistrate returned the petition with the following endorsement: "None, but I think he should not displace the man appointed to his (post). Let him (have the next) vacancy." On the 18th of August 1869 Kartick was informed through an order of the Superintendent of Police that he would get the next vacancy.

The suspension that Mohendra was under appears to have resulted in his dismissal for Exhibit M shows that Kartick was appointed Sardar Ghatwal in the vacancy caused by the dismissal of Mohendra. Mohendra appealed against the order dismissing him, first to the Commissioner of the Burdwan Division who rejected his appeal (Exhibit F) and then to the Lieutenant-Governor who reversed the order of the Commissioner and directed that Mohendra should be "re-instated in service" (Exhibit 95).

It appears that in the year 1904 the Pachit Zemindari had become an encumbered estate under the management of the Court of Wards and that proceedings were being taken for the purpose of revising the assessments. Mr. Gupta, the Magistrate and Collector, had summoned 21 Ghatwals (including Mohendra) to appear before him at his camp at Nagardang.

The 21 Ghatwals, presumably on the ground that they did not wish their assessments to be revised, failed to appear before Mr. Gupta.

Thereupon by an order dated the 19th of July 1904 Exhibit L (1) Mr. Gupta summarily dismissed them. There can be no doubt that as regards Mohendra at least, Mr. Gupta's order of dismissal was never acted on. From a letter from Mr. Gupta dated the 6th of August 1904 (Exhibit 95) addressed to the Manager of Pachit Encumbered Estate, it appears that Mohendra and the other Digwars had consented to execute *kabuliyats* for the revised assessments and that the order for their dismissal would be cancelled in execution of the *kabuliyats*. This coupled with the fact that Mohendra continued as Digwar down to the date of his death shows conclusively that Mr. Gupta's order of dismissal was never put into effect.

On the 27th August 1907, Mohendra presented a petition to the District Magistrate (Exhibit 98) asking that owing to ill-health he might be allowed six months' leave and that his son, the plaintiff, might act in his place. On the same day the District Magistrate granted Mohendra's prayer.

Before the expiry of his leave Mohendra died. The plaintiff thereupon presented a petition to the District Magistrate praying that he might be "either appointed in the said post or to be allowed time". Upon a report by the Police upon this petition the District Magistrate passed orders that "Upendra Rai will continue to act in place of his deceased father, Mohendra Narain Rai, Sardar of Bharra, until further orders".

Kartick died in the year 1900, leaving his infant son, the defendant No. 1, and his widow, Karunamoyi, him surviving.

Shortly after the death of Mohendra Karunamoyi, acting on behalf of the defendant No. 1, presented a petition to the District Magistrate praying that in accordance with the promise made to Kartick in 1864 the defendant No. 1 might be appointed Sardar Gatwal. The District Magistrate referred this petition for inquiry and report to Babu S. C. Mukherjee, Deputy Magistrate. The Deputy Magistrate reported that Karunamoyi's petition should be rejected and that the acting Ghatwal, the plaintiff, should be appointed in place of his deceased father. On the 16th of June 1908, the District Magistrate confirmed the report of the Deputy Magistrate, Exhibit I (29).

On appeal to the Commissionor of Burdwan Division the Commissioner set aside the order of the Magistrate and directed that the defendant No. 1 should be appointed Sardar Ghatwal, Exhibit 130.

Thereupon the plaintiff appealed to the Board of Revenue, who said they had no jurisdiction in the matter, and then to the Government of Bengal. On the 29th of March 1909, the Commissioner of the Burdwan Division was directed to inform

the plaintiff that in the opinion of the Government of Bengal the remedy for any grievance which he may have lies in the Civil Court (Exhibit 133).

Thereupon the plaintiff filed this suit making as defendants the defendant No. 1, who is the appellant before us, the defendant No. 2, the Secretary of State for India in Council, who has filed a written statement supporting the case of defendant No. 1, the defendant No. 3, the Zemindar—the Raja of Pachit, the defendants Nos. 4, 5, 6, and 7, the plaintiff's brothers, and defendant No. 8, the other Digwar of the Barraghat.

On the appeal before us it has been contended on behalf of the appellant, *first* that the office of Sardar Ghatwal is merely a personal office held under the Government, the Ghatwal being remunerated for his services by the profits of the lands in lieu of wages,: *secondly*, even if the Jagir in the hands of Kartick was an ancient permanent heritable tenure, that upon his dismissal the tenure was forfeited and Mohendra did not hold the lands on such tenure and *thirdly*, that in any event the plaintiff cannot succeed to the Jagir and office without the sanction of the Government.

On behalf of the respondent it has been urged that the Jagir is an ancient permanent heritable tenure to which the plaintiff on the death of his father was entitled to succeed as of right. *Secondly*, if the sanction of the Government was requisite such sanction has in fact been given or that it cannot be unreasonably withheld, and that the acts of the execution authorities show that the plaintiff is a fit and proper person to discharge the duties of the office, and the refusal of the Executive Authorities is subject to review by the Court.

If the various appointments and dismissals of the Digwars stood alone there might be a good deal to be said in favour of the view that the office of Sardar Ghatwal was merely a temporary office held at the pleasure of the Government. But in this case we have the very valuable assistance of the judgment in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1) to assist us to come to a conclusion in the present appeal. But before passing to the consideration of that judgment, I shall deal with the second point urged on behalf of the appellant, *viz.*, assuming that Kartick had a permanent heritable holding, on his dismissal the tenure was destroyed and that Mohendra got merely an office which he held at the pleasure of the Government.

I am not inclined to give much force to this argument. Kartick's father was appointed in place of a dismissed Ghatwal and presumably both Kartick's father and Mohendra were placed in possession of the Jagir on the same terms as the original Digwars. This would appear to be so from the payments made by Mohendra, which are proved by the evidence, for the pay of men at the Thanna and documents addressed to him calling on him to perform the duties of his office. The next question is as to whether the sanction of the Government is requisite in order to enable the heir of Mohendra to succeed.

In case of *Nilomoni Singh Deo* v. *Bakranath Singh* (1) the question in dispute was whether Ghatwali lands in this Pergannah in the hands of a son, who had been appointed Ghatwal upon his father's death, were assets liable for the payment of the father's debts.

The appeal, therefore, raised directly what was the nature of the interest the son of a deceased Ghatwal took in the Ghatwali lands upon his father's death. In the course of delivering the opinion of their Lordships Sir Barnes Peacock made the following remarks (at page 203 of the report): "Their Lordships entertain, no doubt that, whether it was a Ghatwali or not, the tenure was analogous to a Ghatwali tenure of the nature described in the preamble to Regulation XXX". (At page 206) "These Jagirs, though hereditary, are not governed by the ordinary rules of inheritance, under Hindu or Muhammadan Law, and, are subject to the condition of the Government's approval of the heir". (At page 207) "In a case also between the appellant and the respondent Bakranath Singh it was held, that the holder of the tenure in question in this suit is not responsible for the debts of a former Jaghirdar. The Deputy Commissioner in his judgment said 'As Jagirdar the defendant has, what his father had, a life-interest in the Jaghir. Whether the son will succeed or not is, notwithstanding the tenure is hereditary, uncertain as he may at any moment be dismissed from Government employ', rather

he should have said 'may never be sanctioned as Jaghirdar.'" (At page 208) "It is quite clear that, if the Jaghir were transferable without the consent of Government, either by descent to an heir, or by voluntary sale, or sale in execution, or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which lands are held at the reduced rent."

We have also been referred to the 4th Volume of Sir William Hunter's Statistical Survey of Bengal (page 254) where it is stated that Ghatwali lands in Bankura are neither transferable nor hereditary.

As against this the respondent relies on the judgment of Harington and Mookerjee, JJ., in the case of *Jogendra Nath Singh* v. *Kali Charan Roy* (2). That was a judgment of these learned Judges on a second appeal and the report merely gives the judgment without a statement of the facts or of the argument. That case came before the learned Judges on second appeal so that they were bound by the finding of fact of the lower Appellate Court, and what was apparently argued in that case was whether the dismissal of a Ghatwal, when he has been acting as deputy for his father, operated as a dismissal of him after his father's death. Further, the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1) was not referred to in the judgment of, and presumably was not cited before, the learned Judges. The case did not, therefore, purport to explain or distinguish the decision of the Privy Council and I do not think it assists us in dealing with this case of lands within the Pergannah Mahisara. Next it was argued on behalf of the respondent that he did in fact obtain the sanction of the Government. This it is said is so, since the Magistrate approved of Kartick acting as Ghatwal and, therefore, the Government must consider that the respondent is a person fit to discharge the duties of the office and it is not open to the Government to disapprove of the respondent unless he is unfit for the office.

But the words used in the judgment in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1) are "the sanction." "Sanction" in its ordinary signification means prior approval and implies a power to disapprove. It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post.

Appointments of practically all posts under the Crown in India are at some time or other held by persons in what is called an acting capacity. This appears from the report in case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1). The judgments in the lower Courts in that case were the decision of the Officiating Judge and the decision of a Bench of this Court one of the members of which, Mr. Justice L. Jackson, is described in their Lordships' judgment as the acting Chief Justice. I cannot think that the Government intended or that the respondent thought that when the District Magistrate after the death of his father continued him in an acting capacity he was appointed to the permanent post with the sanction of the Government. Then it is said that the sanction of the Government to the respondent's appointment cannot be unreasonably withheld and that the refusal to sanction is open to review by the Court. But many reasons which may properly be considered by an Executive Officer in discharge of his duties could not be considered by a Court. Further, what are the qualifications which the Court should require a Digwar to have? I have no idea. It appears to me to be a matter solely for the Executive Authorities. It was admitted by the learned Counsel for the respondent before us that the Commissioner had power to overrule the order of the District Magistrate rejecting the petition of the appellant's mother and confirming the respondent in the office. I think it must be taken that the respondent has failed to obtain the sanction of the Government which was a condition precedent to his succeeding to the Ghatwali lands.

It was held in the case of *Debee Narain Singh* v. *Sree Rishen Sein* (3) that the Civil Court cannot interfere to re-instate a Ghatwal who has been dismissed by the Police Authorities from the land which he formerly held as Ghatwal. Apparently the same view was taken in the case of the *Secretary of State* v. *Poran Singh* (4). If these authorities are

(2) 9 C. W. N. 663.

(3) 1 W. R. 321.
(4) 5 C. 740.

correct that the Court cannot interfere to re-instate who has actually been in possession of the Ghatwali land and then dismissed, I am unable to see how the Court can interfere in favour of a person who has never in fact been appointed as Ghatwal.

In my opinion the judgment appealed against should be reversed and the plaintiff ordered to pay to the appellant his costs both in this Court and in the Court below.

N. CHATTERJEA, J.—The suit out of which this appeal arises relates to a Digwari tenure in the District of Bankura.

The facts appear to be these: One Kartik Roy, the father of the defendant No. 1, and his ancestors before him held the lands in dispute as Sardar Digwar of Ghat Barra in the Bankura District. Kartik Roy was dismissed for neglect of duty and improper conduct in the year 1855. Notifications were thereupon issued inviting "candidates for the post," and one Rasik Lal Upadhya was appointed in place of Kartik Roy. Rasik Lal was also dismissed shortly after, and on the 14th April 1856, the Joint Magistrate of Bankura appointed Rajaram Rai, the paternal uncle of the plaintiff's father, in his place. In 1861 Rajaram having become incapable of performing the duties his nephew, the plaintiff's father (Mohendra), was appointed in his place. Mohendra it appears was suspended for alleged misconduct in 1869, and while he was under suspension the Police Sub-Inspector having reported that Kartik Roy since his dismissal had been useful in giving assistance to the Police, the District Superintendent wrote to the Magistrate asking him whether he had any serious objection to Kartik Roy being re-employed. The Magistrate thereupon made the following order: "None, but I think he should not displace the man appointed to his (torn). Let him (torn) vacancy." Kartik was accordingly informed that when any Sardari or Sodiali becomes vacant, it will be offered to him in the first instance. Mohendra Narain was dismissed in 1870 and Kartik Roy was appointed in his place. The order of dismissal, however, was ultimately set aside by order of the Lieutenant Governor of Bengal and Mohendra Narain was re-instated in the Ghatwali. Mohendra since his re-instatement held the tenure as Ghatwal until the 19th July 1904, when the Magistrate, Mr. Gupta, summarily dismissed him along with other Ghatwals for failure to appear before him in connection with the revision of the assessment of their tenures. This order of Mr. Gupta, however, was not given effect to, as appears from the facts found by the lower Court, and Mohendra continued to act as before. In August 1907, Mohendra was granted six months' leave owing to ill-health, and his son, the plaintiff, was approved and appointed to act in his place. Mohendra died in October 1907 and thereupon the plaintiff presented a petition to the Magistrate praying that he might be "either appointed in the said post or to be allowed time". The Magistrate ordered that "Upendra Rai will continue to act in place of his deceased father, Mohendra Narain Rai, Sardar of Bharra, until further orders".

Kartik died in 1900 leaving his widow, Karunamoyee, and an infant son, the defendant No. 1. In 1907 a petition was presented by Karunamoyee on behalf of her minor son, the defendant No. 1, to the Magistrate praying that the defendant No. 1 might be appointed in accordance with promise made to his father Kartik in 1869. The Deputy Magistrate considered the claims of both the defendant No. 1 and the plaintiff and submitted a report to the District Magistrate, who agreed with the former and held that defendant No. 1 had no right and confirmed the appointment of the plaintiff. On appeal, the Commissioner Mr. Maddox, by his order dated the 11th August 1908, reversed the order of the Magistrate and held that the tenure was hereditary and that the defendant No. 1 was entitled to the Ghatwali. Defendant No. 1 was accordingly appointed Ghatwal. The plaintiff moved the Board of Revenue, but the application was rejected on the ground that the Board had no jurisdiction in the matter. The plaintiff then moved the Lieutenant-Governor of Bengal and was informed that "the remedy for any grievance he may have lies in the Civil Court". The present suit was thereup u instituted by the plaintiff.

The suit was decreed by the Court below and the defendant No. 1 has appealed to

this Court. The first question for consideration is, what is the nature of the tenure? Having regard to the manner in which the Ghatwali in the present case has been dealt with by the Executive Authorities down to 1908 (the date of Mr. Maddox's order) it would seem as if it was merely a Government service held at the pleasure of the Government. But the liability to dismissal for misconduct or neglect of duty is one of the conditions upon which a Ghatwali tenure is held, and it does not appear from the evidence on the record that any case of succession of the heir of a deceased Ghatwal arose before the year 1908. The tenure is situate in Pergannah Mahisara and within the Pachit Zemindari which at one time was included in Birbhum. In the case of *Nilmoni Singh* v. *Bakranath Singh* (1) the Judicial Committee had to consider the nature of a Jagir which was also situate in the same Pergannah and in the same Zemindari. Their Lordships with reference to the Jagir in that case observed as follows: "Neither the origin of the Jaghir, nor the precise time at which it was created, is known; but it appears that, as far back as 1771, corresponding with 1178 B. S., the villages of which it was composed were held by Jaghirdars, who paid to Government two-thirds of the annual value thereof as revenue, and retained the other one-third as remuneration for the services under which the Jaghir was held. The villages included in the Jaghir were permanently settled as part of the Zemindari of Pachit, of which the defendant-appellant is the Zemindar. In fixing the Government revenue at the time of the Decennial Settlement, the lands included in the Jaghir were assessed at the two-thirds then payable by the Jaghirdar to the Government, and the one-third retained by the Jaghirdars in lieu of services formed no part of the assets of the Zemindari in respect of which the Government revenue was fixed", and that the Jagir, although not falling within Regulation XXIX of 1814 (which relates to Birbhum Ghatwali tenures), was a tenure of the nature of those described in the preamble to that Regulation. Their Lordships held that the Jagirs are hereditary, though not governed by the ordinary rules of inheritance, and are subject to the condition of the Government's approval of the heir.

The tenure in the present case is not a Jagir, but a Digwari tenure. A Digwari tenure, however, is similar to a Ghatwali tenure.

The nature of Ghatwali tenures, it is true, varies in different places and the Executive Authorities, in the present case, have appointed and dismissed Ghatwals from time to time. But the Government has the power of appointment and dismissal, and notwithstanding that the said powers were exercised by the Government with reference to the Jagir in the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1), the tenure was held to be hereditary. In the present case it was stated in a *hukumnama* dated the 23rd May 1847 that "Ghatwali lands are held merely for remuneration for labours for their services." But the incidents of Ghatwali tenures such as the present do not appear to have been well understood before the case of *Nilmoni Singh Deo* v. *Bakranath Singh* (1) was decided by the Privy Council, nor are all the incidents settled by judicial decisions even now. The report of Lala Kanji, dated the 19th July 1799, which was part of the evidence in, and was relied upon by the Judicial Committee in that case, is also part of the evidence in the present, and having regard to the fact that the tenure in the present case is situate in the same Pergannah and in the same Zemindari as that dealt with by the Privy Council in that case, and held under similar conditions, I think the incidents of the Jagir laid down by the Privy Council should be held applicable to the Digwari tenure in the present case.

We must take it, therefore, that the tenure is a hereditary one. But before the plaintiff can be held entitled to succeed, it is to be seen whether there was anything to prevent the defendant No. 1 from succeeding his father, Kartik, in the Ghatwali. Notwithstanding that the tenure is hereditary, the Government has the power of dismissing the Ghatwal for misconduct. Kartik Roy was dismissed. Now what was the effect of the dismissal of Kartik Roy? There can be no doubt that the dismissal operated as a forfeiture of the tenure so

far as Kartik himself was concerned. It is contended, however, that as the tenure is hereditary, such dismissal did not affect the rights of his heir. It is unnecessary to consider any usage under which the next male heir of the dismissed Ghatwal may be appointed in his place on his dismissal, because in the present case Kartik Roy presumably had no son at the time of his dismissal which took place so far back as 1855, the defendant No 1 not being born then, as he is still a minor. A stranger to the family, *viz.*, Rajaram was appointed permanently in his place, and the tenure held by him has devolved on the members of his family. The question is whether under these circumstances the defendant No. 1 can claim the tenure on the death of his father, on the ground that it is his hereditary tenure. It seems to me that the contention if given effect to will lead to anomalons results. For instance a person may be appointed Ghatwal and dismissed for misconduct, and another (a stranger to the family) appointed in his place. The latter again may be dismissed and a third one (also a stranger) appointed and so on. If the dismissal of a Ghatwal under such circumstances does not operate as a forfeiture of the rights of the heir, the tenure being by its nature hereditary the heir of each of the dismissed Ghatwals, on their death, may equally claim the tenure on the ground that it is his hereditary tenure. I think, therefore, that where a Ghatwal is dismissed and has no male member of the family fit to be appointed at the time of his dismissal there is a forfeiture of the tenure so far as his family is concerned, because the estate cannot remain in abeyance for the benefit of the heir who may be subsequently born. And where in such a case a stranger to the family is permanently appointed in his place, I do not see how a subsequently born son of the dismissed Ghatwal, on the death of the latter and after the tenure has passed to another family, can claim it on the ground that it is his hereditary tenure. The case of *Jogendra Nath Singh* v. *Kali Charan Roy* (2) does not, in my opinion, support the contention of the appellant. In that case it was held that the dismissal of the plaintiff who was acting as a deputy of his father, even if it was intended to operate as a dismissal of his father, could not in law have that effect, and did not destroy the Ghatwali tenure, and that the dismissal of the plaintiff while he was acting as a deputy of his father did not disentitle him from succeeding on the death of his father. The learned Judges, after commenting on the case of *Secretary of State* v. *Foran Singh* (4) and pointing out that "the actual decision in that case may be supported on the ground that the Ghatwal had been rightly dismissed by reason of misconduct and that such dismissal carried with it as a necessary consequence the forfeiture of his tenure", proceeded to discuss whether the plaintiff's father had been dismissed. Had the learned Judges been of opinion that the plaintiff in that case was entitled to succeed his father although the latter had been dismissed, it would have been unnecessary to consider whether a certain order of the Magistrate was intended to operate as a dismissal of the plaintiff's father, and even if so intended, whether it could in law operate as a dismissal of his father. No doubt the plaintiff in that case was held entitled to succeed on the death of his father on the ground that the tenure was hereditary, although he had been dismissed while acting as deputy of his father. But according to the view taken by the learned Judges there was no dismissal of the father, and the question we are now dealing with, *viz.*, whether the rights of the heir are affected by the dismissal of the father, therefore, was not considered in that case. There is no authority for holding that although a Ghatwal may be dismissed and another person appointed permanently in his place, the subsequently born heir of the dismissed Ghatwal after any lapse of time is entitled to succeed by displacing the person so appointed or his heir. I am accordingly of opinion that Kartik Roy having been dismissed for misconduct and another person having been appointed in his place, his son the defendant No. 1 had no right to succeed to the Ghatwali on his death. If the plaintiff, however, has no right to the tenure, and it is at the absolute disposal of the Government, the defendant No. 1 has certainly acquired a right to the tenure, having been appointed Digwar by the Government. But the estate

taken by Rajaram presumably was the same as that which was held by Kartik Roy. Tenures held under similar conditions have been held by the Privy Council to be hereditary. The tenure has been the subject of inheritance in the plaintiff's family for more than half a century. The plaintiff, therefore, had a hereditary right and would be entitled to succeed subject to approval by Government. Now if the heir of the Ghatwal gets the Ghatwali by hereditary right, subject to approval by Government, and not merely by virtue of the appointment by the Government, it is difficult to hold that the Government can disapprove of the heir even if he is a proper person and fit to discharge the duties. In *Bukronath Singh* v. *Nilmonee Singh* (5), Mitter, J., observed that "as a general rule, the heir of the last incumbent was considered as eligible to be appointed in the place of his ancestor, unless some especial ground of unfitness rendered him incompetent to perform the duties of the Jagir". Markby, J., referring to the admission of the Advocate-General, said: "He admits that the tenure is an hereditary one, unless there is some special objection to the person entitled to succeed, by which I conclude is meant something which disqualifies him or unfits him for the personal discharge of the duties, whatever those duties may be; but he claims for the Government the right to appoint and the right to dismiss the Jagirdars—a right, however, which is to be exercised (as I understand it) only in cases of disqualification or unfitness or the absence of any legal heir". The Judicial Committee in that case observed as follows:—"It is quite clear, that if the Jagir were transferable without the consent of Government, either by descent to an heir, or by voluntary sale, or sale in execution, or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character." The precise nature of the right of the Government or the grounds upon which the right of approval is to be exercised were not necessary to be decided and were not decided in that case. So far as can be gathered from the observations made by the Judicial Committee, the consent of the Government would seem to depend upon the question whether the heir is a proper person and fit to discharge the duties of a Ghatwal. At any rate there is nothing in the judgment of the Privy Council to indicate that Government can disapprove on any ground it likes.

In the case of *Debee Narain Singh* v. *Sree Kishen Sein* (3) this Court held that the Civil Courts cannot interefere to re-instate a Ghatwal who has been dismissed by the Police Authorities in the land which he formerly held as Ghatwal. But the Ghatwal was dismissed by the Magistrate for non-performance of his services; and there can be no doubt that the Magistrate has the power to dismiss a Ghatwal for misconduct or neglect of duty. The question raised was whether the dismissal affected his right to continue to possess the Ghatwali lands, and all that this Court said was that the Civil Court has no power to interfere with the order of dismissal and that the right to possess the lands depends on the tenure of the office. The same observations apply to the case of *Secretary of State* v. *Poran Singh* (4) where it was held that the dismissal of a Ghatwal will carry with it the forfeiture of his tenure. On the other hand in the case of *Lall Dharee Roy* v. *Bro o Lall Singh* (6) it was held that a Commissioner of Revenue is not warranted by law, on the demise of a Ghatwal, to consider the eligibility of rival claimants to a tenure (a perpetual and descendible one) and to reject the claims of the natural heir on considerations purely moral, *e. g.*, having evinced a want of filial respect and dutiful feeling to his father, and that the plaintiff was quite competent to question the order of the Commissioner by a suit in the Civil Court. One of the learned Judges (D. N. Mitter, J.) observed: "A Ghatwali tenure in Birbhum is not resumable at the mere good will and pleasure of the Executive Authorities." The Ghatwali appears to have been a Birbhum Ghatwali, the incidents of which were governed by the provisions of Regulation XXIX of 1814, and are not exactly those of a Ghatwali which we are dealing with in the present case. But the Ghatwali in the present case is analogous to a Birbhum Ghatwali; and the

(5) 5 C. 389; 4 C. L. R. 583.

(6) 10 W. R. 401.

HEMENDRA NATH ROY *v.* UPENDRA NARAIN ROY.

Government has the power of sanctioning the appointment in either case. The case cited above shows that the Government cannot disapprove of the heir on any grounds it likes, and apart from the question of fitness.

If we are to hold that the Government can refuse to sanction or approve on any ground it likes, what becomes of the hereditary nature of the tenure? No authority has been placed before us to show that the Government can do so on an any ground, and apart from the question whether the heir is a fit and proper person. So far as the particular tenure is concerned, the authorities have appointed and dismissed Ghatwals from time to time, but there does not appear to have been any case in which the heir of the Ghatwal, although fit, has been superseded by a stranger.

Once it is held that these tenures are hereditary, it seems to me that it cannot be held that the Government can withhold its sanction to the succession of the heir upon any ground it likes. No doubt, it is for the Government to say whether the heir is a fit and proper person. So far as that question is concerned, the Government, I think, is the sole Judge and the Civil Courts cannot go into that question. But I am unable to hold that the Government can disapprove of the heir or withhold its sanction upon any ground it likes, and apart from the question whether he is a fit and proper person.

It has been pointed out on behalf of the respondent that the heir of the Ghatwal in the case of *Jogendra Narain Singh* v. *Kali Charan Roy* (2) was held entitled to succeed to the tenure, although he had not been approved by the Government and on the contrary had been dismissed while he was acting as deputy of his father. But the questions of approval by the Government does not appear to have been raised in that case, and there can be no doubt, as laid down in *Nilmoni Singh Deo* v. *Bakranath Singh* (1) by the Privy Council, that the right of the heir to the Ghatwali, is subject to the approval or sanction of the Government.

The next question is whether the plaintiff in the present case has been approved by the Government. It appears that in August 1907 Mohendra Narain, the father of the plaintiff, applied for six months' leave owing to ill-health, and the Deputy Magistrate submitted the following note to the District Magistrate: "Sardar Mohendra Narain being ill he prays that his son, Upendra Narain Rai, may be allowed to act for him for six months. Upendra is present and seems to be a fit person to act as Sardar. Submitted to Collector for orders." The order of the District Masgistrate, Mr. R. Krishna, on the note was, "Approved." It is true he was appointed in an acting capacity and as deputy of his father for six months, but the fact remains that so far as the ground of fitness was concerned he was approved. After the death of Mohendra Narain the plaintiff was ordered by the Magistrate to continue to "act in the place of his deceased father, Mohendra Narain Rai until further orders". Then when the matter came up before the Magistrate upon the application of the defendant No. 1 the Magistrate confirmed the plaintiff in the appointment. The above orders taken together go to show that the plaintiff was approved. The last order of the Magistrate has, no doubt, been set aside by Mr. Maddox, the Commissioner, who is the higher authority, but he did not reverse the order of the Magistrate upon the ground of unfitness of the plaintiff, but merely upon his view of the legal rights of the parties and the Government of Bengal referred the plaintiff to a Civil Court. There is no suggestion in the proceedings that the plaintiff was in any way an unfit person and the very fact that the Commissioner considered the legal rights of the parties shows that it was on the footing that both the parties were fit to discharge the duties and were proper persons to be appointed. We have the distinct approval by the Magistrate having regard to the fitness of the plaintiff and the said finding has not up to this time been reversed by any authority. The Commissioner disallowed the plaintiff's claim merely on the ground that the defendant No. 1 was under the law entitled to succeed.

If the power of approval is to be exercised with reference to the question whether the heir is a fit and proper person, as I think it is, then the plaintiff, having regard to the

above proceedings should be held to have been approved.

I am accordingly of opinion that the decree of the Court below is correct and should be affirmed. But in the circumstances I think each party should bear his own costs.

Decree confirmed.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 636 OF 1912.
February 18, 1914.
Present:—Mr. Justice Sadasiva Aiyar.
MOHANAMBAL—PLAINTIFF—PETITIONER
versus
DAVOODSA ROWTHER—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 3, cl. 2 (d)—"Estate," meaning of—Inam of part of village, whether estate—Suit for rent—Civil Court—Jurisdiction.

All *inamdars* are not landholders under the Estates Land Act and the mere fact that the landlord is an *inamdar* and the tenant has got the permanent occupancy right, will not bring the *inam* lands within the definition of an "estate."

Muthusawmi Pillay v. *Jafar Husain Khan Sahib*, 14 Ind. Cas. 215 and *Tadikonda Buchi Virabhadarayya* v. *Sonti Venkanna*, 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782, referred to.

A few acres of *inam* land forming part of a village, the whole of which village had not been granted in *inam*, do not form part of an estate within the meaning of section 3, clause 2 (*d*) of the Estates Land Act.

The Civil Courts do not lose jurisdiction over a suit for rent brought by an *inamdar* unless it is also shown that the *inam* lands come within the definition of estate or part thereof.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Mayavaram at Kumbakonam, in Small Cause Suit No. 2012 of 1911.

Mr. *K. Jagannatha Aiyar*, for the Appellant.

Mr. *S. Gopalasami Aiyangar*, for the Respondent.

JUDGMENT.—The Subordinate Judge has considered principally the question whether the defendant was the owner of the *kudivaram* or permanent occupancy right in the lands and his conclusion in the defendant's favour seems correct. But the Judge at once proceeds to the conclusion that the *inam* lands form an estate within the definition contained in section 3, clause 2 of the Estates Land Act and that the *inamdar* is landholder within section 3, clause (5). It seems to me that this is a case of *non sequitur*. Section 3 clause (2) is itself sub-divided into five sub-clauses (*a*) to (*e*). The Subordinate Judge's judgment does not indicate under which of these sub-clauses (*a*) to (*e*) the disputed *inam* lands fall. It was argued by the respondent's learned Vakil that the lands come under sub-clause (*d*). That sub-clause relates to "any village of which the land revenue alone has been granted in *inam*, etc.," that is, any separated part of a whole village *so* granted in *inam*. In the present case, the *inam* lands are a few acres in a whole village, these few acres were granted to a temple and there is nothing to show that the whole village had been granted in *inam* and that the disputed lands are a separated portion of such an *inam* village. All *inamdars* are not landholders under the Estates Land Act. Benson and Sundara Aiyar, JJ., held that the pre-settlement *inamdar* was not a landholder and even if the *inam* was a whole village, it was not an estate. [See *Todikonda Buchi Virabhadarayya* v. *Sonti Venkanna* (1)]. Similarly Abdur Rahim, J., seems to have held in *Muthusawmi Pillay* v. *Jafar Husain Khan Sahib* (2) that those two facts alone, namely, that the landlord is an *inamdar* and that the tenant has got a permanent occupancy right, will not bring the *inam* land within the definition of an estate. In the result, I hold that the Civil Courts have not lost jurisdiction over suits for rent brought by an *inamdar* unless it is also shown that the *inam* lands come within the definition of estate or part thereof, and reversing the judgment of the learned Subordinate Judge, I direct the suit to be tried (on the question other than the question of jurisdiction and the question of the defendant's *kudivaram* right) and to be disposed of according to law.

Costs hitherto will abide the result.

Order reversed.

(1) 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782.
(2) 14 Ind. Cas. 215.

SANWAL SINGH v. BHIKHARI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 240 OF 1912.

November 17, 1913.

Present:—Mr. Lindsay, J. C.

Thakur SANWAL SINGH—PLAINTIFF—APPELLANT

versus

BHIKHARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901*)*, s. 233 *cl. (k)*, —*Partition of* mahal—*Jurisdiction of Civil and Revenue Courts—Suit for declaration that plaintiff is entitled to land allotted to defendants in partition—Civil Court, power of, to rectify errors in partition by Revenue Court —Revenue Court, order of, referring objector in partition proceedings to Civil Court, effect of—Second appeal, fresh case set up, entertainability of—Practice—Pleadings.*

A suit for possession, by a declaration that the plaintiff is entitled to a portion of the land wrongly allotted to the defendants in partition by the Revenue Court, does not lie in the Civil Court, in view of the exclusive provisions of section 233 (*k*) of the U. P. Land Revenue Act. It is clearly a matter relating to the partition of a *mahal*, for the plaintiff's claim cannot be decreed without affecting the partition come to by the Revenue Court.

Jagan Nath Parshad v. *Ram Dutt*, 11 Ind. Cas. 531; 14 O. C., 153, *Tribeni Sahai* v. *Gokal Prosad*, 9 Ind. Cas. 475; 8 A. L. J. 244; 33 A. 440 and *Jagan Nath* v. *Tribeni Sahai*; 1 Ind. Cas. 696; A. W. N. (1908) 274; 31 A. 41, referred to.

When on an objection being raised in a partition proceeding, the Revenue Court referred the objector to the Civil Court for his relief:

Held, that it could not be argued therefrom that the partition was made subject to the decision of the Civil Court upon the point objected to.

Chokhey Singh v. *Jote Singh*, 1 Ind. Cas. 166; 12 O. C. 288; 13 C. W. N. 274 (P. C.); 11 Bom. L. R. A. L. J. 100; 9 C. L. J. 151; 5 M. L. T. 167; 31 A. 73; 19 M. L. J. 123, distinguished from.

A case not set up in the Courts below cannot be allowed to be raised in second appeal.

Appeal from the decree of the District Judge, Hardoi, dated 22nd March 1912, upholding that of the Subordinate Judge, Unao, dated 15th August 1911.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The point for decision in this second appeal is whether the suit which was brought by the plaintiff-appellant was entertainable by a Civil Court with reference to the provisions of section 233, clause (*k*), of the Land Revenue Act (III of 1901). The facts of the case, so far as it is necessary to state them for the purposes of this judgment, are that the plaintiff's father, Nidhan Singh, was the owner of a 14-annas $7\frac{1}{2}$ pies share in *Mauza* Roshanabad. There were two other co-sharers in this village, one Jodha Singh who owned one anna and another Bisram Singh who owned $4\frac{1}{2}$ pies. In February 1874 Jodha Singh transferred his one-anna share to Tulsi Ram, the father of Bhikhari, the first respondent in this case. Out of this one-anna share an area of 8 *bighas* 3 *biswas*, consisting of various plots of land and groves, was reserved from the sale. After the death of Jodha Singh his son transferred this reserved area to Nidhan Singh, the father of the plaintiff. This was on the 18th July 1892. As a result of these transactions Nidhan Singh became the owner of a fourteen-annas and seven and a half-pies share *plus* an area of 8 *bighas* and 3 *biswas* reserved out of what was once Jodha Singh's one-anna share. The first defendant Bhikhari became the owner of Jodha Singh's one-anna share less this reserved area, while Bisram who is the defendant-respondent No. 2 was still the owner of the $4\frac{1}{2}$ pies which originally belonged to him. In 1909 these defendants applied to the Revenue Court for partition of their shares into a separate *mahal*, and it is admitted that a partition in due course was carried out by which two *mahals* were constituted, one of 14-annas $7\frac{1}{2}$-pies belonging to the plaintiff, Sanwal Singh, while the other consisting of a 1-anna $4\frac{1}{2}$-pies share belonging to the two defendants. The case for the plaintiff is substantially this. He says that when this partition was carried out due effect was not given to the transfer of 8 *bighas* 3 *biswas* to him which, as has already been stated, at one time formed the 1-anna share of Jodha Singh. It is admitted that the plots which went to make this reserved area have been allotted to the plaintiff's *mahal*, but his case is that in lieu of these plots other plots were assigned to the *mahal* of the defendants with the result that the plaintiff, instead of having a 14-anna $7\frac{1}{2}$-pies share *plus* 8 *bighas* and 3 *biswas*, has only got 14 annas and $7\frac{1}{2}$ pies. The present suit was brought, therefore, for a declaration that the plaintiff was entitled to 8 *bighas* 3 *biswas* out of the *mahal* belonging to the defendants and there was also a prayer that possession might be awarded to the plaintiff. In his plaint he specified certain numbers which in his opinion corresponded to the area to which he was entitled and he asked for a decree

in respect of those specified plots or, in the alternative, if the Court thought fit to award him any plots of the same nature and value, for a decree for such plots. Both the Courts below have dismissed the suit on the ground that it is barred by the provision of section 233 (*k*) of the Land Revenue Act. In appeal it has been contended that this decision is erroneous, but after considering the arguments which have been put forward and the various cases which have been referred to, it appears to me that the view of the law taken by both the lower Courts is correct. The terms of section 233 (*k*) are very clear. It is laid down that no person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters:—"(*k*) partition or union of *mahals* except as provided in sections 111 and 112." If we look to the substance of the case put forward by the plaintiff it seems quite clear that what he is wanting is to have allotted to him an area of 8 *bighas* odd out of the *mahal* belonging to the defendants. This seems to be clearly a matter relating to the partition of a *mahal*, for the relief which the plaintiff claims cannot be given to him without affecting the partition which has already been come to by the Revenue Court.

There can be no doubt that on the facts, as stated, the plaintiff has not been awarded the full measure of his rights in the Revenue Court. It is admitted that the defendants have got in their *mahal* an area of 8 *bighas* odd more than ought to be in it. But the question is whether this mistake having been made in the Revenue Court, can be corrected by a suit laid in a Civil Court. The authorities seem to be very clear on this point. I would refer in the first instance to the case reported as *Jagan Nath Parshad* v. *Ram Dutt* (1). That was a case in which in carrying out a partition some error had been committed by the Revenue Court in the matter of the allotment of shares. Mr. Chamier in the judgment in that case remarked: "What we have to see is, whether the two plots were ultimately at the partition allotted to the appellants or to the respondent; and that must be decided upon the lots."

Further on he says: "What one has to do is, to find out what was finally decided in the case." Here it was finally decided "that the plots were to go to the appellant." It is quite clear from this that the view of the law taken in this judgment was that a Civil Court would not go behind the partition proceedings in order to correct an error in the allotment of lands. A similar view of the law was taken in *Tirbeni Sahai* v. *Gokal Prosad* (2). In that case by a mistake of an *Amin* some wrong plots had been allotted to one of the parties. It was held that no suit would lie in a Civil Court to correct the error. Another case which may be usefully referred to is the one reported as *Jagan Nath* v. *Tirbeni Sahai* (3), the facts of which are very similar to the case now before me. There the plaintiff alleged that a certain grove had at the time of partition been wrongly allotted to the defendant's *mahal*. He claimed a decree for a declaration that he was entitled to this grove and also asked for possession. It was held that his remedy was in the Revenue Court and if there was any mistake in the proceedings of the Court conducting the partition, an appeal against the order should have been made, as provided, in the Revenue Court. Rightly or wrongly, however, the Revenue Court had awarded to the defendant what the plaintiff said should have been allotted to his *mahal* and the Judges were of opinion that this was clearly a matter relating to the partition of a *mahal* and that civil suit was barred by the provisions of section 233 (*k*). No doubt, as has been pointed out by the learned Counsel for the appellant, his client raised objections on more than one occasion in the Revenue Court and claimed that the 8 *bighas* and 3 *biswas* should be allotted to his *mahal*. One objection was dismissed in a summary fashion, and as to another objection which was made at a later stage it was said that the plaintiff would get his relief from the Civil Court. However, this does not appear to me to affect the question for decision, and I do not think it can be argued that because the plaintiff was told by the Revenue Court that he could work out his remedy in a Civil Court he can now say that any orders for partition were made subject to what might afterwards be decided in a civil suit between the parties. The case went on in the Revenue

(1) 11 Ind. Cas. 531; 14 O. C. 153.

(2) 9 Ind. Cas. 475; 33 A. 440; 8 A.L. J. 244.

(3) 1 Ind. Cas. 696; 31 A. 41; A.W.N. (1908) 274.

Courts to a finish and the partition was in due course confirmed by the Collector. The authorities all appear to me to be against the appellant and I hold accordingly that the decision of the lower Appellate Court was perfectly correct. The learned Counsel has referred to a case reported as *Chokhey Singh* v. *Jote Singh* (4) which is a decision of their Lordshsips of the Privy Council, but it appears to me that the facts there are quite different from the facts of the case now under consideration. The proceedings in that case had been taken in the first instance under the old Land Revenue Act XVII of 1876 and the plaintiff in the subsequent civil suit had before the Revenue Court intimated his intention of bringing a suit in the Civil Court. Here the plaintiff never disclosed any intention of bringing such a suit, on the other hand he was pressing for the decision of his objection by the Revenue Court itself, and if any order was given adversely to him by the Court of first instance he ought to have taken it up in appeal to the higher Revenue Authorities.

Another point has been raised on behalf of the appellant. It is argued that there is no bar to his being declared an under-proprietor in the defendant's *mahal* in respect of an area of 8 *bighas* 3 *biswas*. This argument is based on the fact that when the land was exempted from sale by Jodha Singh it was described as being *bila-lagani* and on the strength of certain rulings of this Court it is contended that land which has been described in this manner in a deed of sale should be treated as an under-proprietary holding. This case, however, was not set up in the Courts below and that would be one reason why it should not be entertained now so as to entitle the appellant to have it declared that his suit was maintainable in the Civil Court, and there is also another reason put forward by the learned Counsel for the respondents which seems to me to be a valid one. If the plaintiff's case is that the particular plots which were exempted by Jodha Singh are held in under-proprietary right the answer is that those particular plots have been allotted to this *mahal*. What he is now seeking to do is to have other plots of equal area and quality allotted to him in the defendant's *mahal* with a declaration that in respect of them he is entitled to the status of an under-proprietor. I do not think that this can be done. The result is that the decision of the lower Appellate Court is confirmed. This appeal fails and is dismissed with costs

Appeal dismissed.

(4) 1 Ind. Cas. 166; 12 O. C. 288; 13 C. W. N. 274, (P.C.); 11 Bom. L. R. 69; 6 A. L. J. 100; 9 C. L. J. 151; 5 M. L. T. 167; 31 A. 73; 19 M. L. J. 123.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3143 OF 1911.

March 4, 1914.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

ANNADA PROSAD DUTT—DEFENDANT—APPELLANT

versus

JOGESH CHANDRA SEN GUPTA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104; Sch. I, O. I, r. 13; Sch. II, para. 14—Arbitration—Reference by only some of parties—Non-joinder, objection as to—Waiver—Refusal by Court to remit award—Appeal.

Where the plaintiff and some of the defendants joined in a petition for reference to arbitration without making the other defendants parties, and at no stage before the Court any objection was taken upon the ground of non-joinder:

Held, that the reference to arbitration was not bad by reason of non-joinder, for, applying the principle set forth in rule 13 of Order I of the Civil Procedure Code, the right to object upon that ground was waived.

Under paragraph 14 of Schedule II of the Civil Procedure Code, a Court may remit an award to an arbitrator upon the ground that the award has left undetermined one of the matters referred; but if the Court after considering the objection made upon this ground refuses to remit the award to re-consideration, no appeal lies from such refusal.

Appeal from the decree of the District Judge of Dinajpur, dated August 5, 1911, confirming that of the First Munsif of Dinajpur, dated June 29, 1910.

Babus *Jogesh Chandra Roy* and *Bankim Chandra Mukherjee*, for the Appellant.

Babus *Mohendra Nath Ray* and *Prokash Chandra Majumdar*, for the Respondents.

JUDGMENT.—This was a suit for declaration of title to and for possession of a plot of land and for declaration of the plaintiff's right of way over another plot. The appellants

together with several other persons were made defendants. The issues were settled on the 10th September 1909. On the 11th of February 1910 the plaintiffs and the appellant filed a petition before the Munsif nominating three persons as arbitrators and saying, "we shall be fully bound by the decision that will be made by the said three gentlemen on the matters in this suit." Thereupon the Munsif passed an order appointing the three gentlemen arbitrators in the case, directing that the record should be sent to them and directing them to submit their award within a certain time. The arbitrators accordingly submitted an award in favour of the plaintiffs. The appellant objected to the award on various grounds. The objection was overruled by the Munsif; and in accordance with paragraph 16 of the second Schedule of the Code of Civil Procedure he pronounced judgment according to the award. The defendant-appellant appealed to the District Judge. His appeal was dismissed mainly upon the ground that no appeal lay. This appeal was then made to this Court.

A preliminary objection has been made by the respondent that no appeal lay to the District Judge and, therefore, no appeal lies to this Court. On behalf of the appellant it has been argued first that the reference to arbitration was bad by reason of non-joinder of the other persons who had been made defendants in the suit. It is unnecessary for us to decide whether, if there were such a defect in the case, an appeal would lie to this Court, for applying the principle set forth in rule 13, Order I, 1st Schedule of the Code of Civil Procedure, we hold that the right to object upon this ground was waived. The appellant joined in a petition for reference to arbitration without making these other persons parties and at no stage before the Munsif was any objection upon the ground of non-joinder made.

It is then contended that all the questions at issue were not referred to the arbitrators. It is pointed out that one of the issues in the case was the issue of limitation and that nothing is said upon the subject of limitation in the award of the arbitrators. As we have pointed out the issues had been drawn up and were on the record at the time the record was sent to the arbitrators for their decision. The appellant never suggested before the Munsif that this issue was not referred to the arbitrators with the other issues in the case. His objection before the Munsif was that the issue was referred but was not decided. This contention fails.

The third contention is that the issue of limitation was referred to the arbitrators but was not decided by them and that upon that ground the award was a bad award. Now under paragraph 14 of the second Schedule of the Code of Civil Procedure a Court may remit an award to an arbitrator upon such a ground as this, namely, that the award has left undetermined one of the matters referred to arbitration. But if, as in the present case, the Court after considering the objection made upon this ground refuses to remit the award to re-consideration, no appeal lies from the refusal to remit the award. Further when a Court has refused to remit an award upon such a ground the Court is bound under paragraph 16 to pronounce judgment according to the award, and no appeal lies from a judgment so pronounced. No appeal, therefore, lay to the District Judge on this ground and no appeal lies to this Court.

The result is that the appeal is dismissed with costs. We invite attention to the forms headed "application for an order of reference" and "order of reference" in the appendix to Schedule II of the Code of Civil Procedure. It is desirable that these forms should be brought into use.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 160 OF 1913.

April 3, 1914.

Present:—Justice Sir George Knox, Kt.

RAMCHANDRA SINGH—PLAINTIFF—APPELLANT

versus

Musammat DURGA DEVI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908) s. 20—Payment of interest—Burden of proof—Limitation.

Under section 20 of the Limitation Act the payment of interest must be proved to have been made

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either by the debtor himself or by his agent duly authorized in this behalf.

Revision against an order of the Small Cause Court Judge, Meerut, dated 11th of July 1913.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Harendra Krishna Mukerji*, for the Respondent.

JUDGMENT.—This is a claim for Rs. 372-11-0, principal and interest, due on a bond dated the 17th of June 1907. The bond was for Rs. 98.

The claim was brought in the Court of the Judge of Small Causes at Meerut. The defendant denied the claim and urged that the suit was barred by limitation.

The plaintiff in his plaint tries to take the case out of the bar of limitation by a statement made in the plaint that one Naubat Singh, *Mukhtar-i-am* of the person responsible for payment, before the expiration of the prescribed period paid the sum of Rs. 5 as interest due on the debt. Under the circumstances the burden lay upon the plaintiff to prove that this sum of Rs. 5 was paid as interest on this debt and was paid by an agent duly authorized to make such payment as interest by the person liable for the payment. So far as the record shows no witnesses were put forward by the plaintiff. There was the bond and there was the *Mukhtarnamah-am* and the pleadings of the parties. The Judge of the Small Cause Court came to the following conclusion upon the matter before him; "The payment of interest by Naubat Singh, the *Mukhtar-i-am* of the widow of Narain Singh, does not save limitation under section 20 of Act IX of 1908. Besides this the *Mukhtarnamah-am* executed in favour of the agent Naubat Singh does not authorize him to revive any debt."

I have heard parties on both sides and I have looked carefully into the payment of the sum of Rs. 5, which is a payment recorded by the plaintiff, and there is nothing on the record to show that the defendant was in any way conscious that the sum of money was being so paid. As a matter of fact he denies the claim altogether. The payment of Rs. 5 paid in this way on the very last day of limitation is open to suspicion. The *Mukhtar-i-am* is an ordinary *Mukhtar-i-am* and inspite of very wide powers given does not specify a power which would immediately cover this transaction.

I cannot think it likely that when this question was being argued before the Court the plaintiff, if he had witnesses to prove the two facts, *i.e.*, that the payment was a payment as interest and, *secondly*, was a payment by a person duly authorized to make the payment as interest, would not have produced them and tendered them in the case.

I am not satisfied that the decree is a decree not according to law.

I, therefore, dismiss this application; I make no order as to costs.

Application dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 405 OF 1913.

March 21, 1914.

Present:—Mr. Justice Tudball.

MATA PERSHAD MISSER AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAJADHAR LOHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence—Mortgage—Proof of copy from registration—Fixed-rate holding—Sub-tenancy in sir *holding—Acquisition of fixed rate holding—Land mortgaged by sub-tenant of* sir *—Mortgagee continuing in possession, effect of.*

The mere production of a copy of mortgage-deed is not sufficient to prove the mortgage.

A sub-tenancy of *sir* land in 1864 could not develop into a fixed-rate tenancy.

Obiter.—If the fact were established that a sub-tenant of *sir* land mortgaged his plot with possession to a mortgagee and the *sir* rights vanished and the mortgagee continued to hold as tenant and occupancy rights were acquired, then the acquisition would enure for the benefit of the mortgagor and on redemption the latter would be entitled to possession.

Second appeal from the decision of the District Judge of Mirzapur, dated 10th January 1913.

The Hon'ble Mr. *Gokul Prashad*, for the Appellants.

Mr. *Nawal Kishore*, for the Respondents.

JUDGMENT.—This appeal arises out of a redemption suit which has some rather peculiar features. The plaintiffs-respondents are Lohars by caste, heirs and representatives of Ganpat and Kishan Dayal Lohars, the alleged original mortgagors. They seek

to obtain possession, on redemption of a mortgage, dated 4th June 1866, of an area, 3 *bighas* 18 *biswas*, plot No. 133 in the village, "*a fixed-rate tenure*" The mortgage, they claim, was for the sum of Rs. 150 and was redeemable on payment of this sum, interest and profits being deemed equal. The date fixed for payment was 11th June 1911. The plaint shows that they clearly claimed to redeem a fixed-rate tenure which they state was mortgaged to Jaipal Misser, the predecessor-in-title of the contesting defendants.

They produced a copy of the deed obtained from the Registration Department. They called on the opposite party to produce the original, but the latter failed to do so.

The contesting defendants denied the mortgage *in toto*. They claimed that Jaipal Misser was the tenant of a large holding at fixed rates of which the area in dispute was one plot, that the holding was recorded as such at the revision of Settlement in 1882 and continuously ever since and they had held it as such and not as mortgagees. The Munsif framed two issues:

(1) Are the plaintiffs the fixed-rate tenants of the plot in dispute or the defendants ?

(2) Did Ganpat and Kishan Diyal, ancestors of the plaintiffs, mortgage the plot in dispute to the defendants' ancestor and, if so, on what condition ?

On the first point he held that the plaintiffs had utterly failed to prove that they were the fixed-rate tenants of the land.

In regard to the second point he held that it was unnecessary to, decide it but remarked as follows:—

"The plaintiffs' only evidence regarding the fact of the mortgage is the copy of the registered mortgage-deed, executed by Ganpat and Kishan Diyal in favour of Jaipal in 1866. (*N.B.* In the copy of the judgment the year is given as 1873, but this is clearly an error). As it is not proved that the plaintiffs' ancestors were the fixed-rate tenants of the plot and also as the plot formed part of the Zemindar's *sir* land, the plaintiffs' ancestors could not transfer or mortgage it and hence if they executed any sort of mortgage-deed of the land in dispute the plaintiffs are not entitled to get redemption of it." He dismissed the suit.

The plaintiffs appealed.

The learned District Judge held:

(1) that at the date of the mortgage the plot in question was the *sir* land of the Zemindar and the plaintiffs' ancestors were the sub-tenants thereof;

(2) that though it was difficult to understand how any body could take a mortgage of so precarious a tenure for so large a sum as Rs. 150 still the mortgage was established by the production of the copy;

(3) that the mortgagee, Jaipal Misser, probably in collusion with the Zemindar and after payment of money, must have had himself entered at the revision of records in 1882 as a fixed-rate tenant;

(4) that the mortgagor was entitled to redeem his mortgage;

(5) that it was unnecessary for the plaintiffs to prove that their ancestors were fixed-rate tenants; that they had proved a subsisting mortgage and were entitled to possession on redemption, but that they could not step into the shoes of the mortgagees, who are now the fixed-rate tenants, as they were not the mortgagors of a fixed-rate tenancy; they were only entitled to possession of the tenancy which their ancestors mortgaged.

He made each party pay their own costs. The decree drawn up was for redemption of the plot in dispute and in case the payment was not made on or before the 10th February 1913, the plaintiff was to be debarred from all rights to redeem. The mortgage being usufructuary, the latter portion of the decree is obviously wrong. In case of default, the decree should direct the property to be sold. The property in the present case as held by the Court below is a sub-tenancy of *sir* land, which under the law in force in these Provinces at the present time is not transferable and cannot be sold.

The defendants appeal.

The first ground of appeal is that the sub-tenancy of *sir* land, which the lower Appellate Court has found to be the mortgaged property, no longer exists and, therefore, no redemption can be decreed.

The second ground is that the entry at the last revision of records in 1882, that the defendants are tenants at fixed rate, is conclusive evidence of that fact and the Court cannot go behind it.

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The third is that the suit being clearly one for redemption of a fixed-rate tenancy, the Court below had no power to grant redemption of a different property.

The fourth is that a sub-tenancy is not transferable and, therefore, redemption cannot be decreed.

The fifth is practically the same as the first, being a plea that the Zemindar having given up his *sir* rights the sub-tenancy vanished long ago and, therefore, the mortgaged property no longer exists.

At the hearing of the appeal it seemed to me that there was no legal evidence on the record to establish the fact of the mortgage. The case was adjourned to allow of the record being thoroughly examined and to enable the point to be fully argued.

The defendants totally deny that there was ever a mortgage at all. The evidence accepted by the lower Appellate Court shows that plot No. 138 old (new No. 208) was recorded at the first revision of records in 1840-1842 (the Permanent Settlement was made in 1793) as the *sir* of the Zemindars.

In 1864 (according to some old papers produced and accepted in evidence by the Court below) it was recorded as in the cultivation of one Sitlu *lohar*. The latter was the father of Ganpat and the uncle of Kishan Dayal, the two alleged mortgagors. The plot was one of seven plots entered against Sitlu.

The mortgage-deed is dated 1866. In that same year three months before the mortgage the Zemindari in the village changed hands.

In 1870 the owners of the Zemindari again sold it to *Musammat* Mogeshar Kuar and in the sale-deed mentioned the fact that a large area was being held by Jaipal Misser as a fixed-rate tenant, the present plot being a portion thereof. There is on the records an admission by the defendant Mata Pershad that Jaipal, his father, was the *karinda* of Babu Nawal Kishore Singh, the husband of *Musammat* Mogeshar Kuar. In 1871 the plot is entered as in the cultivation of Jaipal but in brackets are entered the words "*jot* Sitlu" to show that it was land which had been held by Sitlu.

Of the seven plots entered in 1864, as being cultivated by Sitlu, I find five are still recorded in 1871 as cultivated by him. One is the plot in question and one No. 123 is entered as cultivated by Moti *lohar* with the words "*jot* Bisheshar Kuar" in brackets.

At the revision of records in 1882, Jaipal Misser was recorded as the fixed-rate tenant and he and his descendants have always been so recorded since then. It has once been mortgaged by the family since.

It will thus be seen that Ganpat and Kishan Dayal have never, so far as the evidence goes, been recorded as the tenants or sub-tenants of the plot. No right of occupancy, either ordinary or at fixed rates, is disclosed as ever having accrued to them or Sitlu.

The District Judge has inferred from the fact that the mortgage deed purports to have been executed by Ganpat and Kishan Dayal, that Sitlu must have been dead in 1866 and that the entry of his name in 1871 was an error, but the copy of the deed itself shows that Sitlu was alive in 1866 as he was present at the time of registration.

The District Judge has also concluded that the entry of Jaipal Misser as fixed-rate tenant at the revision of 1882 must have been brought about by Jaipal by payment of money to the Zemindars. This is a mere inference, there is no evidence to support it. The entries made at Settlement time and at revisions of records are duly verified and attested and it is impossible to infer that they are wrong because they conflict with the entries to be found in the papers of 1864 and 1871. The records of these two years which were produced in evidence, were not produced from the custody of a record room. They are third copies produced by a *patwari* and are said to be copies which were left in the custody of the *patwari* according to the rules of those times. Such a custody is by no means a guarantee of their being pure and undefiled. However be that as it may, it seems to me that there is no evidence on the record to establish the mortgage. The mere production of a copy of the deed is not sufficient to prove the mortgage. No attesting witness has been called. Not one of the witnesses who has been called saw the execution. All that they can state is that they heard of the mortgage from Ganpat. There is no

entry of the mortgage to be found in any record, public or private. The fact that a deed was registered shows that a deed was drawn up and executed by some one, but there is no legal evidence of a subsisting mortgage of this plot by Ganpat and Kishen Dayal in favour of Jaipal. The witnesses state that Ganpat used to cultivate the plot and said that he had mortgaged it. The plaintiffs seek by their suit possession of a fixed-rate tenancy in plot No. 138 (208 new). There is not a scrap of evidence to show that they or their predecessor-in-title ever held such a right.

A sub-tenancy of *sir* land in 1864 or 1865 could not develop into a fixed-rate tenancy (*vide* the definition of the latter class of tenancy).

It is possible if the *sir* rights vanished that a sub-tenant might become a tenant and acquire a right of occupancy; and if the fact were established that a sub-tenant of *sir* land mortgaged his plot with possession to a mortgagee and the *sir* rights vanished and the mortgagee continued to hold as tenant and occupancy rights were acquired, then the acquisition would enure for the benefit of the mortgagor and on redemption the latter would be entitled to possession. In my opinion, however, the evidence on the record does not establish the mortgage as a subsisting mortgage or even establish mortgage itself. The mere production of a copy of the deed is insufficient in law.

On this ground the suit was bound to fail. I, therefore, allow the appeal. The suit will stand dismissed with costs in all Courts; those in this Court including fees on the higher scale.

Appeal decreed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 90 OF 1911.
November 17, 1913.
Present:—Mr. Lindsay, J. C.

Lala PARBHU DAYAL—DEFENDANT—APPELLANT

versus

BABBAN LAL AND ANOTHER—PLAINTIFFS—KANIZ FATMA BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 100—Will creating charge by way of annuity—Charge upon immoveable property, whether enforceable against bona fide transferee for value without notice—Mortgage and charge, distinction between—Registration of charges not compulsory—Document, creation of charge by, not compulsory—Lien, legal and equitable, admission of.

Where a charge upon an immoveable property was created by a Will, the registration of which was not compulsory and of the terms of which a stranger, the auction-purchaser, could not have been cognizant:

Held, that the charge could not be enforced as against the auction-purchaser, he being a *bona fide* purchaser for value without notice.

Maina v. *Bachchi*, 28 A. 655; 3 A. L. J. 551; A. W. N. (1906) 165, dissented from.

A charge does not operate to transfer to the charge-holder any interest in a specific immoveable property as a mortgage does.

Appeal from the decree of the Subordinate Judge, Lucknow, dated 15th February 1911.

Babu *Basudev Lal*, for the Appellant.

Pandit *Jagmohan Nath Chak*, for the Respondents.

JUDGMENT.—A number of questions, both of law and fact, are raised in the grounds taken in the memorandum of appeal, but for the purpose of disposing of the case it is necessary to deal only with the plea contained in the 10th ground of the memorandum. If this is accepted the appeal must be allowed. The plea is one of law, namely, that a charge upon immoveable property cannot be enforced against a *bona fide* purchaser for value without notice.

The facts may be stated shortly:

One Darogha Wajid Ali died on the 14th December 1876. By a Will, dated the 29th May 1875, he bequeathed the bulk of his property to his son, Syed Nazir Hasan, with direction to pay certain annuities from the revenues of his immoveable property. One of those annuities was in favour of a younger son, Amir Hasan, who is still alive. He was to receive a stipend of Rs. 60 per mensem

which was to be payable to him and his issue "*naslan bad naslan.*" It was further directed by the Will that on failure of issue the allowance was to stop, the right to receive the money reverting to the owner for the time being of the estate.

Amir Hasan has alienated the right to receive this annuity and it has eventually been transferred to the plaintiffs who brought the suit, out of which this appeal has arisen, for recovery of arrears of the annuity due in respect of the six years 1904-1909. A number of defendants were impleaded on the ground that they had taken transfers from time to time of certain portions of the immoveable property which once constituted the estate of Darogha Wajid Ali. The allegation in the plaint was that these transferees took the property subject to the charge and that the property in their hands was liable to satisfy the claim which was for Rs. 4,320 *plus* interest, Rs. 1,533-9-6, calculated at the rate of 12 per cent. per annum.

One of the defendants in the case was the present appellant, Lala Parbhu Dayal, who in December 1903 purchased in execution of a decree a two-third share in Aima Mau, one of the villages which had belonged once to Wajid Ali. It is said, and there is nothing to contradict the statement, that the property was so purchased upon the faith of the description given in the sale proclamation, a description which did not set out that the property intended to be sold was subject to any charge.

It is expressly stated in the lower Court's judgment that Parbhu Dayal, the appellant, was one of the several defendants who raised a plea of non-liability on the ground of *bona fide* purchase for consideration without notice of any lien. The fourth issue raised the question whether the property in the hands of the auction-purchaser was subject to the charge. The Subordinate Judge dealt very briefly with the point. He held that under clause 4 of the Will the immoveable property which was disposed of by the Will had been made subject to a charge in favour of the annuitant. He did not at all discuss the further question whether that charge was capable of being enforced against a *bona fide* purchaser for value without notice.

In the event he gave a decree against all the defendants for the principal sum claimed together with interest at half the rate demanded in the plaint.

Only the defendant Parbhu Dayal has appealed. It is not necessary for me to discuss any of the pleas raised in his appeal, except one. I do not propose to examine the argument as to whether under the provisions of the Will the annuity, recovery of which is sought, is a charge upon the immoveable property left by Wajid Ali. I will assume for the purposes of this case that Wajid Ali by his Will made his immoveable property security for the payment of this annuity to his son, so as to constitute a charge within the meaning of that expression as used in section 100 of the Transfer of Property Act. But does it necessarily follow from this that the annuitant, in order to realise what is due to him, is entitled to follow the property in the hands of a *bona fide* purchaser for value without notice of the fact that such a security had been made? It is quite clear that the making of the charge does not operate to transfer to the annuitant any interest in a specific immoveable property as in the case of a mortgage, and this distinction in the nature of these two transactions is of great importance and in the opinion of the learned author of the Law of Mortgage in India (Ghose, 4th Edition, page 104) constitutes the reason of the rule which obtains in England that a mere charge may not be enforced against a *bona fide* purchaser for value without notice. Again at page 129 of the same work the author points out another objection to the enforcement of charges against such persons by showing that charges may be created without any written instrument and in such cases they are wholly untouched by the provisions of the Registration Act. "They confer rights *in rem* and it would certainly be a great hardship if they could be enforced against *bona fide* purchasers for value." Further at page 149 the rule is laid down in general terms, but the view thus expressed has not been accepted in one judgment of the Allahabad High Court, the case of *Maina* v. *Bachchi* (1), in which the learned Judge gave it as his opinion that it was much too broad a proposition to state that in all *cases* where by act of parties or operation of law immoveable property of one person is made security for payment of

(1) 28 A. 655; 3 A. L. J. 551; A. W. N. (1906) 165.

money to another and the transaction does not amount to a mortgage, the security will not be enforced against *bona fide* transferees for value without notice. In support of this opinion the learned Judge points out that the Transfer of Property Act recognises the right to enforce a charge as well as a mortgage. As to this, of course, there can be no dispute, but it is equally clear that the remedy of the charge-holder is not necessarily co-extensive with that of the mortgagee, for section 100, which creates the right to enforce the charge, only says that "the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, *so far as may be*, apply to the person having such charge."

And in view of this language I do not think that much importance attaches to the fact upon which stress was laid by the learned Judge, namely, that section 100 contains no provision that charges shall not be enforced against transferees for value.

Again the learned Judge observes:—

"It would appear that the provisions as to registration contained in the Registration and Transfer of Property Acts apply to charges (when created by acts of parties) just as much as to mortgages, and if they do so apply I can see very little reason for drawing a distinction between mortgages on the one hand and charges on the other, more particularly as registration amounts to notice."

So far as the Transfer of Property Act is concerned there is nothing in it which requires the registration of charges nor indeed which requires that charges shall be created by document. A charge can be created without any written instrument at all and the Registration Act only deals with written instruments. And again the Registration Act does not insist upon the registration of all documents by which a charge may be created. In the present instance the charge, which it was assumed was created, was made by a Will which the testator was under no obligation to register.

The learned Judge also refers to the provisions of section 40 of the Transfer of Property Act, which expressly lays down that certain rights not amounting to an interest in property are not to be enforced against transferees for consideration and without notice, and draws attention to the absence of any such restriction in section 100. But if a charge does not amount to the transfer of an interest in property, it is difficult on principle to see why, any more than other transactions of such a limited nature, it should be enforced against a purchaser for value without notice even if the language of section 100 does not bar its enforcement. Altogether I am of opinion, in agreement with the view taken on page 130 of Ghose's Law of Mortgage (4th Edition), that the Courts in India should be cautious in the admission of legal as opposed to equitable liens and if the law as administered by the English Court of Chancery is adopted, the equitable defence open to a purchaser for value should also be admitted.

It may not be necessary to go so far as to say that in no case should a charge be enforced against a *bona fide* transferee without notice, but at any rate in a case like the present where the charge, if there is one, was created by a Will the registration of which was not compulsory and of the terms of which a stranger such as the appellant here, who bought at an auction-sale, could not have been cognizant, it would, in my opinion, be altogether improper to enforce the charge.

I allow this appeal and modify the decree of the Court below by directing that the plaintiffs' suit as against Lala Parbhu Dayal be dismissed with costs. The plaintiffs-respondents will pay the appellant's costs in this Court.

Appeal allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 84 OF 1913.

April 3, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SHEOGOPAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NAJIB KHAN—PLAINTIFF—RESPONDENT.

Pre-emption decree set aside—Sale price attached and its part paid to creditor of pre-emptor—Pre-emption

SHEOGPAL v. NAJIB KHAN.

decree affirmed on appeal—Execution—Whether pre-emptor can get possession without re-paying the amount drawn by his creditor.

In pursuance of a pre-emption decree the pre-emptor deposited the sale price in Court. On the vendee's appeal the decree was set aside. About a month after this one of the creditors of the pre-emptor, attached the sale price, which was still in Court, and was paid out a portion of it in satisfaction of his decree. Subsequently, on the pre-emptor's appeal the decree of the primary Court was affirmed, but when he applied in execution for possession he was met by the plea that the full sale price was not in Court for the payment of the vendee:

Held, (1) that after the decree of the Court of first instance had been set aside, the money, if it belonged to any one, belonged to the pre-emptor;

(2) that it was quite wrong of the Court to attach and pay out a part of the money which was in Court before a final decree had been made in the suit;

(3) that as the Court had paid money to the pre-emptor's creditor without any fault on the part of the vendee, that as the latter could not be dispossessed of the property without receiving the full sale price and that as the pre-emptor had benefited by payment of his debt due to one of his creditors, he must make up the deficiency before he could be given possession.

Letters Patent Appeal from the decree of Mr. Justice Tudball, printed in 21 Ind. Cas. 67.

FACTS appear from the judgment of the Court as well as from the judgment appealed against reported in 21 Ind. Cas. 67.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *B. K. Mukerji*, for the Respondent.

JUDGMENT.—This is a judgement debtor's appeal. The facts are very fully stated in the judgment of the learned Judge of this Court dated the 6th of June 1913. It appears that on the 15th of February 1907 Najib Khan obtained a decree in a pre-emption suit, conditional upon his paying into Court the sum of Rs. 1,000 by the 15th of March 1907. He complied with this condition. The vendee, however, appealed, and on his appeal the claim was dismissed on the 15th of June 1907. On the 18th of July of the same year a creditor of Najib Khan attached the Rs. 1,000, which was deposited in Court, for the payment of the decree which he had against Najib Khan for Rs. 193-4-6, and this sum was paid to the creditor. Eventually, however, the High Court remanded the case to the lower Appellate Court and that Court affirmed the decree of the Court of first instance, that is to say, the decree for pre-emption. The plaintiff Najib Khan, the decree-holder, after the lapse of some time applied in execution for possession. He was met by the plea that the one thousand rupees was not in Court for payment to the vendee. The Court executing the decree thereupon allowed the application. The vendee appealed and the lower Appellate Court modified the order of the Court of first instance by directing that if Najib Khan paid Rs. 193-4-6 together with Rs. 100 damages, then he might have possession but not otherwise. On second appeal to this Court a learned Judge allowed the appeal and restored the order of the Court of first instance.

In our opinion the equity of the case is clearly in favour of the vendee being paid the full amount of the consideration for his sale which was set aside as the result of the decree in pre-emption It was no fault of his that the money was paid out of Court to the creditor of Najib Khan.

Najib Khan clearly benefited by the payment because the debt to one of his creditors was satisfied. Of course it was quite wrong of the Court, which granted the attachment of the money in Court, to order its payment out until a final decree had been made in the pre-emption suit. The learned Judge of this Court says: "In the circumstances of the case, I can see no equity in enforcing the pre-emptor to pay a further sum of Rs. 193-4-6, much less the additional fine of Rs. 100 which has been imposed by the District Judge." While we agree with our learned colleague about the fine of Rs. 100, we cannot agree with him in what he says about the Rs. 193-4-6. In the first place it is not paying any 'further sum' to the *vendee*. The vendee never received the Rs. 193-4-6; and in the next place whatever misfortune Najib Khan may have suffered as the result of the order for payment out to the attaching creditor, the vendee has the clearest equity to be paid back the money which he paid for the property to his vendor which property he is now being dispossessed of. As already mentioned the Rs. 193-4-6 went to discharge a debt of Najib Khan. The case of *Abdus Salam* v. *Wilayat Ali Khan* (1) has been cited. It is unnecessary for us to express any opinion upon this case. It is clearly distinguishable from the

(1) A. W. N. (1897) 31.

present because at the date when the money in that case was attached and paid out the pre-emption decree stood good and the money was payable to the vendee. In the present case when the money was paid over, the decree of the Court of first instance had been set aside by the District Judge and the money if it belonged to any one belonged to the pre-emptor. We allow the appeal to this extent that we vary the decree both of this Court and of the lower Appellate Court by directing that the plaintiff Najib Khan shall have possession upon the terms of his paying into Court the sum of Rs. 193-4-6 within two months from this date. We direct that the appellants do have their costs of both hearings in this Court, including fees on the higher scale.

In the Court below each party will bear his own costs.

Decree varied.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 92 OF 1911.

November 6, 1913.

Present:—Mr. Lindsay, J. C., and Mr Kanhaiya Lal, A. J. C.

RAHAS BEHARI LAL—PLAINTIFF—APPELLANT

versus

BACHCHU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage by conditional sale—Foreclosure—Post diem *interest—Interpretation of document—Mortgage lien—Decree for foreclosure against auction-purchasers of mortgaged property—Execution-sales, whether Court gives warranty of title in.*

In a foreclosur suit based upon a mortgage by conditional sale, containing the stipulation to the effect that if the principal with interest at the stipulated rate was not paid by the date on which the period of the mortgage expired the mortgage was to be foreclosed in lieu of the sum so due on that particular date, the mortgagee claimed interest for the period subsequent to the date on which the term of the mortgage expired:

Held, that on the true construction of the document the mortgagor was liable to pay *post diem* interest so claimed.

Mathura Das v. *Raja Narindar Bahadur*, 19 A. 39; 23 I. A. 138; 1 C. W. N. 52 and *Ghantayya* v. *Papayya*, 23 M. 534, referred to.

A certain lien was legally enforceable as against a certain property. The property was attached in execution of a decree, but the Court ordered only half of the lien to be notified, and the auction-purchaser bought it subject to this half of the lien. Subsequently a suit was brought for the enforcement of the whole lien on the property thus purchased:

Held, that the auction-purchaser could not avail of the Court's notification as to only half of the lien over the property purchased by him, for the Court in execution-sales gives no warranty of title.

Appeal from the decree of the Subordinate Judge, Kheri, dated 21st February 1911.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babus *Basudev Lal* and *Salig Ram*, for Respondents Nos. 4 and 5.

Babu *Hari Kishen Dhaon*, for Respondent No. 6.

JUDGMENT.—This case has already been before this Court, and was remanded by our order of the 22nd January 1913 for decision of certain issues which the first Court had left undetermined, findings on which were in this Court's opinion necessary for the proper disposal of the appeal. The issues have now been decided and the findings of the lower Court are before us. The suit was one upon a mortgage by conditional sale executed on the 17th December 1892 in favour of certain persons whose rights under the mortgage were assigned to the plaintiff under a deed executed on the 3rd April 1905.

The date fixed for payment was the 17th December 1907 and the rate of interest agreed upon was two per cent. per mensem. Interest was to be paid every six months and in default of payment the interest was to be added to the principal, and interest at the stipulated rate was to become payable on the total sum. According to the account put in by the plaintiff-mortgagee at the time he brought the suit, the amount of the debt was Rs. 29,183-15-8 and foreclosure was asked for in default of payment of this amount by the defendants to the suit. The Subordinate Judge gave the plaintiff a decree for Rs. 1,742-1 only. He arrived at this sum by refusing to allow the mortgagee interest subsequent to the date fixed in the deed for payment, on the ground that there was no undertaking in the deed to pay *post diem* interest. The learned Subordinate Judge interpreted the conditions of the deed to mean that if the principal with interest at

the stipulated rate was not paid by the date on which the period of the mortgage expired the mortgage was to be foreclosed in lieu of the sum so due on that particular date. In coming to this conclusion he laid stress upon the words '*isi qadr*' contained in the following expression: "*isi qadr zar-i-rehn wa sud men jaedad marhuna ko bajae bai ke tasawwur karke rehn-nama mazkur misl bai kamil tasawwur karunga.*"

He took the words "*isi qadr*" to mean the total amount, principal and interest, due on the 17th December 1907 and understood the contract to be that the mortgagee was to foreclose as soon as the period elapsed under the penalty of losing all interest subsequently in case he failed to do so. The appellant-plaintiff's case is that the lower Court was wrong in refusing *post diem* interest and we are satisfied that this contention is correct and must prevail. There was a distinct covenant by the mortgagor that he would pay compound interest in default of payment of interest by regular instalments due every six months, and it cannot reasonably be assumed that this undertaking to pay was to bind the mortgagor merely for the period for payment fixed in the mortgage-deed. It is not sufficient to say, as the Subordinate Judge has said, that there is no express promise to pay interest after the due date. As was remarked by their Lordships of the Privy Council in the case of *Mathura Das* v. *Raja Narindar Bahadur* (1).

"The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a Jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction."

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52

Or, as was observed by a Bench of the Madras High Court in the case in which there was no express promise to pay *post diem* interest (while, on the other hand, there was nothing to point to the view that *post diem* interest was not intended to be paid):

"Now to hold that a promise to pay interest in the general words contained in the instrument before us is a promise to pay up to the due date only would be to say that a default in the due performance of the contract was to result in an advantage to the party making the default and a disadvantage to him who was not in fault. This is, of course, not what parties contemplate when they contract with each other. Certainly, it is more reasonable to hold that a promise to pay interest in circumstances like the present is a promise to pay interest as long as the principal sum is improperly withheld." [*Ghantayya* v. *Papayya* (2)].

This rule of construction has been accepted generally by the Courts in India and it is not necessary for us to refer to the string of authorities cited by the appellant's learned Counsel in the course of his argument.

We hold, accordingly, that on the true construction of the document before us the mortgagor was liable to pay *post diem* interest and that the amount stated in the plaint was due at the time the suit was filed. The other question, we have to deal with, arises out of cross-objections filed on behalf of the fourth and fifth respondents, Raja Ram Singh and Ishri Singh, and in order to understand the nature of this question it is necessary to refer in detail to certain transactions affecting the share of the village of Khurramnagar which comprises the interest which was mortgaged to the plaintiff. We begin with the fact that Baldeo Singh owned a 10-*biswa* share in Khurramnagar.

1. On the 26th July 1892, he hypothecated to one Gopal Singh a one-*biswa* share out of these 10 *biswas* to secure a loan of Rs. 99. The mortgage was unregistered. Gopal transferred his mortgagee rights to his brother Ishri, the fifth respondent, who brought a suit on the mortgage in 1898 and having got a decree for sale purchased the property himself.

(2) 23 M. 534.

RAHAS BEHARI LAL *v.* BACHCHU SINGH.

2. On the 17th December 1892, Baldeo executed a mortgage by conditional sale of 5 *biswas* out of the 10 *biswas*. This is the mortgage now in suit.

3. On the 20th July 1894, one Kesho in execution of a simple money-decree got sold $2\frac{1}{2}$ *biswas* out of Baldeo's 10-*biswa* share and this was purchased by Parmeshar Din, defendant-respondent No. 6, who is the plaintiff's own father.

4. On the 7th March 1895, Baldeo mortgaged an one-*biswa* share to one Sheo Sahai. The latter subsequently foreclosed, and the one-*biswa* share so acquired was later on sold to the fourth respondent Raja Ram.

Pausing here it may be explained that up till this last date there was with Baldeo Singh sufficient property to allow full effect being given to all the transfers of which mention has been made. Those transfers had affected only $9\frac{1}{2}$ out of 10 *biswas* which constituted the full share of Baldeo Singh. And there is nothing, in the language of the mortgage-deeds nor in the circumstances attending the execution sale at which Parmeshar Din purchased, to suggest that any one of these transactions was in any way subject to the other. Each mortgage was a first mortgage, and it is not argued that Parmeshar Din made his purchase subject to any encumbrance.

5. We come then to the 20th July 1895 when a 5-*biswa* share belonging to Baldeo was sold in execution of a simple money-decree and purchased by the sixth respondent, Parmeshar Din.

It would appear that previous to this sale, the mortgagees, who then held the interest under the mortgage now in suit, applied to have their mortgage lien notified as affecting the 5 out of 10 *biswas* which had been attached. The decree-holder objected that the entire debt, which was secured by a mortgage of 5 out of 10 *biswas*, should not be declared and in the end the Court passed an order that a lien for half the debt should be given notice of as affecting the share it was proposed to sell. The property was purchased subject to this lien.

It is said that even after this execution sale the mortgagor Baldeo still retained $\frac{1}{2}$ *biswa* share. It is admitted that this has been sold to Parmeshar Din since this suit was brought.

The present position, therefore, is this. Out of the 10 *biswas* originally owned by Baldeo one *biswa* is with the fourth respondent, Raja Ram, one with the fifth respondent, Ishari Singh, and 8 *biswa* with Parmeshar Din.

Raja Ram and Ishri Singh contended before the first Court that the shares acquired by them were not in any way affected by the plaintiff's mortgage and that, therefore, no foreclosure decree could be passed against them. The Subordinate Judge refused to decide the issue arising out of these pleas but his successor has now, acting on the order of remand, found that the shares now in possession of these respondents are outside the mortgage in suit.

The defendant Parmeshar Din, in order to save the property in his possession, pleaded that he had bought $2\frac{1}{2}$ *biswas* free of encumbrance (which was quite correct) and that as he had bought the other five *biswas* subject to one-half of the lien created by the mortgage in suit the other half of the debt was not recoverable from any property in his possession. The Subordinate Judge has now found that the decree for foreclosure to which the plaintiff is entitled must be worked out against the 8 *biswas* now in possession of Parmeshar Din. The appellant who may, we think, be assumed to be acting in sympathy or collusion with his parent has challenged the lower Court's findings and his learned Counsel argued the case so as to leave practically nothing for Prameshar Din's Counsel to say. But we are satisfied that the learned Subordinate Judge has come to the right conclusion. There can be no reason whatever for disturbing the rights acquired by the fourth and fifth respondents under mortgages, which at the time they were made purported to be and could be treated as first charges upon the shares which they affected, the more so as no such disturbance is called for in the interest of the plaintiff-mortgagee who can get the full measure of his rights. The interest of his father, no doubt, must give way—a result which both father and son would rather avoid—but the question is not to be decided on any consideration of sentiment. The fact is that when on the 20th July 1895, Parmeshar Din purchased the 5 out of 10 *biswa*-share in execution of decree, he was purchasing

whatever right, title and interest the judgment-debtor had left in 5 *biswas* out of his original 10-*biswa* share. Previous to that sale there had been independent dealings with $9\frac{1}{2}$ out of the 10 *biswas*, and any portion of the property already dealt with, which was so purchased by Parmeshar Din, was subject to previous claims enforceable or already enforced against it. Parmeshar Din cannot be allowed to take shelter behind the plea that by reason of the proclamation before the sale he took 5 *biswas* subject only to half the debt created by the mortgage in suit. The Court in execution sales gives no warranty of title and it may be observed here that the Munsif who ordered this lien to be proclaimed had not before him the other parties who had acquired interests under mortgages. We have to ascertain the situation on a full view of the facts and are not concerned now with the correctness or otherwise of the Munsif's order. As we have said, by the time this sale took place the stage had passed at which any further dealing with Baldeo Singh's property could take place, so as to pass an unencumbered interest, and this being so Parmeshar Din must submit to the position. He has now got in all 8 *biswas* out of the 10 *biswas* which belonged to Baldeo Singh and on the facts, as we have stated them, we hold that in default of his redeeming the mortgage held by his son he is liable to be foreclosed to the extent of five out of the eight-*biswas* share he holds. The result is that we must allow the cross-objections of the respondents Nos. 4 and 5 and declare that as against them the plaintiff's suit stands dismissed, with costs to them in both Courts.

Allowing the appeal in part we modify the decree of the first Court by declaring that the plaintiff is entitled to a foreclosure decree for Rs. 10,000 *plus* the amount awarded by the lower Court, he having in his petition of appeal relinquished his claim for the balance as claimed in the Court below. Proportionate costs will be allowed upon this aggregate sum both here and in the Court below. A decree will be drawn up in the usual form directing the defendant No. 6 to redeem within the usual period or in default to be subjected to foreclosure in respect of 5 *biswas* out of the 8 *biswas* he now holds. The costs above referred to will, of course, be borne by the defendant No. 6.

Appeal allowed in part.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 304 OF 1914.

March 26, 1914.

Present:—Mr. Justice Tudball.

BUDHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SULTAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 12—Appeal filed beyond time—Sufficient cause—Application for copies—Time allowed.

A Munsif gave his judgment on the 1st of October 1913. The 2nd of October was a working day and the Court was open. From the 3rd of October to the 2nd of November the Court was closed for long vacation. The Court re-opened on the 3rd of November and on that day the defendants applied for copies of the judgment and decree. These were ready and delivered to them at Muzaffarnagar on the 14th of November. They filed the appeal at Meerut on the 15th of November:

Held, that the application for copies of the judgment and the decree was made within the time allowed by law for the filing of the appeal and hence the time spent in obtaining the copies should be excluded in computing the period of limitation.

Held, further, that under the circumstances of the case there was "sufficient cause" within the meaning of section 5 of the Limitation Act to explain the delay in filing the appeal.

Second appeal from the decision of the Subordinate Judge of Meerut, dated 10th January 1914.

Mr *Hamilton*, for the Appellants.

JUDGMENT.—This appeal arises out of a dispute between two sets of rival claimants to an occupancy tenure. The plaintiffs-appellants and the defendants-respondents are descended from a common ancestor, but the plaintiffs' case was that they were the occupancy tenants of the land and the defendants were their sub tenants. The plaintiffs went to the Revenue Court and sued for ejectment of the defendants The Revenue Court held that the defendants were the tenants in chief and not the plaintiffs' sub-tenants. The plaintiffs then came to the Civil Court and sued for recovery of possession of the land and for a declaration that they and not the defendants were the chief

tenants of the holding. The Court of first instance decreed the plaintiffs' suit. The lower Appellate Court, after discussing the evidence on both sides, dismissed the plaintiffs' suit, holding that the plaintiffs had failed to prove that they were the principal tenants of the disputed land. The plaintiffs have come here on second appeal.

The first ground taken raises a question of limitation based on the following facts. The judgment of the Munsif was dated the 1st of October 1913. The 2nd of October was a working day and the Court was open. From the 3rd of October to the 2nd of November inclusive the Court was closed. The Court re-opened on the 3rd of November and on that day the defendants applied for copies of the judgment and the decree. These were ready for them and delivered to them on the 14th of November at Muzaffarnagar. The appeal had to be filed at Meerut. It was filed on the 15th of November. The indulgence of the Court below was asked under section 5 of the Limitation Act and that Court acquiesced in the request and excused the delay of one day as it was impossible to file the appeal at Meerut on the 14th, the copies having been delivered on that day at Muzaffarnagar. Two points are urged: *first* of all it is pleaded that the application for copies made on the 3rd of Novmeber was not made within the period of limitation and, therefore, the period from that date to the 14th of November which was utilized in obtaining copies could not be allowed to the defendants at all, and *secondly*, no sufficient cause had been shown for the exercise of the discretion allowed by section 5 of the Act. It is quite true that in the ordinary way the period of limitation for an appeal from the decision of a Munsif is thirty days and the application for copies has to be made within thirty days. But under another section of the Act when a Court is closed on the last day of the period of limitation for an appeal, the appeal may be made on the day the Court re-opens. The practical result of section 4 of the Limitation Act is that the period of limitation for an appeal is extended to more than thirty days in some cases. In the present case the appeal could have been filed on the 3rd of November and it would not in that case have been barred by limitation. It was on that day that the application for copies was made and, therefore, in my opinion, this application for copies was made within the time allowed by law for the filing of the appeal in this suit. It is urged that the defendants were bound to apply for their copies on the 2nd of October and not having so done, they must be either held to be guilty of negligence or it must be held that they did not apply for copies within the period of limitation. So far as negligence is concerned I really fail to see that there had been any negligence whatsoever. There was but one working day between the date of the decision of the Munsif and the closing of the Court and the Court did not re-open until the 3rd of November. It was impossible for the defendants to apply within thirty days allowed by law (excepting the one day, that is, the 2nd of October). As a matter of actual fact the appeal was filed one day late, that is, on the 15th of November instead of the 14th, but the reason of that one day's delay is obvious and clearly amounts to a "sufficient cause" as mentioned in section 5 of the Limitation Act. In my opinion the lower Court was fully justified in the circumstances in allowing the appeal to be filed beyond time under powers granted to it by section 5 of the Limitation Act. As to the case itself the other two grounds of appeal are that as the plaintiffs and their predecessors-in-title have been continuously recorded as tenants in chief and occupancy tenants while the defendants have simply been recorded as sub-tenants, the lower Appellate Court was bound to presume the correctness of such entry until the contrary was proved; but the lower Appellate Court has wrongly cast the burden of proof on the plaintiffs instead of on the defendants. As a matter of fact no question of burden of proof arises in the case because both parties adduced evidence. The plaintiffs produced records which were in their favour. The defendants produced other evidence. The Court considered both sets of evidence and came to a finding which is a finding of fact and as such binding on this Court. There is ample evidence apparently on the record on the basis of which the lower Court could have arrived at its finding. By that finding I am bound in second appeal. The appeal, therefore, fails and is dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 502 OF 1913.
April 18, 1914.
Present:—Mr. Justice Tudball.
SITA RAM PANDE—PLAINTIFF—APPELLANT
versus
MADHO PANDE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 36—Usufructuary mortgagee pre-empting equity of redemption—Possession neither claimed in suit nor obtained in execution, effect of.

A usufructuary mortgagee in possession sued for pre-empting a sale of the equity of redemption of the mortgaged property without asking for possession and on obtaining a decree deposited in Court the sale price which was removed by the vendee:

Held, that the mortgagee pre-emptor became the full owner of the property by operation of law and that being himself in possession it was quite unnecessary for him to seek anything further in execution of the pre-emption decree.

Execution second appeal from the decision of the Subordinate Judge of Ghazipur, dated 7th February 1913.

Mr. *Govind Prashad*, for the Appellant.

Mr. *Parmeshwor Dayal*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of the following circumstances: The plaintiff and his brother were mortgagees of the property in question. The mortgage being usufructuary they were in possession. The mortgagor sold the equity of redemption to the opposite party, Madho Pande. Thereupon the plaintiff, Sita Ram Pande, brought a suit to enforce his right of pre-emptiom as a co-sharer. Being in possession he did not ask to be put into possession of the property. His claim was decreed, he paid the money into Court within the time fixed and Madho Pande removed the money from Court. Subsequently the plaintiff applied to the Revenue Court for an entry of his name as full owner, he till then being recorded as a mortgagee. Madho Pande objected, whereupon the plaintiff brought the present suit for a declaration that he was the full owner of the property, that he was in possession of it, that the defendant had no title to it and had no right to obstruct him. The Court of first instance decreed the suit and granted the declaration. The lower Appellate Court has held that the suit is barred by section 47 of the Code of Civil Procedure, because the plaintiff did not put the pre-emption decree into execution and had not formally been placed in possession of the property. It is an admitted fact that in the pre-emption suit the plaintiff did not ask for possession, for the simple reason that the property which he sought to pre-empt was a bare equity of redemption, an intangible right of which no possession could be granted, and also because he himself was in actual possession *qua* mortgagee.

It is urged on behalf of the respondent that because the plaintiff failed to have his right proclaimed in the village under Order XXI, rule 36, therefore, he has no right whatever to the equity of redemption which in some mysterious manner has remained vested in the respondent, although he has taken out of Court the pre-emption money deposited by the plaintiff. It is quite clear to my mind that under these circumstances no title whatever vests in the defendant when the plaintiff satisfied the condition laid down in the pre-emption decree by depositing the amount of the sale price in Court and the defendant removed that amount from Court. The plaintiff being himself in possession had no necessity to seek anything further in execution of the pre-emption decree. By operation of law he became the full owner of the property. Being in possession, it was unnecessary for him to go through the formality laid down in the Order and rule mentioned above. The defendant is a person who has absolutely no title whatever and is admittedly not in possession of anything. I allow the appeal, set aside the decree of the Court below and restore that of the first Court. The plaintiff will have his costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.
CIVIL RULE NO. 3973 OF 1908.
January 18, 1909.
Present:—Mr. Justice Doss and Mr. Justice Richardson.
GOLAM NAJAF MIAH—PETITIONER
versus
PANCHANAN GUPTA—OPPOSITE PARTY.

Civil Procedure Code (Act XIV of 1882), s. 622—Sub-Divisional Officer acting under s. 2 of Sonthal Parganas Act (XXXVII of 1855)—Revision—Commissioner or High Court—Jurisdiction.

SIVA NARAYAN GHOSH *v.* KAMAKHYA GHOSE.

Where a Sub-Divisional Officer exercises jurisdiction as a Court created under section 2 of Act XXXVII of 1855, an application for revision of his order lies only to the Court of the Commissioner and not to the High Court under section 622, Civil Procedure Code of 1882.

Civil Rule against the decision of the Commissioner, Bhagalpore Division, dated the 2nd April 1908, confirming an order of the Sub-Divisional Officer, Pakur, dated the 20th December 1907.

Moulvi *Nuruddin Ahmed*, for the Petitioner.

Babus *Umakali Mukherjee* and *Nares Chandra Sinha*, for the Opposite Party.

JUDGMENT.—This is a Rule calling upon the opposite party to show cause why the order of the Sub-Divisional Officer should not be set aside on the grounds, *first*, that no judicial enquiry was made as provided by law; and, *secondly*, that the compensation awarded was insufficient and was based on no evidence.

Having regard to the valuation of the suit and the total amount awarded for the lands involved in all the analogous suits, we are of opinion that the Sub-Divisional Officer was exercising jurisdiction as a Court created under section 2 of Act XXXVII of 1855 and as no appeal lay from his order to the Deputy Commissioner, on account of such valuation, an application for revision was made by the petitioner before the Commissioner under section 19, Sonthal Perganahs Justice Regulation (V of 1893) and the Commissioner passed an order on the 2nd April 1908 refusing to interfere.

We think that the Court of the Commissioner was the only Court which in this case could interfere under its revisional powers. That being so, the petitioner has no right to come up to this Court under section 622, Civil Procedure Code. Moreover, assuming that this Court has jurisdiction to interfere we think that the Sub-Divisional Officer made sufficient judicial inquiry for the purposes of section 24 of the Bengal Tenancy Act.

In the circumstances we think that the Rule must be discharged with costs three gold *mohurs*.

Rule discharged.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1149 OF 1913.

November 27, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

SIVA NARAYAN GHOSH AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

KAMAKHYA GHOSE AND ANOTHER—DEFENDANT—OPPOSITE PARTY.

Minor—Guardian—Bond for ancestral debt, executed by mother as guardian of minor son—Liability of son or mother.

Where the mother of a minor son executed a bond, purporting to be on behalf of the minor, to pay a debt of his deceased father by instalments, but did not describe herself as his guardian:

Held, (1) that the son was liable for the re-payment of the debt as it was his pious obligation to pay that debt and as it could have been recovered by the creditor out of the assets in his hand.

Subramania Ayyar v. *Arumuga Chetty*, 26 M. 330, followed.

(2) that no decree could be given against the mother.

Rule against the order of the Small Cause Court of Nadia.

Babu *Beman Behary Ghose*, for the Petitioners.

Babu *Monmotha Nath Roy*, for Babu *Phanindra Nath Ganguli*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside a decree of dismissal in a suit for recovery of money. The petitioner took a bond on the 2nd May 1905, executed by the second defendant as the mother and guardian of the first defendant, who was at the time an infant. The bond recites that the father of the infant had borrowed paddy from the petitioners, that the price remained unpaid at his death, that the infant found himself unable to re-pay the money, that he begged the creditor to recieve the sum in instalments, that the creditor out of compassion consented and that accordingly the bond was given for Rs. 90 to be paid in nine annual instalments of Rs. 10 each. In the body of the bond, the infant is described as the heir and successor of his deceased father and his mother is described as his guardian, the document recites that it is given by the infant as also by his mother. But the mother in puting her signature did not describe herself as the guardian of her infant son. It is admitted that some of the instalments were duly paid, but default was made with respect to the others, with the

result that the creditor commenced the present action both against the mother and her son, who, it appears, had attained majority before the suit was brought. The Court below has held that the infant cannot be held liable and has made a decree against the second defendant alone on the ground that under the bond she made herself personally responsible for the re-payment of the loan. The creditor now seeks to have the decree of dismissal against the first defendant set aside. In our opinion there is no room for serious controversy that the Court below has taken an erroneous view of the liability of the first defendant.

It has been contended that as the mother did not, while putting her signature to the bond, describe herself as the mother and guardian of the infant executant, she was personally responsible for re-payment of the money. On the other hand our attention has been drawn to the circumstance that throughout the body of the document it purports to have been executed by the infant alone, which leads to the inference that the mother intended to execute the bond on behalf of her infant son. In our opinion the latter construction is obviously the correct interpretation of the bond. As was pointed out by Lord Justice Knight Bruce in *Hanooman Persad Pandey* v. *Musammat Babooee Munraj Koonweree* (1): "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses". In that case the mother of an infant had entered into various transactions apparently in her personal capacity. But their Lordships of the Judicial Committee held that the transactions were entered into in substance on behalf of her infant son and that consequently the liability of the infant under those transactions must be investigated. In this view no decree should have been made against the second defendant. She is, however, apparently satisfied with the decree which had been made against her and has not applied to this Court to have it set aside. Consequently the decree against her will stand. We are now concerned only with the liability of the first defendant. As regards him, it has been argued that as he was at the date of the execution of the bond an infant, no contract could be made on his behalf by his mother under which he became personally responsible and in support of this view reference has been made to the cases of *Maharana Shri Ranmal Singji* v. *Vadilal Vakhatchand*(2) and *Bhawal Sahu* v. *Baij Nath Pertab Narain Singh* (3). But the cases mentioned are clearly distinguishable. Here, as the recitals in the bond amply indicate, the debt had been contracted during the life-time of the father of the first defendant. He was under a pious obligation to pay that debt and it could also have been recovered by the creditor out of the assets in his hand. Under the bond the mother entered into an arrangement with the creditor for re-payment of this money in instalments convenient to the infant. It is impossible for us to hold that the first defendant is not liable for re-payment of the ancestral debt, the satisfaction of which was undertaken on his behalf by his mother under the bond mentioned. The view we take is supported by the decision in the case of *Subramania Aiyar* v. *Arumuga Chetty* (4).

The result is that the Rule is made absolute and the decree of the Small Cause Court Judge set aside in so far as it dismisses the suit against the first defendant. The suit will stand decreed against the first defendant with costs both here and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*. The plaintiff is entitled to recover this sum from the first defendant only to the extent of the assets of his father in his hands.

Rule made absolute.

(1) 6 M. I. A. 393; 18 W. R. 81; 19 Eng. Rep. 147.

(2) 20 B. 61.

(3) 35 C. 320; 12 C. W. N. 256; 3 M. L. T. 156.

(4) 26 M. 330.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 10 OF 1913.

October 25, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

BUKHARAM—APPELLANT

versus

RAMJI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9 — Some of defendants present — Dismissal of suit in default—Suit barred against defendants actually present

BUKHARAM *v.* RAMJI.

and not against others—No res judicata—*Dismissal in default not covered by rule of Common Law as to bar of action against several joint contractors—Case of judgment against one.*

Where there are more defendants than one and one or more of them appear, and the others do not appear; on the dismissal of the suit in default, the disability imposed by Order IX, rule 9 of the Code of Civil Procedure on the plaintiff means a disability only as against the defendant or defendants who were actually present.

The dismissal of a suit in terms of Order IX, rule 8, is not intended to operate in favour of the defendant as *res judicata*.

A dismissal in default does not come within the rule of Common Law that a judgment recovered against one of several joint contractors, though unsatisfied, is a bar to any action against the others.

Miscellaneous appeal against the order of the District Judge, Wardha, dated the 29th January 1913, reversing the decree and remanding the case decided by the Junior Munsif, Wardha, on the 9th October 1912.

Mr. *V. R. Dixit*, for the Appellant.

Mr. *W. V. Gharpure*, for the Respondent.

JUDGMENT.—The plaintiff instituted Suit No. 13 of 1911 on two bonds executed by the four defendants and one Daulat, a minor, through his guardian. On the date fixed for hearing both the plaintiff and the defendants were absent, but the minor's guardian *ad litem* was, however, present. The Court passed an order dismissing the suit 'in default'. The plaintiff has filed the present suit on the same bonds against the four defendants omitting Daulat. The first Court held that the suit is barred by Order IX, rule 9, of the Civil Procedure Code. The lower Appellate Court has remanded the case for trial on the merits, holding that the suit would have been barred only against Daulat, if he had been made a party. Against this order of remand one of the defendants has preferred this second appeal.

A feeble attempt was made to show that the order passed under Order IX, rule 7, is a decree as shown in the marginal note to rule 9 of the same Order and operates as *res judicata*. This contention, even on behalf of Daulat, would be untenable. In the case of *Chand Kour* v. *Partab Singh* (1) their Lordships of the Privy Council say that "the dismissal of a suit in terms of section 102 was plainly not intended to operate in favour of the defendant as *res judicata*. It imposes, however, when read along with section 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action."

The next question is whether the plea in bar can be relied on by the defendants who were themselves absent. The Code does not expressly provide for a case where the plaintiff is absent and some of the defendants are absent. Order IX, rule 4, allows the plaintiff to bring a fresh suit when both parties are absent, and the suit is dismissed in default. Why should a party who was himself in default be placed in the same position as a party who was present, and on whose admission a decree might have been passed in the plaintiff's favour? In my opinion the order should be taken as passed partly under Order IX, rule 3, and partly under Order IX, rule 7, and when Order IX, rule 9, imposes a disability on the plaintiff it means a disability only as against the defendant who was actually present. The words "the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action" must be limited to a suit against the same defendant in whose favour the order was passed. I do not see why the plaintiff should be in a worse position than if he had never brought a suit against the present defendants for that appears to be the effect of Order IX, rule 4. This view is in accordance with the opinion expressed by Mittra and Caspersz, JJ., in *Doma Ram* v. *Raghu Nath Pandit* (2).

The appellant's Counsel then argued that the liability created by the bonds was a joint liability and, therefore, a second suit would not lie. Though he cited no rulings, I presume he meant to rely on the Indian decisions which have followed the doctrine of *King* v. *Hoare* (3), as interpreted by the House of Lords in *Kendall* v. *Hamilton* (4). The decisions in this country as to whether the rule applies outside the Presidency Towns are coflicting, but I need not express any opinion, for the rule of Common Law is inappli-

(1) 16 C. 98 at p. 101; 15 I. A. 156.

(2) 10 C. W. N. 40 at p. 41.

(3) (1844) 13 M. & W. 494: 67 R. R. 694; 14 L. J. Ex. 29; 8 Jur. 1127; 2 Dowl. & L. 382.

(4) (1879) 48 L. J. C. P. 705; 4 A. C. 504; 41 L. T. 418; 28 W. R. 97.

cable to the facts of the case. The rule, as I understand, is this. A judgment recovered against one of several joint contractors, though unsatisfied, is a bar to any action against the others. The reason of the rule is, as stated in the judgment of one of the Law Lords at page 719 of the Law Journal Report, that "the original cause of action had thereby passed *in rem judicatam*, and could not be the foundation of any further proceeding." Referring to *King* v. *Hoare* (3) Lord O'Hagan says: "That decision has been recognised by Courts of Law in accordance with the statement of Parke, B., that 'the cause of action is changed into matter of record which is of a higher nature, and the inferior remedy is merged in the higher,' and that the judgment bars it, 'because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage.'" It is obvious that a dismissal in default does not come within the rule.

The appeal fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 74 OF 1913.

January 30, 1914.

Present:—Mr. Justice Beaman.

YESHVANT VISHNOO NENE—PLAINTIFF

versus

KESHAVRAO BHAIJI AND OTHERS—DEFENDANTS.

Fazendari tenure—Sub-letting lease—Construction.

All true Fazendars are persons holding plots of land upon perpetual tenure, subject only to the payment of nominal rents to the Government. Any true Fazendar might deal with the land he holds as he pleases and might sub-let it on any conditions he likes, and it would not necessarily follow that any element of the original tenure was introduced into the sub-contracts.

Where a tenant takes from a Fazendar, and in the lease it is expressed that the tenant takes on Fazendari tenure, and the terms of the lease are not in themselves inconsistent with such an expression, the term Fazendari must be read between the parties in the sense in which it has always been understood to denote the character of the tenure of the true Fazendar as between himself and the Government, that is to say, a permanent tenure.

Messrs. *Wadia* and *Desai*, for the Plaintiff.

Mr. *Jinnah* (with him Mr. *Strangman* Advocate General), for the Defendants.

JUDGMENT.—In this case I think the defendants must succeed on two very substantial grounds. The plaintiff is suing as a Fazendar to evict the defendants. The defendants claim to be permanent tenants. It is unnecessary to trace the respective title of the parties since there is no dispute but that the plaintiff derives from the original Fazendar and the defendants from the original lessee Manik Vithal. I am much indebted to Counsel for taking me back to the original sources of the law in this Presidency upon Fazendari tenure, and thus giving me an opportunity of analysing the sources of that law and tracing the confusion of thought and language which appears ever since to have characterised the common Bar opinion upon this topic.

The first ground upon which I shall place my decision is that upon a mere construction of the lease, Exhibit B in the case, dated the 22nd of February 1850, I have no doubt whatever but that it is a permanent lease. The lessee takes on what is called Fazendari tenure, and he takes expressly for building purposes; and it is also expressed that his tenancy is to be co-extensive with the right of the true Fazendar over the entire oart. Now, it is by the use in leases of this kind of such words as "Fazendari tenure" that the confusion of thought, to which I have alluded, becomes most conspicuous. I think there cannot be the least doubt but that the matter is in itself essentially simple and would never have gathered so much mystery about it but that all true Fazendars, as far as I know, have never been called upon, or, if they have been called upon, have never been able, to adduce paper title explanatory of their status. It is to be remembered when I say this that, in my opinion, every one originally paying tax and pension was a true Fazendar. This dates from Aungier's Convention in 1672. The effect of it was to confirm all Fazendars found in possession of land outside the Fort in perpetual possession upon payment of a tax or pension. "Pension" here means royalty, not quit-rent, and those who paid pension only were in

respect of their lands virtually free holders, acknowledging by the payment of this pension royalty to the Suzerain Power. Some Fazendars appear to have paid both tax and pension and some tax only or pension only. Thus it becomes perfectly clear that, historically and in its inception, "Fazendari tenure" is to be referred to the relations existing between the original Fazendars and the Government. But even in the *Bombay Gazetteer*, as well as in common parlance, "Fazendari tenure" appears usually to be understood as confined to the relations subsisting between the true Fazendars and their tenants. This I believe to be historically as well as theoretically inaccurate, but I think it is more than probable that these latter relations were in the beginning governed much more by usage than by contract, and when governed by usage, assumed very peculiar forms, to which legal effect was sought to be given in the dissentient judgment of Yardley, J., in *Doe dem. Dorabji Dadi Santuk* v. *Bishop of Bombay* (1). There is nothing, however, that I can see in theory to prevent a true Fazendar sub-letting his land on ordinary principles of contract, and wherever that is done and those principles are discoverable in the document, the resultant relations are purely contractual and not to be determined by inquiry into usage. But still it is quite obvious that all true Fazendars are persons holding plots of land, probably acquired before the advent of the British Government, upon perpetual tenure subject only to the payment of a nominal rent to the Government. Every such true Fazendar might, of course, deal with the land, he so held, as he pleased and might sub-let it just as any other owner of land or buildings might sub-let his property, and it would not necessarily follow that any element of the original tenure was introduced into those sub contracts. This probably explains the dictum of Farran, J., in an unreported judgment (in Suit No. 262 of 1883), *Purmananddas Jivandas* v. *Ardaseer Faramji*, in which that learned Judge says:—"My experience is that it is used with reference to tenants holding under a private landlord to indicate sometimes an indefeasible right to hold in perpetuity on payment of a small quit or ground rent and sometimes any kind of tenure agreed upon between the parties." It appears to me, however, that, expressed as it is, that sentence throws but little light, if any, upon the subject. If the word 'Fazendari' indicates anything at all, that must be with reference to its own peculiar and special connotation and it seems to me erroneous to say that it could indicate any kind of tenure agreed to between the parties. There may be instances (and the case before the learned Judge was one of them) in which the other terms in the sub-contract show clearly that the introduction of the term "Fazendari" is deprived of all its special connotation, and is, therefore, either superfluous to or contradictory of the real intentions of the parties. Thus to talk of a tenant taking from a Fazendar on Fazendari tenure from month to month with other terms, showing that what was intended was purely a monthly tenancy, would mean no more than that the term "Fazendari" has been ignorantly used and was in that connection meaningless. In all such cases the explanation of the introduction of this word is probably referable to the fact that the lessor is himself a Fazendar and might have wished to insist upon reproducing that character in his own interest in the sub-contract. However that may be, a very little reflection will show that there cannot be two Fazendars of the same property at the same time, and, therefore, it is only by the actual assignment of his Fazendari rights (and that is a case with which I am not now concerned) that a true Fazendar ceases to be a true Fazendar and his assignee assumes that character in his stead. But there is another sense in which the use of the term "Fazendari" in these sub-contracts may have a very distinct significance for purposes of construction and interpretation; that is to say, where a tenant takes from a Fazendar, and in the lease it is expressed that the tenant takes on Fazendari tenure, and the terms of the lease are not in themselves inconsistent with such an expression, I think it may safely be assumed that the real intention of the parties was that the Fazendar meant to transfer to the tenant upon the agreed rent exactly the same relations, as between them, in which he in turn as Fazendar stands to the Government, that is to say, that in all these sub-contracts, where the Fazendar designedly gives them

(1) (1848) Perry's O. C. 498; 3 Ind. Dec. (o. s.) 456.

upon Fazendari tenure, the term "Fazendari" must be read between the parties in the sense in which it has always been understood to denote the character of the tenure of the true Fazendar as between himself and the Government, that is to say, a permanent tenure. I have not the very least doubt in my own mind that that has, during recent years, at any rate been the understanding between the parties to leases of this kind in the Town and Island of Bombay when a Fazendar sub-lets on Fazendari tenure, unless the other provisions of the lease make it quite clear that there was a different and contradictory intention. So that if in every case of a lease by a Fazendar to one who was not a Fazendar, the latter had been described in the lease as a sub-Fazendar, virtually the whole confusion of thought, with which this topic has been clouded in our law books, would, in my opinion, be at once dispelled. There is, however, one possible alternative, *viz.*, that when the Fazendar sub-let on "Fazendari tenure" he meant to import the very peculiar incidents which custom and usage may have attached in olden times to the relations existing between such sub-tenants and the Fazendar. But, I think, it would be too late now, especially in view of Sir Erskine Perry's judgment, to re-open inquiries into what such ancient custom and usage may have been whenever we find the words "Fazendari tenure" in these sub-leases.

Applying that reasoning to the terms of the present lease, it is quite clear that there is nothing in it contradictory to the natural use and meaning of the words "Fazendari tenure," which it contains. The landlord Gopal Danaji held the land in relation to the Government as a Fazendar, and, therefore, in perpetuity. He gives a portion of it to Manik Vithal on "Fazendari tenure", that is to say, as between himself and Manik Vithal, to the latter in perpetuity. I, therefore, have felt no difficulty whatever in construing the document of 1860 as a lease in perpetuity. I do not now dwell upon a question raised at one part of the trial by Counsel for the defendant as to the genuineness of that document. It is more than thirty years old and it comes from proper custody. I see no reason whatever to doubt that it is a genuine document, and I may add that I think the defendant's position would have been very much weaker without it than it now is with it; for, if that document were held to be a forgery, then we should have to look for the origin of the tenancy elsewhere and might have to invoke the language of Exhibit A in the case, which is an agreement of the year 1859, between the same parties. There can, of course, be no doubt (for this is common ground) but that in the year 1860 there was a subsequent agreement of the 22nd of February; but if Exhibit B be not that agreement, then its terms are lost for ever, and in investigating the origin of the tenancy, in order to throw light upon its true character, I do not see how the Court could ignore Exhibit A. I will not pursue that topic any further, for, as I have said, I do not think that there is any sufficient reason to doubt the genuineness of Exhibit B, the lease of the 22nd of February 1860.

The second ground, upon which I think the defendant has an equally solid defence, is that of limitation. As far back as 1871, the plaintiff gave the defendant peremptory notice to quit on the ground that the tenure was an ordinary tenancy from year to year. The defendant replied virtually denying *in toto* the plaintiff's title. There the denial went further than probably the defendant would wish to carry it now, for he denies that to his knowledge the plaintiff was a Fazendar of the land, or had any right of interference with his (the defendant's) occupation of it. In this case, however, I take it to be common ground that the plaintiff is and always has been the true Fazendar of the entire *oart*, of which the land in dispute forms a portion. Nevertheless, it appears to me quite clear that the defendant at the same time repudiated, and intended to repudiate the plaintiff's right to treat him as a tenant from year to year; that is to say, he asserted his right to a permanent tenancy, if not in the actual notice, at any rate by his subsequent conduct, of which abundant evidence is forthcoming in the year 1901. Between 1875 and 1901, there is no evidence before the Court to show that the defendant paid to the plaintiff any rent whatever. It has been contended on behalf of the defendant that not one anna of rent was paid for the whole of that period. However that may be, the defendant has

never repudiated his liability to pay the quit-rent or ground rent of Rs. 9 a year which his predecessor-in-title Manik Vithal agreed to pay to the Fezendar under the lease of 1860. So that, when the plaintiff sued the defendant in 1901, the defendant so far admitted his title as to consent to pay him ground rent, on condition that it was described as Fazendari, at the old rate of Rs. 9 per annum, stipulated for in the lease of 1860. I apprehend, therefore, that there can be no doubt but that the defendant has established a prescriptive right to perpetual tenure of the land upon the terms originally agreed upon between Gopal Danaji and Manik Vithal in 1860.

I will not pause upon the third ground of defence, which was that by the agreement of 1901, whatever may be said about the events which had previously happened, the plaintiff accepted the defendant as his permanent tenant. I am by no means sure that that would be a very solid ground.

But upon the two points I have dealt with I think that the defendant has well established that the plaintiff's suit for ejectment fails.

There is a prayer for three years' arrears of rent, and that the defendant has never objected to pay. That amount must, therefore, be decreed to the plaintiff, but, of course, that will not affect the order for costs, which will be the same as though the suit had in all respects been dismissed.

Decree for the plaintiff for Rs. 27; but the plaintiff should pay all the costs of this suit.

Attorneys for the Plaintiff : Messrs. *Dikshit and Purshottamrai.*

Attorneys for the Defendants: Messrs. *Judah and Soloman.*

CALCUTTA HIGH COURT.
CIVIL RULE No. 174 OF 1913.
February 11, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

DARBARI PANJIARA AND OTHERS—JUDGMENT-DEBTORS—PETITIONERS

versus

BHATHI ROY—DECREE-HOLDER—AND BENI ROY (WHO IS SAID TO BE IN POSSESSION OF THE LAND IN DISPUTE)—OPPOSITE PARTY.

Sonthal Parganas Justice Regulation V of 1893, *ss.* 7, 9—*Sonthal Parganas Act (XXXVII of* 1855), *s.* 2—*High Courts Charter Act (*24 *&* 25 *Vict. C.* 104), *s.* 15—*Sonthal Parganas—Courts of Deputy Collectors, Sub-Divisional officers and Deputy Commissioners—High Court's power of superintendence over these Courts.*

The Courts of the Sub-Deputy Collector, the Sub-Divisional Officer and the Deputy Commissioner in the Sonthal Parganas are not subject to the appellate jurisdiction of the High Court.

Therefore, it is not competent to the High Court to interfere with the proceedings before these Courts, in the exercise of the power of superintendence conferred on it by section 15 of the Indian High Courts Act, 1861.

Rule in the matter of Revenue Miscellaneous Case No. 1034 of 1910-11 of the Court of the Deputy Commissioner of Sonthal Parganas and Revenue Miscellaneous Case No. 958 of 1910-11 of the Court of the Sub-Divisional Officer of Deoghur.

Babu *Surendra Nath Ghoshal,* (*Amicus Curiæ*), for the Petitioner in person.

Dr. *Rash Behary Ghosh* and Babu *Naresh Chandra Sinha*, for the Opposite Party.

JUDGMENT.—This Rule raises a question of first impression as to the true scope of section 15 of the Indian High Courts Act, 1861. The solution of the question raised is by no means free from difficulty, which has been enhanced by the circumstances that the petitioners appeared in person in support of the application. But we have received considerable assistance from Babu Surendra Nath Ghosal who acted as *amicus curiæ*, and not only placed before us a full and clear statement of the facts of the case but also drew our attention to the legislative provisions applicable to the matter.

The facts, so far as it is necessary to state them for the elucidation of the question of law involved, may be briefly narrated. The petitioners were tenants under one Bhoti Roy in Rohini within the Sonthal Parganas. On the 1st April 1910, the

landlord obtained a decree for Rs. 82-8-0 which was the arrear of rent due for the year 1315 and the first three quarters of the year 1316. This decree was made by the Sub-Deputy Collector of Deoghur. On the 16th January 1911 the decree-holder applied to the Sub-Deputy Collector for execution by ejectment, on the allegation that the judgment-debtors had no moveable property and previous application to realise the judgment-debt by attachment and sale of moveables had failed. The Sub-Deputy Collector held that under these circumstances the judgment-debtors might be ejected from a portion of the holding and submitted the record to the Sub-Divisional Officer for orders on the 16th January 1911. On the 4th February 1911, the Sub-Divisional Officer recorded his opinion that the tenants should be evicted from the entire holding, and with this recommendation forwarded the record to the Deputy Commissioner for orders. On the 17th February 1911, the Deputy Commissioner sanctioned eviction from the entire holding. The records were then returned to the Sub-Divisional Officer who proceeded to eject the judgment-debtors and called upon the Sub-Deputy Collector to arrange for re-settlement of the lands. No tenant, however, came forward to take settlement upon payment of the arrears due. The judgment-debtors also expressed their inability to pay the arrears. The Sub-Divisional Officer thereupon ordered that the decree-holder might keep possession for one year after which the lands should be returned to the judgment-debtors. Subsequently one Beri Roy offered to take settlement, and his application was granted. The judgment-debtors thereupon objected substantially on the ground that this Beri Roy was no other than the decree-holder himself, but their objection was overruled both by the Sub-Divisional Officer and the Deputy Commissioner, although they offered to pay up the judgment-debt in full. We are now invited to set aside these proceedings for eviction as irregular and without jurisdiction. There is little room for controversy that the proceedings have been throughout irregular.

Under paragraph 29 of the Statutory Rules for the guidance of Civil Courts in the Sonthal Parganas issued by the Local Government on the 18th August 1905 under section 27 of Regulation V of 1893, read with section 1, clause 2 of Act XXXVII of 1855, a tenant whose right is not saleable may, in execution of a decree for rent, be, with the Deputy Commissioner's consent, evicted, and the land may then be re-settled. It is plain that the eviction in execution can be effected only by the Court executing the decree. This view is not affected by section 25 of Regulation II of 1886, which provides for the exemption of *raiyats* from liability to ejectment except by order of the Deputy Commissioner. In the case before us, the question of ejectment of the tenants from the entire holding never came under the consideration of the Court executing the decree. Section 25 of Regulation II of 1886, which was framed for the protection of the *raiyat*, was never intended to be used to his detriment in the manner in which it has been applied in the case before us. The procedure contemplated by the Legislature is that the Execution Court determines whether or not the decree is to be executed by ejectment, and the safeguard is provided that if the Execution Court decides in favour of ejectment, the order is not to be carried out until it has been sanctioned by the Deputy Commissioner. It could never have been intended that the scope of the order, as made by the Execution Court, should be widened by the Deputy Commissioner; as a matter of fact, this has been done in the present case without any notice to the *raiyat*. It is further plain that even after the Deputy Commissioner has given his sanction, there may be no ejectment in fact, because, if the decree is satisfied, it is open to the Execution Court to terminate the proceedings. In these circumstances, we are of opinion that the proceedings for ejectment of the petitioners have not been taken in conformity with the provisions of the Regulation and the Statutory Rules on the subject.

The question now arises whether it is competent to this Court to interfere in the exercise of the powers conferred on it by section 15 of the Indian High Courts Act, 1861. This power of superintendence can be exercised only over Courts which are subject to the Appellate Jurisdiction of

the High Court. The question is consequently reduced to this, *viz.*, whether the Courts of the Sub-Deputy Collector, the Sub-Divisional Officer and the Deputy Commissioners are Courts subject to the Appellate Jurisdiction of this Court. To determine this question, we must examine the constitution of these Courts as defined in Regulation V of 1893 which was framed with a view to make provision for the administration of criminal and civil justice in the Sonthal Parganas. Section 7 of this Regulation provides for the establishment under the Bengal Civil Courts Act, 1837, of two grades of Courts, *viz.*, the Court of the District Judge, and the Courts of the Subordinate Judges. Section 12 provides for the establishment by the Local Government under the Sonthal Parganas Act, 1855 (Act XXXVII of 1855), of four grades of Courts, *viz.*, the Court of the Commissioner, the Court of the Deputy Commissioner, the Courts of the Sub-Divisional Officers and the Courts of the Deputy Collectors not in charge of a Sub-Division and Sub Deputy Collectors. Section 9 of the Regulation defines the jurisdiction of the District Judge and of the Subordinate Judges, and restricts it to suits of which the value exceeds one thousand rupees, and which are not excluded from their cognizance by Regulation III of 1872. Section 14 similarly deals with the question of the jurisdiction of the Courts of the Deputy Collectors or Sub-Deputy Collectors, Sub-Divisional Officers or the Deputy Commissioner. It is sufficient to state for our present purpose that a Sub-Deputy Collector has jurisdiction to try suits of the value of one hundred rupees, provided such suits are not cognizable either by a Court established in the Sonthal Parganas under the Bengal Civil Courts Act or by a Settlement Officer under the Sonthal Parganas Settlement Regulation. It is consequently plain that there is a fundamental distinction made in the Regulation between the two classes of Courts, namely, the Courts established under the Bengal Civil Courts Act and the Courts established under the Sonthal Parganas Act. This distinction is accentuated by two circumstances. In the first place, section 2 of the Sonthal Parganas Act, 1855, read with section 9 of the Sonthal Parganas Justice Regulation, 1893, provides that in the trial of civil suits in Courts established under the Bengal Civil Courts Act the General Laws and Regulations are to be applied, whereas by section 1, clause 1, of the Sonthal Parganas Act, 1855, the trial of suits in the Courts of Officers appointed under the Sonthal Parganas Act is removed from the operation of the General Laws and Regulations, and by section 1, clause 2, is governed by "directions" issued by the Lieutenant-Governor. In the second place under section 15 of Regulation V of 1893, the Court of the Deputy Commissioner is constituted the District Court and the Court of the Commissioner is constituted the High Court in relation to all suits tried in the Courts of Officers appointed under section 2 of Act XXXVII of 1855. The position plainly is that the Legislature contemplated the establishment of two entirely distinct series of Courts in the Sonthal Parganas, each invested with jurisdiction over specified classes of cases to be tried according to the procedure prescribed for each class. In the case before us, as already stated, the suit for rent was valued at less than one thousand rupees, and was rightly tried in the Court of the Sub-Deputy Collector. The execution proceeding was properly commenced in the Court in which the suit had been brought and the decree made. In relation to that Court, the Court of the Commissioner is the High Court, and it is impossible for us to hold that the Court of the Sub-Deputy Collector is a Court subject to the Appellate Jurisdiction of this High Court. It has been contended that the market-value of the land from which the petitioners have been ejected may be proved to exceed rupees one thousand in value. But this is a circumstance obviously immaterial for the determination of the question raised before us. The Sub-Deputy Collector had unquestionably the jurisdiction to entertain the suit for rent, to make a decree therein and to execute that decree, if need be, by ejectment of the judgment-debtors from their holding. The Court of the Sub-Deputy Collector in this matter is subordinate to the Court of the Sub-Divisional Officer, the Deputy Commissioner and the Commissioner: it cannot, in any sense, be deemed subject to the Appellate Jurisdiction of this Court. It has finally been argued that inasmuch as the same

person is appointed to act as Sub-Divisional Officer and Subordinate Judge, while the same individual is appointed to discharge the duties of the Deputy Commissioner and the District Judge, their orders as Sub-Divisional Officer or as Deputy Commissioner are subject to the superintendence of this High Court precisely in the same manner as the orders passed by them in their capacity as Subordinate Judge or District Judge. This argument is obviously fallacious. We are concerned not with the individuals who preside over Courts, but with the Courts as Institutions or Tribunals empowered to hear and determine controversies between parties litigant. From this point of view, the Court of the Sub-Divisional Officer is entirely distinct from the Court of the Subordinate Judge. The case before us has no analogy to the cases to which our attention was drawn on behalf of the petitioners, namely, *Abdul Karim* v. *Municipal Officer* (1) affirmed by the Judicial Committee in *Municipal Officer* v. *Ismail* (2) and *Rahimbai* v. *Mariam* (3), in which the question arose as to the status of the Resident and Assistant Resident at Aden, and *In the matter of Thomson* (4), where the question arose as to the status of the Court of the Recorder of Moulmein. No useful assistance can be derived from these cases as the question raised before us must be determined in view of the nature of the constitution of the Courts in the Sonthal Parganas established under section 2 of the Sonthal Parganas Act, 1855. The view we take is in accord with that adopted in *Gholam Najif Miah* v. *Pancharan Gupta* (5), by Doss and Richardson, JJ., on the 18th January 1909.

The result is that this Rule is discharged, but we make no order as to costs.

Rule discharged.

(1) 27 B. 575; 5 Bom. L. R. 562.
(2) 30 B. 246; 3 A. L. J. 53; 3 C. L. J. 5; 10 C. W. N. 185; 33 I. A. 30 (P. C.); 8 Bom. L. R. 4; 1 M. L. T. 1; 16 M. L. J. 73.
(3) 5 Ind. Cas. 867; 34 B. 267; 12 Bom. L. R. 149.
(4) 6 B. L. R. 180; 14 W. R. 257.
(5) 23 Ind. Cas. 876; 19 C. L. J. 292.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 172 OF 1913.

April 7, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

PITAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAYA PRASHAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court's power to vary decree in favour of party not appealing.

In a mortgage suit, the plaintiff got a decree subject to his paying a certain amount due to a prior mortgagee. The plaintiff accepted the decision and did not appeal, but on defendant's appeal the Appellate Court found that a smaller sum was due to the prior mortgagee:

Held, that as the plaintiff had not appealed against the decree, the Appellate Court could not reduce the amount due under the prior mortgage.

Second appeal against the decree of the Subordinate Judge of Farrukhabad, dated October 4, 1912.

FACTS.—The facts are briefly as follows:—

The plaintiffs brought a suit on the basis of certified copies of two mortgage-deeds, dated the 12th of May 1883 and 10th of September 1880. The claim was resisted by one of the defendants, Ganesh Rai, a prior incumbrancer. He admitted the execution of the bonds, but pleaded that they were paid up. The other defendants were absent. The Court of first instance held that although the evidence as to the loss of the bonds was 'hearsay', yet as the contesting defendant had admitted their execution, the plaintiffs were entitled to sue on certified copies. The claim was partly decreed. The contesting defendant, Ganesh Rai, and one of the defendants, Pitam, who had not appeared before the Court of first instance appealed against this decree. The Subordinate Judge held that "the plaintiff's story of the loss of both the bonds in suit was absurd;" but it further held that "the defendant-appellant who had not entered appearance in the lower Court must, under the circumstances, be as well bound by the pleadings of the defendant-appellant who had entered such appearance." It further increased the amount of the decree passed in respondent's favour and reduced the amount payable on account of the mort-

PITAM *v.* GAYA PRASHAD.

gage held by Ganesh Rai, although there was no appeal or objection on behalf of the plaintiffs.

Mr. *Gulzari Lal*, for the Appellants, contended that the loss of the documents not having been proved, the suit as against Pitam ought to have been dismissed *in toto*. Although Pitam had not appeared, yet the Court was bound to take some evidence. Here the Courts having found as a matter of fact that the loss of the bonds had not been proved they ought not to have allowed the plaintiffs to sue on a copy. Moreover, the Court below had no jurisdiction to award the plaintiffs a larger amount than that decreed by the Court of first instance as the plaintiffs had submitted to that decree. Nor could for the same reason the amount of the mortgage-money due to the defendant, Ganesh, be reduced.

Mr. *A. P. Dube*, for the Respondents, submitted that as Ganesh had admitted the execution of the bonds he could not contest the claim and the plaintiffs could sue on certified copies. The Court below was competent to pass any decree it thought fit to pass. It could do so under the provisions of Order XLI, rules 24 and 33.

Mr. *Gulzari Lal* referred to *Rangam Lal* v. *Jhandu* (1).

JUDGMENT.—This appeal arises out of a suit based on two mortgages, one of the 12th of May 1888 and the other of the 10th of September of the same year. There was a prior mortgage of the 1st of March 1887 in favour of one Ganesh whose representatives are the appellants other than Pitam. Ganesh brought a suit upon his mortgage and obtained a decree, in execution of which he in 1891 brought to sale the property mortgaged to him and himself became the purchaser. To that suit the mortgagee under the two mortgages of 1888 was not a party. Ganesh claimed priority over the plaintiffs, who are the representatives of the mortgagee under the mortgages of 1888, and he disputed the plaintiffs' claim also on the ground that the mortgages had been discharged. The Court of first instance found both the mortgages of 1888 to be genuine and declared that Rs. 1,237-1 was due upon them. It was also of opinion that Rs. 206 was due to Ganesh upon his prior mortgage. That Court made a decree for sale in the plaintiffs' favour subject to their paying to Ganesh Rs. 206 on account of his prior mortgage. The plaintiffs submitted to this decree and did not prefer any appeal. Ganesh having died in the meantime his heirs and Pitam, one of the defendants, who had not appeared in the Court of first instance preferred an appeal to the lower Appellate Court and they disputed the validity of the two mortgages. It was also contended on behalf of the representatives of Ganesh that a larger sum was due to them than had been decreed by the first Court. The lower Appellate Court was of opinion that the first bond of the 12th of May 1888 had not been proved as the original document had not been produced and its non-production had not been duly accounted for. It, however, proceeded to hold as against Pitam, who had not appeared in the Court of first instance, that the other bond must be deemed to have been proved. It was of opinion that upon the second bond *viz.*, that dated 10th September 1888, a larger sum was due to the plaintiffs than had been found and decreed by the Court of first instance, and that the amount payable to Ganesh was much smaller than Rs. 206. It accordingly made a decree in the plaintiffs' favour for a larger sum than that decreed by the first Court on the basis of the bond of the 10th of September 1888 and reduced the amount directed by that Court to be paid to Ganesh. This appeal has been preferred by Pitam and by the legal representatives of Ganesh. As regards Pitam no decree could be made unless the plaintiffs proved as against him the bond of the 10th of September 1888. The lower Appellate Court was of opinion that the loss of that bond had not been proved and, therefore, as against him it should have dismissed the suit, it not being open to the plaintiffs under the circumstances to adduce secondary evidence. As regards the amount of the bond mentioned above the Court was not entitled to increase the amount payable under it as found by the Court of first instance. The learned Counsel for the respondents relies upon the provisions of Order XLI, Rule 33, of the Code of Civil Procedure. We are of opinion that this rule does not apply to the circumstances of the present case. We may refer to the decision of the Full Bench in *Rangam Lal* v. *Jhandu* (1).

(1) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.

As to the amount payable to Ganesh upon his prior mortgage the plaintiffs took no exception to the decision of the Court of first instance and, therefore, the lower Appellate Court was, in our judgment, not entitled to reduce the amount found to be due to him on foot of his prior mortgage. The result is that we must allow the appeal and dismiss the claim as against Pitam. As against the legal representatives of Ganesh we must vary the decree of the Court below by restoring the decree of the Court of first instance with this modification that we reduce the amount of that decree to Rs. 637 and in other respects affirm that decree. The appellants will have their costs of this appeal. The parties will pay and receive costs in the Courts below proportionately to failure and success. We extend the time for payment for six months from this date. The objections under Order XLI, rule 22, must necessarily fail and are dismissed with costs.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 269 OF 1912.

August 1, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

MIYA SAHEB—DEFENDANT—APPELLANT

versus

CHAMPA LAL—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), s. 46—Sale decree of occupancy rights—Unregistered mortgage—Not allowed—Interpretation of Statutes.

Under section 46 of the Tenancy Act, 1898, no sale decree in respect of occupancy rights can be passed on an unregistered mortgage, even if the deed was executed before the Act came into force.

Where the language of the Statute is clear and unambiguous, Courts have to give effect to it whether it has the effect of divesting a vested right or not.

Appeal against the decree of the District Judge, Nimar, dated 20th January 1912, confirming the that of the Munsif, Burhanpur, dated 18th February 1911.

Mr. *Atmaram Bhagwant*, for the Appellants.

Mr. *S R. Pandit*, for the Respondent.

JUDGMENT.—The plaintiff sued upon an unregistered mortgage executed on the 19th September 1898. The sole defence taken was a denial of execution. Both the Courts below have found the mortgage to have been duly executed. An attempt was made to question this finding, but the finding being purely one of fact, is binding on me.

A new point, however, has been raised in this Court, *viz.*, that the decree of the lower Court so far as it directs sale of land held in occupancy right contravenes the provisions of section 46 of the Tenancy Act, (XI of 1898), which came into force on the 21st October 1898. The respondent objects to this point being allowed to be raised. In this case neither the plaint nor the decree mentions the right in which the fields are held. In the mortgage they are described as occupancy fields. If, as I shall show later, the Legislature forbids the sale of certain kinds of property, it will be the duty of this Court to see that there is no evasion of the law by improperly omitting from the plaint the tenure under which the fields are held. The decree passed in this case is contrary to the instructions given by this Court in Civil Circular No. 5, paragraph 3, Part 1. In my opinion the plaintiff should be asked to state the nature of the right in which the fields are held, especially as his mortgage, *prima facie*, shows the fields are unsaleable.

The next point for decision is whether section 46 of the Tenancy Act has retrospective effect. At the date of the mortgage occupancy rights were transferable with the consent of the landlord. The mortgage was for a sum under one hundred rupees and did not require registration. But for the provisions of section 46 (2), the plaintiff would have been entitled to a sale decree.

I note that section 46 (3) relates to transfer made after the commencement of the Act, for, it says that "no occupancy tenant shall be entitled to sell, make a gift of, mortgage.....his right in his holding." The question then whether such a transfer made after Act XI of 1898 can be avoided in a Civil Court or by an application to a Revenue Officer, does not arise in this case.

It remains for me to decide whether sub-clause (2) of section 46 applies. It is argued that the Legislature did not intend to invalidate a contract valid at the time it was entered into. This is no doubt the ordinary presumption, but where the

language of the Statute is clear and unambiguous, Courts have to give effect to it whether it has the effect of divesting a vested right or not. Now section 43 (2) says: "save in pursuance of a document duly registered before the commencement of this Act, no decree or order shall be passed for the sale of the right of an occupancy tenant in his holding, nor shall such right be sold in execution of any decree or order." It appears to me that the sale of occupancy right is prohibited and the only exception made is in favour of a person holding a registered instrument. It will be seen that no provision is made prohibiting a foreclosure decree being passed, whether on a registered or unregistered instrument. But it is clear that no sale decree can be passed on an unregistered mortgage. What other remedies the plaintiff has on his mortgage it is premature for me to decide.

The Court of first instance will call upon the plaintiff to amend his plaint by describing the right in which the fields are held by the mortgagor. It will be in the discretion of the first Court to allow any further amendment of the plaint that may be applied for by the plaintiff.

I reverse the decrees of both Courts and direct the first Court to try the suit with reference to the above remarks. There will be no order for refund of Court-fees. The appellant will pay the costs hitherto incurred in all three Courts.

Decrees reversed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 138 OF 1912.

January 22, 1914.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

NARAYAN BALKRISHNA KULKARNI—DEFENDANT—APPELLANT

versus

GOPAL JIV GHADI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2, O. XXVI, r. 11—Issue of Commission to examine accounts—Not preliminary decree—"Rights of parties," meaning of.

In a suit for accounts and redemption under the Dekkhan Agriculturists' Relief Act, the Court before passing the decree for possession investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land, and then instead of making the final mortgage account itself referred the taking of the account to a Commissioner under Order XXVI, rule 11, of the Code of Civil Procedure:

Held, that the issue of a Commission, or the instructions which were recorded for the benefit of the Commissioner at the time of the issue of the Commission, did not constitute a preliminary decree within the meaning of section 2 of the Code of Civil Procedure.

"The rights of the parties in regard to matters in controversy," referred to in section 2 of the Civil Procedure Code, mean general rights such as rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit, and in relation to liability to accounts, which, if decided, must have a general effect upon the proceedings in the suit, and can be decided preliminary to the investigation of the matters in dispute between the parties upon the merits.

Second appeal from the decision of the first Class Subordinate Judge, at Ratnagiri, in Appeal No. 410 of 1910, dismissing as time-barred the appeal from the decree passed by the Subordinate Judge at Devgad, in Civil Suit No. 84 of 1909.

Mr. *R. N. Koyajee*, for the Appellant.

Mr *A. G. Desai*, for the Respondents.

JUDGMENT.—The plaintiffs sued to have an account taken under the provisions of the Dekkhan Agriculturists' Relief Act of all transactions from the commencement in connection with two mortgages of the 20th December 1865 and the 21st December 1865, and to have the amount due determined, and to obtain a decree for redemption.

The learned Subordinate Judge on the 30th of August 1910 passed a decree for the plaintiff for possession of the property, except one survey number, free from incumbrances, the defendants having received profits for twenty-five years after the debt had been paid off. Before passing that decree the learned Judge had investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land. Then instead of making up the final mortgage account himself he, as is permissible under the Civil Procedure Code, referred the taking of the account to a Commissioner. The Code provides, Order XXVI, rule 11, that "in any suit in which an examination or adjustment of accounts is necessary, the Court may issue a Commission to such person as it thinks fit directing him to make such examination or

adjustment;" and rule 12 (2) provides that "the proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit." In the present case the work of the Commissioner appears merely to have been the ascertainment of the figures based upon the facts found by the Subordinate Judge, and the figures having been furnished by the Commissioner, and neither party objecting, the Court found the fact to be that the whole debt had been paid out of the profits of the mortgage-property, and passed the decree already referred to.

From that decree an appeal was preferred to the first class Subordinate Judge, with appellate powers, and a preliminary objection was taken that the appeal was time-barred, inasmuch as time ran from the date when the Court issued the Commission to the Commissioner to take the account on the ground that the issue of a Commission or the instructions which were recorded for the benefit of the Commissioner at the time of the issue of the Commission constituted a preliminary decree within the definition of section 2 of the Civil Procedure Code. This preliminary point found favour with the Appellate Court and the appeal was accordingly dismissed, because the matters decided by the Subordinate Judge on the question in issue between the parties were decided in fact by the 15th of August when he issued his directions to the Commissioner.

The learned Judge of the Appellate Court held the decision of the 15th of August to be the formal expression of an adjudication which, so far as regarded the Court of the Subordinate Judge, conclusively determined the rights of the parties *with regard to the manner in which accounts should be taken*, and was, therefore, a preliminary decree within the meaning of section 2 of the Code, and as such was appealable. The words "with regard to the manner in which accounts should be taken" appear to have been selected from a judgment of this Court in *Krishnaji Sakharam Kulkarni* v. *Maruti Appa* (1), but they were selected without due regard to the question which was before the Court in that case. The question was as to the status of the plaintiff, whether he was entitled to the special rights of the favoured class under the Dekkhan Agriculturists' Relief Act in the matter of demanding accounts from the mortgagee. It was a decision with regard to the general right of the plaintiff and the general liability of the defendant, without reference to particular questions of fact which might be in issue between the parties in an investigation of the merits of their particular cases after it had been decided what law was applicable to them. In applying the definition of the Civil Procedure Code of 1908, section 2, it will be found that in the reported cases in this Court the rights of the parties in regard to matters in controversy are taken to mean general rights such as rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account, which, if decided, must have a general effect upon the proceedings in the suit and can be decided preliminary to the investigation of the matters in dispute between the parties upon the merits.

In the present case what was decided on the 15th of August at the time of the issue of the Commission was not any general question of right, such as had been referred to, but merely a number of different points in dispute upon the merits of the case between the parties. The learned Judge passed no decree upon the merits. He was waiting for the Commissioner to send in his calculation which would form an item in the evidence to be taken into consideration before framing the decree.

We, therefore, think that the learned Judge of the Appellate Court was in error in dismissing this appeal, for there was nothing in the Code which prevented him from entertaining it inasmuch as there was not a preliminary decree within the meaning of section 97. We, therefore, set aside the decree and remand the case to the lower Appellate Court for disposal on the merits.

Costs, costs in the appeal.

Decree set aside.

(1) 7 Ind. Cas. 966; 12 Bom. L. R. 762 at p. 765.

RAM DAYAL *v.* SURAJ MAL.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 250 OF 1913.
April 7, 1914.
Present:—Mr. Justice Rafique and Mr. Justice Piggott.
RAM DAYAL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SURAJ MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Sale by father of joint family property—Part consideration not antecedent debt or for legal necessity—Cancellation of sale-deed—Son not bound to pay whole consideration.

A son in a joint Hindu family can ask for the setting aside of an alienation made by his father, provided the consideration for the alienation is not an antecedent debt or for legal necessity. Therefore a sale-deed, the consideration of which is partly antecedent debt and party an advance made to the father which is neither an antecedent debt nor for legal necessity, can be cancelled only on the payment of that portion which is an antecedent debt.

Manbahal Rai v. *Gopal Misra*, A. W. N. (1901) 57, *Ram Dial* v. *Ajodhia Prasad*, A. W. N. (1906) 40; 3 A. L. J. 81; 28 A. 328; *Chandra Deo Singh* v. *Mata Prashad*, 31 A. 176; 6 A. L. J. 263; 1 Ind. Cas. 479, referred to.

Hasmat Rai v. *Sunder Das*, 11 C. 396, not followed.

Second appeal from the decision of the Subordinate Judge of Shahjahanpur, dated 29th November 1912.

Mr. *Mohammad Ishaq*, for the Appellant.

Mr. *Benode Behari*, for the Respondents.

JUDGMENT.—The facts which have given rise to this second appeal are as follows:—

One Ganga Ram had three sons namely, Ram Dial, Badam, and Bansi who were at one time joint with him. The family owned, 1 *biswa*, 10 *biswansis*, 16 *kachwansis* and 13 *nanwansis*-share in Mauza Semri which stood recorded in the name of Ganga Ram. Prior to 1901 Ganga Ram executed a hypothecation bond in respect of 6 *biswansi*-share in favour of one Balkishun. Balkishun obtained a decree on the basis of his bond and in execution of that decree had the mortgaged property proclaimed for sale. On the 26th of February 1901 Ganga Ram executed a hypothecation bond in favour of Shib Sahai for Rs. 200, the consideration of which was said to consist of Rs. 128-12-0 for a prior debt due to Shib Sahai and Rs. 71-4 taken in cash for the payment of the decree of Balkishun. The bond of 26th February 1901 was given prior to the sale of the property in execution of the decree of Balkishun. Ganga Ram did not pay off that decree and the property was sold and purchased in the name of Bansi who was at the time a minor. In 1906 Shib Sahai obtained a decree for sale on the basis of his bond of 1901. In 1906 Ram Dial plaintiff, appellant No. 1, brought a suit in the Court of the Munsif of Sahaswan against Shib Sahai, Ganga Ram, Badam and Bansi for a declaration that the entire property recorded in the name of Ganga Ram was ancestral property out of which Ram Dial was in possession to the extent of $\frac{1}{4}$th as his share and for a further declaration that the debt of Shib Sahai was fictitious and was not binding on him (Ram Dial). The latter was successful in his suit. Subsequently Shib Sahai obtained a decree under section 89 of Act IV of 1882 in respect of $\frac{3}{4}$ths of the property hypothecated to him releasing the $\frac{1}{4}$th as the share of Ram Dial. 15 *biswansis* out of the 1 *biswa*-share hypothecated to Shib Sahai were put up to sale in execution of his decree. But before the sale could take place Ganga Ram executed a sale-deed on the 15th of March 1910 in respect of 4 *biswansis* out of the said 15 *biswansis* in favour of Suraj Mal and Rewa Ram, the sons of Shib Sahai, in lieu of Rs. 600. It was said in the sale-deed that out of this consideration money of Rs. 600 the sum of Rs. 409-3 was to be appropriated towards the decree of Shib Sahai, and the rest, namely, Rs. 190-13 was to be paid to the vendor. According to the endorsement of the Sub-Registrar the sum of Rs. 190-13 was paid in cash to Ganga Ram. On the 27th of March 1911 Ram Dial alone instituted a suit in the Court of the Munsif of Sahaswan for the cancellation of the sale-deed of 15th March 1910 and for the recovery of possession of the 4 *biswansis* conveyed by sale. He impleaded as defendants in the suit the vendees as also Ganga Ram and his two other sons and two other persons who were said to have brought a suit for pre-emption. Ram Dial stated in his plaint that he, his father and brothers formed a joint undivided Hindu family, that the property recorded in the name of Ganga Ram was the joint ancestral *Zemindari* property, and that the sale made by Ganga Ram was made without any legal necessity and for no consideration and was not, therefore, binding on him and was null and void. The principal defence was made by the vendees who denied the joint character of the family and in the alternative maintained

the validity of the sale-deed, on the plea that it was made for legal necessity by Ganga Ram as the head of the family who as such was according to Hindu Law and statutory enactments competent to sell the property in suit. They further pleaded that the sale could not be set aside under the law. During the pendency of the suit the other sons of Ganga Ram, namely, Bansi and Badam, were taken out of the array of defendants and included in that of the plaintiffs on their own application. The learned Munsif held that the family was joint and that the sale could be set aside but only on payment by the plaintiffs of the whole consideration of Rs. 600. He further held that the sum of Rs. 409-13 constituted an antecedent debt and the remaining sum of Rs. 190-3 was neither an antecedent debt nor borrowed for legal necessity. But he thought it inequitable to order cancellation of the sale on the payment of the amount of the antecedent debt only. Two of the plaintiffs preferred an appeal to the District Judge and the defendants-vendees filed cross-objections. In their cross-objections the defendants-vendees did not challenge the joint character of the family. All that they contended for was that the burden of proving that there was no legal necessity for Rs. 190-3 lay on the plaintiffs and that the sale could not be cancelled. The learned Judge agreed with the first Court in holding that the sum of Rs. 409-13 was the only sum which could be said to be an antecedent debt and that the balance was not borrowed for legal necessity. He, however, disagreed with the first Court as to the payment of which the sale was to be cancelled. He was of opinion that the sale should be cancelled on payment by the plaintiffs of Rs. 409-13 instead of Rs. 600. The decree of the first Court was modified accordingly. The plaintiffs have come up to this Court in second appeal and the defendants-vendees have filed cross-objections. The plaintiffs contend that the sum of Rs. 409-13 does not constitute an antecedent debt inasmuch as in a prior litigation between Ram Dial and the father of the defendants-vendees and some others, it was found that the bond of 26th February 1901 was fictitious and without consideration. That finding is said to conclude the question as to the character of the debt, in other words it is a matter which is *res judicata* between the parties. In support of this contention the judgment of the Munsif of Sahaswan, dated the 6th of September 1906, is relied upon. It is true that in one place in that judgment the learned Munsif does remark that the bond of 26th February 1901 is fictitious. But the operative part of his judgment is as follows:

"The bond of defendant No. 1 is without consideration so far as plaintiff is concerned and was intended to benefit defendants Nos. 3 and 4 at the expense of the plaintiff." On this finding we are unable to say that the question as to the character of the bond of 26th February 1901 is *res judicata* in the sense in which the appellants contend. We, therefore, hold that the appeal fails. As to the cross-objections the contention that the sum of Rs. 190-3 was borrowed for legal necessity is not sound. It raises a question of fact which is disposed of by the finding arrived at by the two lower Courts against the defendants-vendees. The next point urged is that under the law the sale-deed in question cannot be set aside on payment of part of the consideration only. It is contended that the sons of Ganga Ram by reason of their pious duty are bound to pay the whole debt of their father, and the creditor of their father can, by a separate suit, proceed against him and after obtaining a decree can bring the entire property to sale in satisfaction of the debt. Under these circumstances it is said that it will be better to allow the cancellation of the sale on payment of the whole of the consideration. In support of this contention the case of *Hasmat Rai* v. *Sunder Das* (1) is relied on. That case, no doubt, supports the contention of the defendants-vendees. But in this Court it has always been held that a son in a joint Hindu family can ask for the setting aside of an alienation made by his father provided the consideration for the alienation is not an antecedent debt or for legal necessity. We will refer to two cases *viz.*, *Manbahal Rai* v. *Gopal Misra* (2) and *Ram Dial* v. *Ajudhia Prasad* (3) which seem to us in point. The same principle seems to follow from the judgment of the majority of the Judges in this Court [*Chandradeo*

(1) 11 C. 396.
(2) A. W. N. (1901) 57.
(3) A. W. N. (1906) 40; 3 A. L. J. 81, 28 A. 328.

Singh v. *Mata Prasad* (4)]. We, therefore, disallow the contention of the respondents and reject the cross-objections. The result is that both the appeal and the cross-objections fail, we dismiss them with costs including in this Court fees on the higher scale. As for the payment of Rs. 409-13 by the plaintiffs we extend time to three months from to-day. In default of payment within that period the plaintiffs' suit will stand dismissed with costs.

Both appeal and cross-objections dismissed.

(4) 31 A. 176; 6 A. L. J. 263; 1 Ind. Cas. 479 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 733 OF 1910.

June 27, 1911.

Present:—Mr. Stanyon, A. J. C.

MUKUNDRAM AND OTHERS—PLAITIFFS—APPELLANTS

versus

DAYARAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Eviednce Act (I of 1872), s. 34—Interpretation—Book—Books of account—Regularly kept.

An entry to be admissible in evidence under section 34 of the Indian Evidence Act must be shown to be in a *book*, that book must be a *book* of account, and that account must be one *regularly kept in the course of business.*

(*a*) The term 'book' may properly be taken to signify ordinarily a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume.

(*b*) A book which merely contains entries of items, of which no account is made at any time, is not a book of account for the purposes of section 34. The legislature did not intend to include in that category any record in which there is no process of reckoning.

(*c*) The fact of regular maintenance and general accuracy of account-books, if not admitted, must be formally proved by the evidence of some person competent to speak to the facts.

The evidential value of account books will, of course, depend upon their formality and the checks against fraud secured by the method of keeping them, but that is not to be confused with admissibility. As regards admissibility section 34 makes no difference between the cash-books and ledgers of a large Bank, and the day-book of a house-keeper. The difference lies in the weight to be given to the entries therein.

Appeal against the decree of the District Judge, Hoshangabad, dated the 10th October 1910, reversing that of the Subordinate Judge, Hoshangabad, dated the 12th May 1910.

Mr. *F. W. Dillon*, for the Appellnts.

Mr. *J. Mittra*, for the Respondents.

JUDGMENT.

* * * * In the present case the documents produced by the witness Damodhar (D. W. No. 12) were tendered in the first Court and admitted in the lower Appellate Court as books of account kept in regular course of business, entries wherein were admissible under section 34. If, therefore, the documents were not proved to be account-books regularly kept in course of business their admission was illegal, because proof of the entries therein would be in violation of section 21 of the Evidence Act. There appears to be so much misapprehension in the Courts below as to the scope and application of section 34 of that enactment, that it may serve some purpose to pause and examine its provisions before applying them to the facts of this case. The remarks of their Lordships of the Privy Council in *Jaswant Singh* v. *Sheo Narain Lal* (1) are instructive as to the variety in account-books. Some may be, as described by the Subordinate Judge in the above case, of no evidential value, but merely a man's private record, prepared by him, as may, be in accordance with his pleasure or convenience. "Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true. And," their Lordships continue, "the Evidence Act, section 34, therefore, enacts that entries in books of account regularly kept in the course of business shall be relevant evidence, though not sufficient of themselves to charge any person with liability." The admission of such entries on behalf of a person making them is an exception to the general rule laid down in section 21 of the Act. Such entries were not admitted in English Common Law unless they happened to be against the interest of the person making them or were made in the course of business by deceased persons. (Taylor's Evidence, page 709; Best's Evidence, paragraphs 501, 503; Roscoe's N. P. Evidence, 60-62.) But Equity Courts have gradually enlarged the exception, and regularly kept books of account have been accepted by them as evidence for many years, and now the rules of the Supreme Court recognize the justice and

(1) 16 A. 157 p. 161; 21 I. A. 6.

expediency of this practice. (*Cf.* Order XXX, rule 7, of the rules of the Supreme Court, 1897, as amended by the Rules of July 1902). It is recognized that to use a system of regular accounts to sustain a particular fraud is so difficult and dangerous a procedure, that the Courts may guide their decisions by using entries in such a system, truth and accuracy and contemporaneous record being almost indispensable for the due carrying on of such accounts. In the case above cited their Lordships of the Privy Council found "a cash-book, a bill-book, and a ledger, all referring to one another." An examination showed correspondence to be exact in some items, and they remarked: "It must be confessed that to forge elaborate accounts extending over six years, or even to insert new sheets in such accounts, would be a most dangerous undertaking, and to make the different books correspond exactly would be a task of almost insuperable difficulty."

I have written enough to show that the words in section 34 of the Evidence Act, "books of account, regularly kept in the course of business" are of the first importance in giving effect to the principle embodied in the section. That principle is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with, undiscovered, for the purposes of a particular case. Therefore when an entry of that kind is tendered, it must be shown to be in a *book*, that book must be a *book of account*, and that account must be one *regularly kept in the course of business*. These essentials require to be carefully observed in this country where written fraud and forgery are extremely common, and the responsibility of keeping accounts for the benefit of others is honoured in the breach rather than the observance—*e. g.*, by money-lenders, mortgagees in possession, *lambardars* who collect for co-sharers, persons in possession of landed property whereof the title is in dispute or litigation.

First, then, what is a 'book?' In its ordinary sense it signifies a collection of sheets of paper bound together in a manner which cannot be disturbed or altered except by tearing apart. The binding is of a kind which is not intended to be moveable in the sense of being undone and put together again. A collection of papers in a portfolio, or clip, or strung together on a piece of twine which is intended to be untied at will, would not, in ordinary English, be called a book. But so narrow a signification would not do in India, where accounts are often kept on sheets of paper laced or threaded together in a manner which allows removal of any sheet at any time by the untying of a knot. Of this class are the *bahis* of practically every Marwari banker in India. The definition of 'book' given in the English Copyright Act, 1845, section 3, is that the term means and includes "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." This is a special definition for the convenience of using a single word to answer the purpose of a particular Act, and would obviously misrepresent what the Legislature had in mind when enacting section 34 of the Indian Evidence Act. It may be pointed out that even the Marwari *bahis*, though capable of being unbound without damage, are not made in that form for that purpose, but, when properly kept, are paged and intended not to be taken apart at any time for any purpose. I think the term 'book' in section 34 aforesaid may properly be taken to signify, ordinarily, a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume. It is easier, however, to say what is not a book for the purposes of section 34; and I have no hesitation in holding that unbound sheets of paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of section 34. The documents admitted on to this record by the lower Appellate Court are not a book or books, and, therefore, the entries upon them were illegally admitted in evidence.

When the article produced is a book we have still to see that it is a book of account, for that is the only kind of book to which the section opens the door of relevant evidence. I am alive to the dictum of the Privy Council in *Deputy Commissioner of Bara Banki* v. *Ram Parshad* (2) disapproving of the dictum of

(2) 27 C. 118; 26 I. A. 254; 4 C. W. N. 417.

West, J., in *Munchershaw Bezonji* v. *New Dhurumsey Spinning and Weaving Company* (3), as giving too limited a meaning to the section. But there is nothing in that case which gives any undue extension to the word 'account' beyond its usual significance. To account is to reckon, and I am unable to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A book which contains successive entries of items may be a good memorandum book: but until those entries are totalled or balanced, or both, as the case may be, there is no reckoning and no account. In the making of totals and striking of balances from time to time lies the chief safeguard under which books of account have been distinguished from other private records as capable of containing substantive evidence on which reliance may be placed. A private diary may be most regularly kept and contain records of facts, contemporaneously made, of the utmost value. It may be used for contradicting or corroborating a witness or refreshing his memory and the like under sections 144, 157, 159 and others of the Evidence Act; for such user does not make the document itself evidence. [Cf. *Ramji* v. *Rangayya* (4)]. It may also come in under section 32 (2) if the requirements of that section are satisfied. But no entry in such a diary can be filed as documentary evidence of the facts stated in it in favour of the person making the entry if he is a party to the suit. It would be excluded by section 21 of the Act, and section 34 provides no exception in favour of it. The reason for such differentiation between a private diary and a private account is manifest. An account, regularly kept, necessarily results in a continuity which makes fraudulent addition extremely difficult and dangerous: it is a chain of forged links into which the subsequent interpolation of a link of forgery without discovery is almost impracticable. The man who wishes to defraud his neighbour generally avoids keeping regular accounts, or, having kept them, suppresses them. The labour of weaving falsehood with truth in regularly kept accounts is too great and continuous to be popular, because of the mathematical connection running through them. But these safeguards of truth are entirely absent in the most regularly kept of private diaries, and subsequent interpolations, to meet an unexpected demand and facilitate fraud, are generally possible without difficulty and danger of discovery. It is clear that the Legislature, which guides itself by human experience, had such considerations before it when it enacted, by section 34, an exception to section 21, in favour of books of account. I am, therefore, of opinion that the Legislature did not intend to include in that category any record in which there is no process of reckoning. Therefore, a book which merely contains entries of items, of which no account is made at any time, is not a book of account for the purposes of section 34. The papers produced by D. W. No. 12 in this case are entirely devoid of totals and balances. Therefore, the entries in them never ripened into *accounts*, and such entries—which could obviously be fraudulently added to or penned through at any time without hindrance or discovery—are not admissible under section 34.

Finally, when we have got books of account, properly so called, we must see that they have been *regularly kept*. This does not mean, as is frequently supposed, that they must be maintained in a particular form favoured by bankers—usually called the *mahajani* system. Their evidential value will, of course, depend upon their formality and the checks against fraud secured by the method of keeping them; but that is not to be confused with admissibility. A single account-book, however simple, if regularly kept, will be admissible. As regards admissibility, section 34 makes no difference between the cash-books and ledgers of a large Bank, and the day-book of a house-keeper. The difference lies in the weight to be given to the entries therein. But, where the fact of regular maintenance and general accuracy of account-books is not admitted, it must be formally proved. In *Dwarka Doss* v. *Jankee Doss* (5) their Lordships of the Privy Council pointed out that "the regular proof of books and accounts requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept, and to prove their general accuracy." In the present case nothing of the kind has been done, and the record of the first Court

(3) 4 B. 576 at p. 583.
(4) 1 M. H. C. R. 168.
(5) 6 M. I. A. 88 at p. 98; 19 Eng. Rep. 33.

endorsed on the accounts that they are unproved is a perfectly correct record. There is frequently confusion in the Subordinate Courts as to how an account-book should be proved and used under section 34 aforesaid. It is a common practice to call a witness and examine him, as to the particular items sought to be proved, by getting him, as it were, to read them out to the Court, sometimes when he has no personal knowledge concerning them and they are not in his handwriting. Meanwhile, it is taken for granted, without formal proof, that because the book is the *khata* or *rokar* of some firm, it is regularly kept. The question whether or not a book is regularly kept is one of fact, to be proved (if not admitted), according to the circumstances of each case. Where an entry is properly admitted it is mere waste of time to have its contents repeated out of the mouth of a witness who merely reads it and cannot supplement it with his personal knowledge. Use of an entry to refresh memory is one thing: its proof as substantive evidence under section 34 is another; but this distinction is constantly lost to sight by Judges and practitioners. A clerk called as a witness may depose:—"I remember paying out Rs. 100 as a loan to the defendant some time last year. Having now refreshed my memory from an entry made at the time in my master's cash-book I can state that the date was the 15th June 1910." This is not a case of evidence under section 34 of the Evidence Act. But suppose the account-book had been produced and the entry tendered in evidence. Then the deposition of the clerk might have been in these terms:—"I know the defendant. I remember that he came to my master's shop and borrowed some money last year. I cannot remember the amount lent or the date of the loan though I saw the money paid. I also saw another clerk make an entry of the loan in my master's cash day-book. This book (Exhibit A) shown to me is that in which the entry was made. It is regularly kept. Transactions are entered as they occur, and the book is totalled and balanced every day, and entries carried into a ledger once a week. This book (Exhibit B) is the ledger for last year and the entry of defendant's loan should be in it." Upon this testimony the Court would be justified in admitting the entries tendered by the plaintiff and using them to corroborate the witness, and prove the amount and date of the loan. It would be waste of time and miss the point of section 34 to get the witness to give oral evidence of the contents of the entries by reading them out. Once they are qualified for admission under section 34, the Court itself can read them and use their contents for its information.

For the reasons I have given I hold that the documents admitted by the lower Appellate Court are not account-books at all, and there is no proof that they were regularly kept. Their admission in evidence was, therefore, illegal, and the finding of the lower Appellate Court on the basis of them is bad. That finding is, therefore, set aside, and the finding of the first Court restored on the question of the alleged re-payments for which defendant claimed credit.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 110 TO 117 OF 1913.

February 20, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

UMA CHARAN MANDAL AND OTHERS—APPELLANTS—PETITIONERS

versus

MIDNAPORE ZEMINDARY COMPANY—RESPONDENTS—OPPOSITE PARTY.

High Courts Act (24 & 25 Vict. C. 104), s. 15—Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 85—Jurisdiction—High Court's power of superintendence—Proceedings for settlement of fair rent before Revenue Officer.

The High Court has no jurisdiction to exercise the power of superintendence it possesses under section 15 of the Indian High Courts Act, 1861, in relation to a proceeding for settlement of fair rents before a Revenue Officer under section 85 of the Chota Nagpur Tenancy Act of 1908.

Rules in respect of proceedings before the Settlement Officer of Chota Nagpur under section 85 of the Chota Nagpur Tenancy Act, 1908.

Babu *Khetra Mohan Sen*, for the Petitioners.

Babu *Jogesh Chandra Roy*, for the Opposite Party.

JUDGMENT.—This Rule raises a question of first impression as to the jurisdiction of this Court to exercise the power of superintendence it possesses under section 15 of

the Indian High Courts Act, 1861, in relation to a proceeding for settlement of fair rents before a Revenue Officer under section 85 of the Chota Nagpur Tenancy Act, 1908. The circumstances under which the question has been raised for decision may be briefly narrated.

The opposite party commenced a suit for recovery of possession of lands in the occupation of the petitioners as under-tenure-holders on the allegation that they were purchasers of the superior tenure at a sale for arrears of rent, and as such were entitled to avoid all under-tenures granted after the creation of the tenure. The District Judge has held that the plaintiffs are not entitled to avoid the under-tenures, but he has given them a declaration that they are entitled to enhance the rent payable. The defendants have appealed to this Court against the decree of the District Judge and the plaintiffs-respondents have preferred a cross-appeal. During the pendency of the appeal in this Court, the plaintiffs have instituted proceedings in the Court of the Settlement Officer of Chota Nagpur for settlement of fair rents under section 85 of the Chota Nagpur Tenancy Act, 1908, and for enhancement of the rent of the under-tenure from Rs. 1-4 a year to Rs. 4 8-0 a year. The defendants have applied to this Court for an order upon the Settlement Officer to stay the trial of the proceedings instituted before him pending the determination of the appeal and cross-appeal preferred to this Court. It is urged on behalf of the petitioner that if the appeal succeeds, the proceedings for the settlement of fair rents will become nugatory, and that the same result will follow if the cross-appeal succeeds and the plaintiffs become entitled to a decree for ejectment; in other words, fair rent may have to be assessed only in the contingency of the failure of both the appeal and the cross-appeal. It has been contended under these circumstances that it is obviously desirable that the question of the settlement of fair rents should not be investigated during the pendency of the appeal and the cross-appeal in this Court. This position has not been seriously controverted by the plaintiffs-oppostite party. But it has been argued on their behalf that this Court has no jurisdiction to issue any direction to the Settlement Officer in respect of the proceedings under section 85.

It is plain that if this Court is competent to give any directions to the Settlement Officer in respect of the proceedings instituted before him, it can do so only in exercise of the power of superintendence vested in it by section 15 of the Indian High Courts Act, 1861. This power of superintendence can be exercised only over Courts which are subject to the Appellate Jurisdiction of the High Court. The question consequently arises, whether the Court of a Revenue Officer in which a proceeding for settlement of fair rents has been instituted under section 85 of the Chota Nagpur Tenancy Act is a Court subject to the Appellate Jurisdiction of this High Court. Sub-section 4 of section 85 provides that when a settlement of rents is made, an appeal shall lie from such settlement in the prescribed manner and to the prescribed officer. Clause 8 of sub-section 2 of section 264 authorises the Local Government to make rules with a view to prescribe the officer to whom and the manner in which appeals shall lie from orders or directions passed by Revenue Officers under section 85. On the 18th June 1909, the Local Government framed Rules to the effect that when rent has been settled by an Assistant Settlement Officer, the appeal shall lie to the Settlement Officer to whom the Assistant Settlement Officer is subordinate, and when rent has been settled by a Settlement Officer himself, the appeal shall lie to the Commissioner. It is plain consequently that where, as here, the proceeding for settlement of fair rent is instituted in the Court of a Settlement Officer that Court is subordinate to the Commissioner. Our attention has not been drawn to any statutory provision or rule which makes the Commissioner or the Settlement Officer subordinate to the Appellate Jurisdiction of this Court. For the purpose of the application of the power of superintendence vested in this Court under section 15 of the Indian High Courts Act, it is not necessary that an appeal should lie to this Court in the very proceeding in which the power of superintendence is invoked; in fact, if the party aggrieved is entitled to relief by way of appeal, it is not necessary for him to invoke the exercise of the power of superintendence. To take one illustration, an appeal to this Court is barred under

section 102 of the Civil Procedure Code of 1908, when the amount or value of the subject-matter of a suit of the nature cognizable by a Court of Small Causes does not exceed five hundred rupees: in such acase if the suit has been tried by a Court subject to the Appellate Jurisdiction of this Court, the exercise of our power of superintendence may be invoked [*Shamdanee* v. *Bhoioo Ram* (1), *Ramabai* v. *Trimbak Ganesh Desai*(2)] provided that the case is of such a nature as to require the interference of this Court in the exercise of its extraordinary powers. But where a Court is made subordinate to the Appellate Jurisdiction of a Tribunal, different from and in no way subordinate to this Court, it cannot reasonably be held that the Court is subordinate to the Appellate Jurisdiction of this High Court. An analogy is furnished by the decision of *Darbari Paniiara* v. *Bhoti Roy* (3) where it was pointed out that in the Sonthal Pergannas there are two entirely distinct series of Courts, Original and Appellate, and that the distinction is fundamental although the same individual may preside over two different Courts. The cases in which it has been ruled that the High Court has jurisdiction to interfere with the orders of Collectors and Deputy Collectors under Act X of 1859 are clearly distinguishable. *Huro Mohun Mukerjee* v. *Kedar Nath Dass* (4), *Bhyrub Chunder* v. *Shama Soonderee* (5), *Gobind Coomar* v. *Kristo Coomar* (6), *Deanutoollaha* v. *Nawab Nazim Sidhee Nuzeer Ali Khan*(7), *Gudadhur Chatterjee* v. *Nand Lall Mukerjee* (8), *Sreemutty Nassir Jan* v. *Akbur Mozoomdar* (9), *Nilmoni Singh* v. *Taranath* (10), *Mohunt Ramanuja Das* v. *Lakhun Parida* (11), *Chaitan Patjosi Mahapatra* v. *Kunja Behari Patnaik* (12). The provisions, it may be pointed out, for appeals under Act X of 1859 are on entirely different lines from those prescribed by the Chota Nagpur Tenancy Act, 1908. The cases of *Madho Prakash Singh* v. *Murli Manohar* (13) and *Ram Lochan Singh* v. *Beni Prosad Kumri* (14) deal respectively with the question of procedure in Revenue Courts, and the procedure applicable to execution of decrees transferred from Revenue Courts to Civil Courts The principle applicable to those matters does not in any way assist the contention of the petitioners nor does the case of *Kartik Chandra Ojha* v. *Gora Chand Mahto* (15) advance the argument of the petitioners. That decision is an authority for the proposition that proceedings on applications for enhancement of rent under the provisions of sections 27 to 30 of the Chota Nagpur Tenancy Act are judicial proceedings before the Deputy Commissioner, who is for this purpose a Court subordinate to the Appellate Jurisdiction of this High Court. Reliance was placed in support of this view on the circumstances that under section 224 an appeal does, under certain circumstances, lie from the judgment of a Deputy Commissioner to the Judicial Commissioner and in certain other circumstances to the High Court. The case before us stands plainly on a wholly different footing. It would, in our opinion, be anomalous to hold that where, by Statute, superintendence over a Revenue Officer is vested, in a particular matter, in the Commissioner and the Board of Revenue, the Revenue Officer should be deemed even for the purposes of that particular proceeding a Court subordinate to the Appellate Jurisdiction of this High Court. In our opinion, section 15 of the Indian High Courts Act, 1861, has no application to proceedings for settlement of fair rents instituted before a Revenue Officer under section 85 of the Chota Nagpur Tenancy Act, 1908. In this view the Rule must be discharged with costs one gold *mohur*.

The other Rules, it is conceded, will be governed by this judgment, and will consequently be discharged, but there will be no order for costs in those Rules.

Rules discharged.

(1) 22 W. R. 44.
(2) 9 B. H. C. R. 283.
(3) 23 Ind. Cas. 883; 18 C. W. N. 575; 19 C. L. J. 294.
(4) 5 W R. Act X Rulings 25.
(5) 6 W. R. Act X Rulings 68.
(6) 7 W. R. 520; B. L. R. Sup. 714.
(7) 10 W. R. 341; 1 B. L. R. 216.
(8) 12 W. R. 406.
(9) 15 W. R. 418.
(10) 9 C. 295; 12 C. L. R. 361; 9 I. I. A. 174.
(11) 11 C. W. N. 112; 8 C. L. J. 43.
(12) 11 Ind. Cas. 207; 38 C. 832; 15 C. W. N. 863; 14 C. L. J. 284.
(13) 5 A. 406.; A. W. N. (1883) 92.
(14) 1 Ind. Cas. 933; 9 C. L. J. 125; 13 C. W. N. 791; 36 C. 252.
(15) 20 Ind. Cas. 420; 40 C. 518; 17 C. L. J. 593.

BIDHUMUKHI CHOWDHURANI *v.* ASMATULLA.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 939 OF 1912.
April 28, 1914.
Present:—Mr. Justice Mullick.
BIDHUMUKHI CHOWDHURANI—PLAINTIFF—APPELLANT
versus
ASMATULLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *s.* 160 (*g*)—*Protected interest*—Se-patni—*General authority in* dar-patni patta *to create* se-patni, *whether sufficient.*

A general authority contained in a *dar-patni patta* expressly stating that the *dar-patnidar* may grant *se-patni* settlements is sufficient to protect from annulment a *se-patni* created by the *dar-patnidar* as a protected interest within the meaning of section 160 (*g*) of the Bengal Tenancy Act, and a special permission in each case is not required.

Appeal from the decree of the District Judge of Rungpur, dated January 26th, 1912, affirming that of the Second Munsif of Rungpur, dated June 19th, 1911.

Dr. *Rash Behary Ghose*, Babus *Dwarka Nath Chakravarti* and *Bimal Chandra Das*, for the Appellant.

Babus *Sharat Chandra Roy Chaudhri* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.—One Lachmipat, the owner of a *patni taluq*, granted a *dar-patni* to Niaulla. This *dar-patni* vested in equal shares in three persons named Bhairab, Nil Chand and Jaga Mohan. Nil Chand died and his estate passed into the possession of Bhairab as executor. Jaga Mohan gave a *se-patni* settlement of his one-third share in the *dar-patni* to Bhairab acting both on behalf of himself and as executor of the estate of Nil Chand. The plaintiff has, by purchase at a sale for arrears of rent, become sixteen-annas proprietor of the *dar-patni*. He states that he has by notice under section 167 of the Bengal Tenancy Act annulled the encumbrance created by the *se patni* and that, therefore, the defendants who are tenants upon the land are liable to pay the whole rent to him. The lower Appellate Court has dismissed the suit. Hence this second appeal.

The main contention is that the *se-patni* is not a protected interest within the meaning of section 160 (*g*), Bengal Tenancy Act. Now the *patta* by which the *dar-patni* was created expressly states that the *dar-patnidar* may grant *se-patni* settlements, but it is argued that a general permission, though in writing, is not sufficient and that what is required is a special permission in each case. I cannot see any reason why we should import into the Statute something more than what is there. All that it requires is that the permission of the proprietor should be express and that it should be in writing. These requirements are fulfilled in the present case and, therefore, the *se-patni* is a protected interest within the meaning of the Bengal Tenancy Act. The learned Vakil for the respondent wishes to go further and argues that whereas section 11 of Regulation VIII of 1819 requires special permission in each case; section 160 (*g*) of the Bengal Tenancy Act is less strict. It is not necessary for the purposes of the present case to enter into discussion as to whether the intention of section 160 (*g*) was to enlarge the powers of encumbrancers, but if it were necessary to decide the point I would say that the scope of section 160 (*g*) was identical with that of section 11 Regulation VIII of 1819. By section 105 of Act X of 1859, a *patni taluq* could be brought to sale for its arrears "according to the rules for the sale of under-tenures contained in any law for the time being in force". It was held by the Privy Council that a sale held under section 105, Act X of 1859, of a *patni taluq* for its arrears had the effect of avoiding all encumbrances. By section 16, Act VIII (B.C.) of 1865, the legislation gave more formal effect to this decision and showed that its intention was to protect the same encumbrances as section 11, Regulation VIII of 1819. It is important to note that section 16, Act VIII of 1865, avoids all encumbrances, "unless the right of making such encumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it". This clearly covers a general authority in writing. Now section 160, Act VIII of 1885, differs from section 16, Act VIII (B.C.) of 1865, only in form and I am satisfied that under the present law a general authority, such as is contained in the *dar-patni patta* under consideration, is sufficient to protect the *se patni*. Therefore, as regards the one-third share of Jaga Mohan leased in *se-patni* to Bhairab the tenants are bound to pay rent not to the plaintiff but to Bhairab. With regard

to the remaining two-thirds share either the plaintiff must show separate collection or he must sue for the whole rent making Bhairab a party. It is found as a fact that he has failed to show separate collection and it is admitted that Bhairab is not a party to the present suit. The whole suit has, therefore, been rightly dismissed. The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 95 OF 1913.

April 9, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

SYAM SUNDER TAG—DEFENDANT—RESPONDENT.

Consideration, failure of.

The plaintiff who was a share-holder in a Company sold his shares therein to the defendant for Rs. 500. The defendant instead of paying the price in cash executed a bond whereby he agreed to pay the amount to the plaintiff with interest. No undertaking was given by the plaintiff that he would obtain the recognition of the transfer by the Company. The Manager of the Company, who had no such authority, refused to recognise and register the transfer:

Held, on the plaintiff's suit on the bond, that as there was no failure of consideration the suit must succeed.

Second appeal from the decision of the Additional Judge of Bareilly, dated 23rd November 1913.

FACTS.—The plaintiff brought a suit for recovery of a certain sum of money on the allegation that the defendant had purchased from the plaintiff 100 shares for Rs. 500 in the Indian Co-operative Bank, "Limited", and executed a bond for the aid sum on April 18th, 1911. The defence was that the bond was executed under undue influence; that there was no consideration for the bond; that as the plaintiff was a Director of the Bank it was not competent to him under the rules to transfer any shares held by him. The Court of first instance decreed the claim. The lower Appellate Court dismissed the suit on the ground that the defendant did not get the shares that were transferred to him. The plaintiff appealed to the High Court.

Mr. *Sarat Chandra Chaudhri*, for the Appellant—The plaintiff had every right to transfer the shares. The Articles of Association prohibiting a Director from transferring shares were passed after the transaction had taken place and they cannot possibly be held to have a retrospective effect. The plaintiff cannot be bound by any act of the Chief Manager done after the institution of the suit. The plaintiff did all that he was required to do by law. It was the duty of the defendant to have taken steps for the registration of his name. There is no want of consideration. The Articles of Association do not bind the parties. At the date of the transfer the shares could be sold and a valid title passed to the defendant. The mere fact that his application was refused long after the suit cannot make any difference. There was no express provision in the Articles of Association preventing the sale.

Lord Lindley on Contract, page 608.

Mr. *Purushottam Das Tandon*, for the Respondent.—As a matter of fact no consideration has passed and the transferor had no right to transfer the shares. The Companies Act (Article 8, Schedule A,) is very clear on the point. In the Articles of Association there is a clause to the effect that the rules framed have a retrospective effect. The transferor being a member, he is bound by the Rules of the Association. His right to sell is not an absolute right. It is subject to the approval of the Directors. The Directors not having agreed to the transfer no valid title passed to the defendant. The consideration having thus failed, no suit was maintainable.

He relied on *In the matter of the Bombay Fire Insurance Company, Limited* (1).

Mr. *S. C. Chaudhri*, not heard in reply.

(1) 16 B. 398.

BAHADUR SINGH *v.* SYAM SUNDER TAG.

JUDGMENT.—This appeal arises out of a suit brought under the following circumstances :—

The plaintiff was the registered holder of certain shares in a concern known as the Indian Co-operative Bank, Ltd. On the 18th of July 1911, the plaintiff executed a deed of transfer of the shares to the defendant in consideration of Rs. 500. On the same date the defendant executed a bond in favour of the plaintiff whereby, after reciting that the defendant was indebted to the plaintiff in the sum of Rs. 500 being the price of the shares transferred to him, he covenanted to pay Rs. 500 with interest at Rs. 12 per cent. per annum. The money has not been paid and the plaintiff instituted the present suit to recover the amount due under the bond. The defendant pleaded *first*, that the transfer and the bond were obtained from him by undue influence and *secondly*, that there had been a failure of consideration inasmuch as the Company had refused to recognise the transfer and register the transferee as the holder of the shares. The Court of first instance decreed the claim. The lower Appellate Court, while finding that there was no undue influence, dismissed the suit on the ground of failure of consideration. The exact circumstances under which the transfer and the bond were executed have not transpired. If we were to speculate on the matter, we might probably think that the plaintiff was anxious to get rid of his shares and that he brought some pressure on the defendant, who was the Managing Director of the concern, to take the shares from him. When we use the word "pressure" we do not necessarily mean "illegal pressure." The defendant contends that the Company refused to recognise the transfer. Under the deed of transfer the plaintiff never undertook to obtain the recognition of the transfer by the Company. On the face of the contract of transfer the transferor was immediately entitled to recover the sum of Rs. 500 and the bond in suit was given to secure the indebtedness from the defendant to the plaintiff for the value of the shares. There is an endorsement on the deed of transfer under the hand of a person by the name of Sidheswar Ghose who is described as the Chief Manager of the Company. After citing a large number of legal rulings he declined for various reasons to register the transfer. He purported to do this on the delegated authority of the Directors. We have looked at the resolution which is relied on as giving this authority and we find that no authority to *refuse to register shares* was conferred upon him. It thus does not appear that the Company ever refused to recognise the transfer. Refusal could only be by a resolution of the Company in pursuance of the Articles of Association.

It is then contended that plaintiff was himself a Director of the Company and that the shares which he purported to transfer were the shares which he held as "qualification shares" for his being a Director. In the Articles of Association which were in force at the time of the transfer there is nothing to prevent a Director from transferring his shares. New Articles of Association are said to have been adopted subsequently with retrospective effect. The provisions of some of these new Articles of Association are very suspicious, but even if we assume that the new Articles of Association were legally adopted, they could not be applied to the transfer which had been made long before they came into operation.

The result is that the defence fails, so far as it is based on the allegation of undue influence, on the finding of fact by the Court below. In our opinion there was no failure of consideration. This being so the appeal must be allowed. We accordingly set aside the decree of the Court below and restore the decree of the Court of first instance, with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

BISHEN SINGH v. BISHEN KAUR.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 41 OF 1912.

April 2, 1914.

Present:—Sir Alfred Kensington, Kt., Chief Judge, and Mr. Justice Rattigan.

BISHEN SINGH—DEFENDANT—APPELLANT

versus

Musammat BISHEN KAUR—PLAINTIFF—AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 11 (1)—Order of dismissal—Decree—Appeal competent—No decree prepared—Revision—Mistake of fact.

An order passed under Order XLI, rule 11 (1), Civil Procedure Code, is a 'decree' from which an appeal lies in the ordinary course. Where, however, in such a case no decree has been drawn up the so-called appeal must be treated merely as an application for revision.

Where the order of dismissal under Order XLI, rule 11 (1), was passed under a mistake of fact, the Chief Court interfered in revision.

Second appeal from the order of the Divisional Judge, Ferozepore, dated the 10th October 1911, affirming that of the Subordinate Judge, 1st Class, Ferozepore, dated the 7th July 1911, decreeing claim.

Mr. *Devi Dyal*, for the Appellant.

Mr. *Santanam*, for the Respondents.

JUDGMENT.—The plaintiff, *Musammat* Bishen Kaur, was granted a decree by the Subordinate Judge on the 7th of July 1911, conditional on her paying into Court a deficiency in Court-fee by the 15th of July. The deficiency was made good and the decree had, accordingly, full effect from the date of the judgment. The Court of the Divisional Judge was closed for civil work during the month of September and the 1st and the 2nd of October were holidays. On the 3rd of October the defendant, Bishen Singh, filed a petition in the Divisional Judge's Court stating that he had been ill and had not been able to have a petition of appeal drawn up; that the 3rd October was the last day on which he could file such an appeal and that he, therefore, prayed to be allowed to file it on the following day. This application was rejected by the Divisional Judge on the 4th of October and on the 5th a memorandum of appeal was presented by the appellant, but as it was not accompanied with a copy of the decree of the first Court, it was returned to the appellant. On the 5th of October appellant filed an application for a copy of the decree, which he obtained on the 9th of October, and on the 10th of October he again presented his memorandum of appeal to the Divisional Judge. On the same date his appeal was rejected on the ground that it was barred by time and that the appellant had shown no sufficient cause for granting an extension of time under section 5 of the Limitation Act. In so holding the learned Divisional Judge remarked that "up till 3rd October the appellant had not even made any application for a copy of the decree, and that if litigants choose to wait till the last day and are then prevented from filing their appeals in time they must take the consequences."

From this order of the Divisional Judge, Bishen Singh appealed to this Court and affixed Court-fee stamps of the value of Rs. 51-12-0 on his memorandum of appeal. In rejecting the appeal the Divisional Judge clearly acted under Order XLI, rule 11 (1), Civil Procedure Code, and the weight of authority is to the effect that an order passed thereunder is "a decree," from which an appeal lies in the ordinary course. In the case before us, however, no decree has been drawn up, and we must, therefore, treat this so-called appeal merely as an application for revision.

After hearing Counsel for Bishen Singh and *Musammat* Bishen Kaur, we are satisfied that the Divisional Judge was in error in holding that the appellant before him had not made any application for a copy of the decree prior to the 3rd of October. Mr. Devi Dyal has produced before us a certified copy of an application by his client dated the 31st July 1911, in which a request is made for copies of the judgment and decree of the Subordinate Judge and a statement is added that such copies must be ready for delivery inasmuch as the applicant had previously applied for them. The endorsement on the back of this application is to the effect that the copy of the decree is ready but that the judgment is in English and that it will take a few days to copy it. We see no reason to doubt the authenticity and correctness of this copy, and it affords proof that the applicant had applied for the copies in question so long ago as July 1911.

Presumably those copies were delivered to

him in due course, and in that case there would be no ground for questioning the truth of his affidavit to the effect that he actually had a copy of the decree on the 3rd of October but that owing to some cause or other that copy was mislaid or lost and could not be filed with his memorandum of appeal on the 10th of October. As the order of the Divisional Judge was passed under a mistake of fact, we feel justified in interfering and in accepting the present petition before us. We accordingly set aside the order of the lower Appellate Court, dated the 10th October 1911, and direct that the record be returned to that Court for decision of Bishen Singh's appeal on the merits.

A preliminary question will possibly arise regarding the Court-fee to be paid on that appeal and if the Divisional Judge holds that the proper Court-fee has not been paid, he should allow time to the appellant to make good the deficiency. In this Court the proper Court-fee stamp was one of Rs. 2 only, whereas the petitioner has paid a fee of Rs. 51-12-0. We accordingly direct that the sum of Rs. 49-12 be refunded to him. The parties will pay their own costs in this Court.

Order set aside.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 46 OF 1912.

September 5, 1913.

Present:—Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Young.

P. M. P. A. N. ANNAMALAY CHETTY—DEFENDANT—APPELLANT

versus

Shaik MAHOMED ISMAIL MINOR BY HIS NEXT FRIEND ALI AHMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Settlement—Deed to be construed according to Muhammadan Law—Life-estate—Donee takes absolute estate.

In construing a deed of settlement executed by a Sunni Muhammadan of Rangoon the law applicable is the Muhammadan Law.

The creation of a life-estate is inconsistent with the Muhammadan Law, and where a life-estate is attempted to be created the donee takes an absolute estate.

Appeal against the judgment and decree of the Chief Court on its Original Side, dated 1st April 1912, in Civil Regular No. 313 of 1911.

Mr. *Giles*, for the Appellant.

Mr. *B. Cowasjee*, for the Respondents.

JUDGMENT.—The point for decision in this appeal is whether a deed of settlement is valid or not. A Sunni Muhammadan, one Shaik Dawood Maistry, on the 8th April 1895 executed a deed of settlement, which sets out that on account of the natural love and affection which he bears to his daughter, Amirun Beebee, he transfers and assigns to her and her heirs as mentioned hereinafter a certain plot of land with the buildings thereon in trust subject to the following terms and conditions.

The deed then proceeds:—

"1. That I appoint myself as sole trustee of the said property to realise the rents and profits thereof and apply the same towards the maintenance of the said Amirun Beebee who is now a minor till she attains her majority, that should I die before she attains her majority Sebina Beebee, her mother, will act as trustee for the aforesaid purpose.

"2. That as soon as the said Amirun Beebee attains her majority she shall be the sole trustee of the said property to apply the rents and profits thereof for her own use and benefit.

"3. That after the death of the said Amirun Beebee her children will enjoy the rents and profits thereof and on the youngest of them attaining his or her majority, the said property is to be divided among them in equal shares and in the event of the said Amirun Beebee dying without any issue, her brothers and sisters will share the said property among them in equal shares."

The suit has arisen in this way. Amirun Beebee has married and her husband is the third respondent. She has a minor son, Shaik Mahomed Ismail, who is the first respondent and plaintiff and is represented by his next friend and uncle Ali Ahmed. Shaik Dawood Maistry died in 1898. On the 23rd February 1911, the appellant who is the first defendant obtained a mortgage decree against Amirun Beebee and her husband Shaik Goolam Kader, the third respondent, on the property described in the deed of settlement claiming the same to belong absolutely to Amirun Beebee. Shaik Mahomed

Ismail claims that his mother has only a life-interest in the property and asks a declaration to such effect and that the mortgage decree obtained by appellant does not affect the property dealt with by the deed of settlement and that appellant has only a mortgage lien over the life-interest of Amirun Beebee in the income of the said property.

The learned Judge on the Original Side has decreed the suit on the authority of the case of *Umes Chunder Sircar* v. *Mussumat Zahur Fatima* (1). The mortgagee—the appellant—urges that by the deed Amirum Beebee has acquired the full property in the premises mentioned in it.

The first point for decision is whether the Muhammadan Law or the general law applies.

For the minor it is urged that this is not a question of succession or inheritance and so section 13 (1) of the Burma Laws Act does not apply. There is not sufficient evidence on the record to show whether the case is one of succession or inheritance as there is nothing to show what other property the settler had. If he settled all his property on his daughter and the others mentioned by the deed it would, in my opinion, be an attempt to evade the Muhammadan Law of succession and so would be a matter of succession or inheritance within the meaning of section 13 (1) of the Burma Laws Act. But supposing that it is only a disposal of his property that does not conflict with the rules of his personal law; the question arises whether the Muhammadan Law is not applicable in the matter. Section 13 (2) of the Burma Laws Act enacts that subject to the provisions of sub-section (1) and of any other enactment for the time being in force all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its Ordinary Original Civil Jurisdiction. That Court administers the provisions of the Transfer of Property Act, 1882. Section 2 of this Act enacts that nothing in the second Chapter of it shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law. The deed of settlement is a transfer of property of the nature of that contemplated by sections 20 and 21 of the Act and they fall within Chapter II. Taking the deed to be one falling within the provisions of Chapter II the law applicable to it in the High Court at Calcutta would be the Muhammadan Law and not the law contained in the Transfer of Property Act. Looking at the deed as a gift Chapter VII of Transfer of Property Act must be considered. Gift is defined in section 123 but section 129 enacts that nothing in the Chapter shall be deemed to affect any rule of Muhammadan Law. The following cases show that at Calcutta in cases of gifts by Muhammadans, the Muhammadan Law is followed, *Fatima Beebee* v. *Ahmad Bakhsh* (2), *Mullick Abdool Gafoor* v. *Muleka* (3), *Yusuff Ali* v. *Collector of Tipperah* (4). Therefore in any case I would hold that the law applicable in constructing the deed is the Muhammadan Law.

The consideration now arises as to what rule of the Muhammadan Law is applicable. The judgment appealed from says that Shaik Dawood Maistry was a Sunni Mahomedan and this statement was not contested nor traversed at the hearing. I will, therefore, take it that he belonged to the Sunni and not the Shiah School of Muhammedanism. The Hedaya is, therefore, applicable to him. The passages at pages 488 and 489 of Hamilton's translation of that work—the second Edition—are relied on by appellant and especially the passage concerning an *Amree* or life grant to this effect. "An *Amree*, moreover, is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated." The learned author is, no doubt, referring to the passage at page 488 where in dealing with a gift with a condition he writes: "Such gift or charity is valid; but the condition annexed is invalid: because it is contrary to the spirit or intendment of the contract; and neither gifts nor charities are affected by being accompanied with an invalid condition because the Prophet approved of *Amrees* (gifts for life) but held the condition annexed to them by the grantor to be void." Learned Counsel for respondent urged that the Imam Abu Hanifa and his disciples

(1) 17 I. A. 201; 18 C. 164.

(2) 31 C. 319.
(3) 10 C. 1112.
(4) 9 C. 158.

Qazi Abu Yusuf and Imam Mohammed differed on the rule of law. I am unable to find that they did on the rule relating to *Amree*; they differed on the rule of a gift by way of *Rikba*, which is a different form of gift. The question of gifts with conditions is dealt with by Mr. Syed Ameer Ali in his learned Book Volume I (3rd Edition) page 77 and also by Sir R. K. Wilson in his learned Work, 4th Edition, page 350. He comments on the case-law up to date in the preface to the last edition of the book. In the case of *Musammat Humeeda* v. *Musammat Budlun* (5) their Lordships of the Privy Council expressed the opinion that the creation of a life-estate does not seem to be consistent with Muhammadan usage and there ought to be very clear proof of so unusual a transaction. In the case of *Suleman Kader v. Dorab Ali Khan* (6) their Lordhsips said: "Their Lordhsips are by no means satisfied that the gift to this lady of these Government promissory-notes subject to a condition that she is to have the interest only for life and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Muhammadan Law, in its legal effect, a gift to her absolutely, the condition being void." But they found that it was not necessary to determine the point. . In the case of *Abdool Gofur* v. *Nizamudin* (7) their Lordships expressed the opinion that the creation of a series of life rents was a kind of estate which did not appear to be known to Muhammadan Law. But the two most important cases seem to be those of *Abdul Wahid Khan* v. *Mussumat Nuran Bibi* (8) and that of *Umer Chunder Sircar* v. *Mussumat Zahoor Fatima* (1) already referred to. In the latter case where by a Mahomedan deed of settlement a husband granted lands to his second wife, on condition that if she had a child by him the grant should be taken as a perpetual *mokarrari* and in the case of no child being born as a life *mokarrari* with remainder to the settlor's two sons, it was held that the two sons took definite interests under the deed similar to vested remainders though liable to be displaced and that such interests were liable to attachment. The point under decision was which of the parties had acquired the ownership of certain lands first in point of time. There had been two sales in execution of two decrees, and in one case the respondent had bought the interest of her judgment-debtor in the lands, and in the other the appellants' predecessor-in-interest had also purchased the interest of his judgment-debtor the same man as respondents' judgment-debtor in the same lands. The report of the case does not show that the question was ever raised as to whether the settlement was not practically a deed of gift disguised by a nominal consideration and whether, if that were so, the Mahomedan rule of law would invalidate either the gift itself or the limiting conditions. This question does not seem to have been raised for decision. In the other case that of *Abdul Wahid Khan* v. *Mussumat Nuran Bibi* (8) the legal effect of an instrument of compromise was directly for decision. The compromise was to the effect that one Gauhar Bibi, a widow of one Mouzzum Khan was to hold possession of and be mistress of certain lands but without power of alienation except in case of special emergency and that two sons of Mouzzum Khan by other wives were to possess and enjoy the lands after her death. The suit was by the sister of one of the sons and half sister of the other and others who had acquired an interest in the estate, and was brought after the death of the half brothers and Gauhar Bibi against a daughter and widow of one of the half brothers and the husband of the daughter. Gauhar Bibi had after the death of the half brothers executed a deed of gift in favour of the aforesaid daughter. The suit was for a share of the estate on the ground that it was settled that Gauhar Bibi should retain possession of the estate during her life time without power of alienation and that after her death both the sons should take the estate half and half. The claim was by virtue of inheritance from the two half brothers. Their Lordships held that during Gauhar Bibi's life-time the whole interest in the estate was to be in her and then said: "Then comes the question: What is the interest which is given by the compromise to the sons? To give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs, and is similar to a vested remainder under the English Law. Such

(5) 17 W. R. 525.
(6) 8 C. 1; 8 I. A. 117.
(7) 17 B. 1; 19 I. A. 170.
(8) 22 I. A. 91; 11 C. 597.

an interest in an estate does not seem to be recognised by the Mahammadan Law." Their Lordships concluded their judgment by saying, "Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Muhammadan Law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the life-time of Gauhar Bibi."

The question arises as to which of these two cases should be followed in the present one, and as I have held that this case is one that must be determined by the rule of Muhammadan Law, I would decide that the case of *Abdul Wahid Khan* v. *Musammat Nuran Bibi* (8) is the one to follow. In that case their Lordships decided on the rule of Muhammadan Law, and in the other the rule of Muhammadan Law was not referred to nor raised.

It only remains to consider what the actual rule of Muhammadan Law is that is applicable to a deed like the one under discussion in the case of Sunni Mohamedans. I have already in this judgment set out the law and authorities relied on. In the case of *Abdoola Khakhibhoy Readymoey* v. *Mahomed Haji Suleman* (9) the Muhammadan Law was discussed and it was held on a review of the authorities that the creation of a life-estate is inconsistent with Muhammadan Law and that where a life-estate is attempted to be created the donee takes an absolute estate. That view appears to me to be correct. I would, therefore, allow this appeal and reverse the decree passed by the learned Judge on the Original Side and dismiss the suit with costs to appellant in both Courts.

YOUNG, J.—I concur.

Appeal allowed.

(9) 7 Bom. L. R. 306.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1133 OF 1913.

January 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BIBHUTI BHUSAN PAL CHOWDHURY AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

LALIT MOHUN PAL CHOWDHURY AND OTHERS—DEFENDANTS NOS. 5, 6 AND 7—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), ss. 115, 151, 152—Inherent power of Court—Amendment of decree to bring into conformity with judgment—Necessary for ends of justice—High Court's power of interference—Revision.

The Courts in this country have an inherent power to amend or vary decrees so as to bring them into conformity with the judgments after they are signed by the Judges under section 151 of the Civil Procedure Code, even if they do not fall under section 152, *Brijratan* v. *Jaynarain*, 7 Ind. Cas. 876; 37 C. 649, followed.

An order under section 151, however, can only be made where it is necessary for the ends of justice.

Where the Court acts under section 151 in a case where it should not have done, it is competent to the High Court to interfere and set matters right.

Rule in the matter of a money suit of the Second Munsif's Court at Berhampore.

Babu *Brojo Lal Chakravarti*, for the Petitioners.

Babu *Upendra Narain Bagchi*, for the Opposite Parties.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court below has amended its decree with a view to bring it into conformity with the judgments. The plaintiffs, who are petitioners before this Court, sued the defendants for contribution. The decree in their favour is in these terms: "The suit be decreed with costs and interest at six per cent. per annum against defendants Nos. 3, 5, 6 and 7 but dismissed against the others." The decree then proceeds to specify the amounts payable by the several defendants and adds that the plaintiffs are to recover as costs a sum of Rs. 191-11-3. An application was made on behalf of the defendants for amendment of this decree on the ground that the plaintiffs were not entitled under the judgment to any costs. This application has been allowed by the successor of the Judge, who heard the suit in the first instance. In this Court it has been contended on behalf of the plaintiffs that the order is

manifestly erroneous and that the decree as originally drawn was in conformity with and gave effect to the judgment. This has not been seriously disputed by the opposite party. In our opinion the position is perfectly clear. The judgment allows the plaintiffs costs and the decree as originally drawn up gave effect to that direction. The only question for consideration is whether it is competent to this Court to interfere. The order has not been and could not be made under section 152 of the Code of Civil Procedure, because that section applies only where there has been a clerical or arithmetical mistake in the judgment or decree or any accidental slip or omission. The Court below has professed to act under section 151, that is, under the inherent power of the Court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In the present case the Court has made the order under section 151, and, as has been pointed out in a series of cases of this Court, amongst which may be mentioned *Brijratan* v. *Jaynarain* (1), the Courts in this country have an inherent power to amend or vary decrees so as to bring them into conformity with the judgments after they are signed by the Judges, even if they do not fall within section 152, Code of Civil Procedure. An order under section 151, however, can only be made where it is necessary for the ends of justice. It cannot be seriously questioned that the order which has been made by the Court below has had precisely the opposite effect. The Court below has consequently acted under section 151 in a case where it should not have done, and it is clearly competent to this Court to interfere and set matters right.

The result is that the Rule is made absolute and the order directing amendment set aside. The decree will be restored to its original condition. The petitioner is entitled to costs of this Rule. We assess the hearing-fee at one gold *mohur*.

Rule made absolute.

(1) 7 Ind. Cas. 876; 37 C. 649.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 11 OF 1914.

April 16, 1914.

Present:—Justice Sir George Knox, Kt.

TURSI RAM AND ANOTHER—APPLICANTS

versus

PARMA—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Revision—High Court's power to interfere—Shahnas delivering attached property without permission—Remedy.

A High Court cannot interfere either under section 115 or section 151 of the Civil Procedure Code with an order of a Munsif making a *Shahna*, who was put in charge of attached property but had given it away without permission to the judgment-debtor or decree-holder, pay a certain amount to the judgment-debtor.

The order though irregular cannot be said to be without jurisdiction.

The *Shahna*, if a servant of the Court, has a right, by way of appeal, to the District Judge.

Revision against an order of the Munsif of Fatehabad, dated 26th of July 1913.

FACTS.—Some grain was attached and made over to certain *Shahnas* for safe custody. The *Shahnas* (applicants) alleged that they had handed it over to the judgment-debtors. The judgment-debtors denied having received the grain. The Munsif accordingly made the following order:—

"The *Shahnas* are responsible to give the goods entrusted to them by the *Amin* of the Court. If they gave it to the judgment-debtor or decree-holder or any other person they must pay the price, which according to the *Amin's* report is Rs. 38 *plus* Rs. 65. Besides this 20 seers is said to be taken by the judgment-debtors. Its price is not stated. I take it to be Rs. 1-11. Therefore ordered that Tursi and Shiama must pay Rs. 104 to Parma, judgment-debtor."

The *Shahnas* appealed to the District Judge who held that no appeal lay to him. They then applied to the High Court in revision.

Mr. *Benode Behary*, for Applicants.—The Court below had no jurisdiction to pass such a decree. No notice was given to the *Shahnas* and the order was passed behind their back. The Court has not proceeded properly in deciding the case without allowing the applicants to substantiate their defence. The Court cannot pass an order awarding the judgment-debtor a sum to be recovered from the *Shahnas* whose action was *bona fide*.

AMIR SHAH v. JETHA.

Mr. *Kailas Nath* (for Mr. *S. K. Dar*), for the Opposite-Party.—The *Shahnas* became the servant of the Court as soon as the property was placed in their custody, and the Court was justified in imposing a fine. The analogy of a Receiver appointed under Order XVI, rule 12, Civil Procedure Code, holds good in case of a *Shahna*. *Orr* v. *Muthia Chetty* (1).

The *Shahnas* were responsible to the Court for the safe custody of the property and the Court has not acted illegally in the exercise of its jurisdiction.

Mr. *Benode Behari* was heard in reply.

JUDGMENT.—This purports to be an application calling upon this Court to revise an order dated the 20th of July 1913, whereby the Munsif ordered the applicants to pay Rs. 104-11 to the judgment-debtor.

The grounds upon which this Court is asked to interfere are (1) that the order passed by the lower Court is without jurisdiction, (2) that the lower Court ought not to have passed the order against the applicants behind their back without giving them an opportunity of producing their defence (3) that the actions of the applicants were *bona fide*, (4) that the applicants made over the property at the joint request of both the judgment-debtor and the decree-holder and the price thereof has been credited by the decree-holder, (5) that the lower Court has acted illegally and with material irregularity in the exercise of its jurisdiction.

From the arguments addressed to me and from the order and for the reason for the same filed in the case I gather that the applicants are *Shahnas*; they were put in charge of property which had been attached by an *Amin* of the Court, this property they made over to the judgment-debtor or the decree-holder without permission asked of the *Amin* and without any report made either to the *Amin* or to the Court. It has not been pointed out to me under what power this Court can interfere with an order of this kind. Reference is made to sections 115 and 151 of the Code of Civil Procedure. So far as I can see this case falls under neither of these sections. The order may have been an irregular order, but I am not satisfied that the Court had no jurisdiction to pass the order and no precedent of any kind has been laid before me. If these *Shahnas* are servants of the Court for the time being their remedy lies elsewhere, and if the order be looked upon as a fine the remedy lay in an appeal to the Judge.

I am told that an appeal was filed to the District Judge but he refused to interfere, but that order of the Judge is not before me and I have not been asked to consider it.

In short as I am not satisfied as to my right to interfere, I refuse to exercise my discretion.

I reject the application but make no order as to costs.

Application rejected.

(1) 17 M. 501.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 477 OF 1909.

October 31, 1913.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Beadon.

AMIR SHAH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JETHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Plaintiff to succeed by reason of superiority at date of sale and retention of status.

A pre-emptor must succeed by reason of the superiority of his position at the date of sale and his retention of the status on which his suit is based.

Second appeal from the decree of the Divisional Judge, Shahpur Division, dated the 2nd March 1909, reversing that of the Munsif, 1st class, Lyallpur, dated 21st July 1908, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi, K. B.*, for the Appellants.

Messrs. *Morton* and *Ganpat Rai* for Mr. *Beechey*, for the Respondents.

JUDGMENT.—This is a suit for pre-emption. The vendor was an *Arora* resident in a village, and the land sold was agricultural land. The purchaser was a *Kureshi* of the same village, was an agriculturist, and a co-sharer in the *khata* which comprised the land sold. The sale was effected on the 23rd of October 1906 and on the 12th April (the lower Appellate Court says the 2nd but the 12th is recorded in Shadi Lal's Punjab Pre-emption Act, 1907), a notification was issued by the Punjab Government declaring

Kureshis members of an agricultural tribe within the terms of the Act. The plaintiff was an *Arora*, a member of the vendor's tribe, and a co-sharer in the *khata* comprising the land sold. He consequently fulfilled the conditions of the proviso to section 11 of the Pre emption Act and his and the vendor's tribe was not, and is not, an agricultural tribe within the terms of the Act.

A preliminary objection that no further appeal lay, by reason of the value, for purposes of jurisdiction, of the land in suit, at 30 years' Government revenue, being less than Rs. 250 was overruled at the hearing. It is true that the Government revenue is only about Rs. 2-8-10, but the pre-emptive price was found by the lower Appellate Court to be Rs. 800 and this finding has not been contested before us, and *Ghulam Ghaus* v. *Nabi Bakhsh* (1) is direct authority for holding that a further appeal lay.

The lower Appellate Court held that the plaintiff had at the date of sale a right of pre-emption and that the purchaser had at that time no right, and decreed the suit. Counsel for the purchaser-appellant contended that, inasmuch as the purchaser became a member of an agricultural tribe before the date of suit, he acquired a right of pre emption at least equal to that of the plaintiff whose suit must consequently fail. The authorities cited for this proposition were all, with the exception of *Sundar Singh* v. *Sajjan Singh* (2), prior to *Sanwal Das* v. *Gur Prashad* (3) in which a majority of the Full Court decided that the pre-emptive rights of the parties must be decided by their rights at the date of sale, provided that the position of a party had not been altered otherwise than by some improvement in the position of another party. The effect of this ruling is that the purchaser's acquisition of a right of pre-emption, equal or superior to that of the plaintiff, after suit but prior to decree has not the effect of depriving the plaintiff of the benefit accruing to him from the superiority of his right at the date of sale, provided that he has not divested himself of that right or been deprived of it in some manner other than the acquisition of a right independently of him or of the property on the ownership of which his right is based.

Sundar Das v. *Sajjan Singh* (2) does not help the appellant, the facts and *ratio decidendi* being clearly distinguishable. In that case the person, who asserted his right of pre-emption privately, after institution of the plaintiff's suit and acquired the property from the purchaser, had at the date of the sale in respect of which a suit was filed a right of pre-emption equal to the plaintiff's right. *Sanwal Das* v. *Gur Prashad* (3) was not referred to in *Sundar Das* v. *Sajjan Singh* (2) obviously in consequence of the distinction between the facts of the two cases.

The plaintiff must succeed, by reason of the superiority of his position at the date of sale and his retention of the status on which his suit was based, and the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 24 P. R. 1903 (F. B.); 35 P. L. R. 1903.

(2) 10 Ind. Cas. 367; 53 P. R. 1911; 164 P. L. R. 1911; 166 P. W. R. 1911.

(3) 4 Ind. Cas. 179; 90 P. R. 1909 (F. B.); 159 P. W. R. 1909; 147 P. L. R. 1909.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 174 OF 1 13

March 5, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Bakewell.

T. M. NARASIMHACHARIAR—PLAINTIFF

versus

V. KRISHNAMACHARIAR—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 63, 73—Decree-holders of different Courts attaching in execution entitled to rateable distribution in Court of highest grade without transfer of decree.

Under sections 63 and 73 of the Code of Civil Procedure all the holders of money-decrees, who have attached the property of their judgment-debtor in execution in several Courts before the actual receipts of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it.

Mr. *V. V. Srinivasa Iyengar*, for the Plaintiff.

Mr. *C. K. Mahadeva Iyer*, for the Defendant.

JUDGMENT.

WALLIS, J.—This case raises a question of some difficulty and importance as to the effect of section 63, Civil Procedure Code, which provides that when property not in the custody of any Court is unedr

attachment in execution of decrees of more Courts than one, the Court to receive or realize the property and to determine the claims thereto and objections to the attachment thereof shall be the Court of the highest grade, or where there is no difference in grade, the Court which first attached. The section, whilst conferring on the Court in question exclusive jurisdiction not only to receive the attached property but also to determine claims thereto and objections to the attachment thereof, even if such objection be to an attachment in one of the other Courts, does not say to what extent, if any, the Court which receives or realizes the assets is to take account of the attachments in execution of the decrees in the other Courts, and different views have been taken as to this question. In the present case a debt due to the judgment-debtor by the Public Works Department and attached in execution of several decrees against the judgment-debtor in several Courts has been paid into this Court under section 63 and Order XXI, rule 36, Civil Procedure Code, by the Executive Engineer who has at the same time forwarded a list of the attachments served on him up to that time, one of which was prior in date to the attachment by this Court. The case then came before me sitting alone, when the prior attaching creditor, who has not transferred his decree to this Court, claimed to be paid in priority to the decree-holder in this Court, or at least to be entitled to rateable distribution; and in view of the importance of the question and the conflict of decisions, I directed the case to be posted before a Bench and notice to be served upon all the creditors mentioned by the Executive Engineer as having attached before payment into this Court; and they have now appeared and preferred their claim to rateable distribution.

The right to rateable distribution is conferred by section 73 upon holders of decrees for money who have made application to the Court holding the assets for the execution of their decrees before the receipt of such assets. This right was conferred as to the assets realized by sale or otherwise in execution of a decree by section 295 of the Code of 1877, whereas under the Code of 1859 the first decree-holder who attached in execution of his decree was entitled to be paid in full as under the writ of *fieri facias* at Common Law and the principle of rateable distribution was only made applicable as against subsequent attachments. It appears to me that under this section, both under the old Code and the present Code, a substantive right as decided in *Sankaralinga Reddy* v. *Kandasami Tevan* (1) to apply for a rateable distribution of the assets is conferred upon decree-holders who fulfil the prescribed conditions, though under sub-section (2) such assets may be recovered back in a suit if it be shown that the decree-holder was not entitled to receive them, as where his debt was only colorable or the assets were subject to a prior charge; *Shankar Sarup* v. *Mejo Mal* (2). In this view every holder of a money decree who attaches property of the judgment-debtor in execution thereby acquires a right to share equally with other creditors in the assets arising therefrom when subsequently realized or received by the Court. The nature of the right which cannot be called a vested right is discussed in *Sankaralinga Reddy* v. *Kandaswami Tevan* (1). What, however, where the attachments are in different Courts and the property is received or realized by the Court of the highest grade under section 63? In such a case there is no receipt at all by the other Courts unless the receipt by the Court of the highest grade can be deemed to be a receipt by the other creditors as well. In my opinion this is the correct view and it is only for purposes of convenience that the highest Court is made the collecting Court and the Court to adjudicate on claims and objections, and the property received or realized must be deemed to have been received or realized by or on behalf of all the Courts in which there have been attachments in execution of money-decrees prior to the actual receipt of the assets. If this be so, then the decree-holders in the other Courts are entitled to rateable distribution under the very terms of section 73. There seems no reason to suppose that it was the intention

(1) 30 M. 413; 17 M. L. J. 334; 2 M. L. T. 365.
(2) 23 A. 313; 5 C. W. N. 649; 3 Bom. L. R. 713; 28 I. A. 203.

of the Legislature to prefer the decree-holder whose decree happened to be in the Court of the highest grade over other decree-holders who may have attached earlier and for large amounts. The difficulty is obviated if the payment into the Court of the highest grade is treated as payment into Court in all the suits and this, in my opinion, is the true construction of section 63 which does not in terms confer any preference on the decree-holders in the highest Court and indeed says nothing as to how after claims and objections to attachments have been dealt with the money realized is to be disposed of. This is quite natural if such disposal is governed by section 73. On the other hand if that section does not apply and the decree of the Court of the highest grade is to be first satisfied, there is no provision as to how any balance is to be dealt with. According to the ordinary rule of construction a section like section 63, which merely deals with procedure, should not be construed as affecting the substantive rights *inter se* of the decree-holders in the different Courts. The construction of section 63 above adopted seems to be supported by the authority of Wilson, J., in the unreported case referred to by Sale, J., in *Clark* v. *Alexander* (3) where property attached in execution of a decree of the High Court was subsequently acquired under the Land Acquisition Act and the compensation money representing the property, whilst in the hands of the Collector, was attached in execution of the decree by the Alipore Court and was paid by the Collector into the High Court at its request. Though of opinion that in the circumstances of that case the money had been paid into the High Court irregularly and not strictly in accordance with section 285, now section 63, the learned Judge was of opinion that there it must be deemed to have been "realized in all the suits" and rateably distributed. The same conclusion would have followed *a fortiori* if the money had been paid into the High Court regularly under section 285, now section 63. In this view all the holders of money-decrees, who have attached in execution in any Court before the actual receipt of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court and without getting their decrees transferred to it. This has also been held by Sale, J., in *Clark* v. *Alexander* (3) and O'Kinealy, J., and another learned Judge in *Har Bhagat Das Marwari* v. *Anandaram Marwari* (4).

These two decisions have been doubted in *Ramjas Agarwala* v. *Guru Charan Sen* (5). Where, however, the point did not arise for decision, and it has been suggested that decree-holders whose attachments were subsequent in date to that of the decree-holder attaching in the Court of the highest grade were not entitled to claim rateable distribution against him, but that a decree-holder who had attached in another Court before the date of his attachment might object to it and the Court might dispose of his objection under the express terms of section 63 and prefer the creditor whose attachment was prior in date. For the reasons already given I am unable with great respect to adopt this view of the section.

There is no doubt a decision of this Court in *Muttalagiri Nayak* v. *Muttayyar* (6) that the decree-holder in the Court of the lowest grade must get his decree transferred to the Court of the highest grade before he can claim rateable distribution; though section 285, now section 63, was mentioned in the argument, it is not referred to in the judgment or in the three cases cited in the judgment.

Muttalagiri Nayak v. *Muttayyar* (6) has been dissented from on this point by Krishnasami Aiyar, J., in *Arimuthu Chetty* v. *Vyapuri Pandaram* (7) following *Clark* v. *Alexander* (3) and *Har Bhagat Das Marwari* v. *Anandaram Marwari* (4); but earlier in the judgment the learned Judge is reported to have laid down that he was bound to hold on the authority of *Muttalagiri Nayak* v. *Muttayyar* (6) that an application to the Court of the highest grade for execution before the receipt of the assets was an essential prerequisite of a general claim to rateable distribution. No such proposition was to be found in the judgment, nor is there anything in the sections themselves, as I construe them, to support it. For these reasons I think

(3) 21 C. 200.

(4) 2 C. W. N. 126.

(5) 3 Ind. Cas. 105; 14 C. W. N. 396; 11 C. L. J. 69.

(6) 6 M. 357.

(7) 8 Ind. Cas. 852; 35 M. 388; 21 M. L. J. 505; (1911) 1 M. W. N. 47; 9 M. L. T. 121.

all the decree-holders who attached the money in question in execution of their money-decrees before it was paid into this Court by the Executive Engineer are entitled to rateable distribution. The rateable distribution will be effected by this Court and the monies attached by creditors who have attached through the Courts other than High Court will be transferred by the Registrar to that Court.

BAKEWELL, J.—I agree.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 58 OF 1913.

SUIT NO. 1836 OF 1912.

February 2, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

BACHOO HARKISONDAS—DEFENDANT—APPELLANT

versus

NAGINDAS BHAGWANDAS—PLAINTIFF—RESPONDENT.

Hindu Law—Partition of ancestral property between adopted grandson and natural grandson—Authority of Dattaka Chandrika.

According to the Hindu Law, on the partition of ancestral property between the adopted son of a natural son of a common ancestor and the natural son of another natural son of the common ancestor, the former is entitled only to one-fifth of the property, the remaining four-fifths going to the latter.

The *Dattaka Chandrika* is in the Bombay High Court a leading authority on the subject of adoption.

Messrs. *Raikes*, *Setlur* and *Desai*, (with him Mr. *Strangman*), for the Appellant.

Messrs. *Setalvad*, *Bhandarkar*, *Kanga* and *Jayakar*, (with him Mr. *Inverarity*), for the Respondent.

JUDGMENT.—This is an appeal from a decision of Mr. Justice Macleod with reference to the rights of the plaintiff in the joint ancestral property, in which, it is admitted, he and the defendant Bachoo are interested. The common ancestor of the parties was Nagardas Sobhagchand, and this suit is based upon the allegation that the property now in dispute is ancestral property coming from Nagardas. Nagardas had two sons Harkissondas and Bhagwandas. Harkissondas died on the 14th of September 1900 leaving a widow Gangabai who was then pregnant. Bhagwandas died on the 17th of December 1900 leaving a widow Mankorebai, to whom he had given authority to adopt. On the 18th of December the defendant, Bachoo, was born to Harkissondas and on the 17th of February 1901 Mankorebai adopted the plaintiff, Nagindas. It has been held in Suit No. 128 of 1901 that Nagindas was validly adopted into the family, but no decision was given as to the share to which he would be entitled upon a partition. That is the question which arises in the present suit.

The parties being Gujaratis are governed by the law of Mitakshara, except where it conflicts with the provisions of the Mayukha. The defendant contends that he, as the natural son of his father, is entitled to a share four times as large as that of the plaintiff, on the ground that an adopted son is entitled only to a fourth of the share of a legitimate natural son. If the defendant is entitled to a larger share on the ground that he is the natural born son of his father, it is not disputed that in this Presidency the plaintiff will only be entitled to take a share equal to one-fourth of the defendant's share, that is to say, one-fifth of the entire property. The question of the quantum of the share not being in dispute, the only question we have to decide is whether the defendant is right in his contention that he can claim a preferential share. The point has been decided upon facts similar to those in the present case by a Bench of the Calcutta High Court in *Raghubmund Doss* v. *Sadhu Churn Doss*(1). The parties were, as here, governed by the Mitakshara Law and the Court basing its decision upon a passage in section V of the Dattaka Chandrika (verses 24 and 25) held that the adopted son of a predeceased natural son of a common ancestor could not share equally on partition with the natural son of another predeceased natural son of the common ancestor. The decision has been criticised by Mr. Mayne who (in section 190 of his book) would confine the application of the passage in the Dattaka Chandrika to cases of the competition with a paternal uncle of an adopted son of the deceased owner of the estate. That result is arrived at by the assistance of certain glosses or additions to be found in Sutherland's Translation which are not in the original

(1) 4 C. 425; 3 C. L. R. 534.

and his conclusion is not possible upon the translation furnished by Sir Ramkrishna Bhandarkar and accepted by the parties. According to the translation adopted by the Court in *Raghubanund Doss* v. *Sadhu Churn Doss* (1) of the passage in question and according to a translation made by Sir Ramkrishna Bhandarkar, there can be no doubt that the Dattaka Chandrika, if applicable, does assign to the adopted grandson the inferior share. That is conceded by the learned Judge, but he says that the rule laid down in that work is in conflict with the provisions of the Mitakshara, and, therefore, cannot be given effect to between the parties. He has accordingly passed a decree for partition equally between the plaintiff and the defendant Bachoo. The defendant appeals, and it is contended on his behalf that the learned Judge is in error in thinking that there is any conflict between the rule as laid down by the Dattaka Chandrika and the rule which must be evolved by an application of the law as enunciated in the Mitakshara. It has been said by a Full Bench of this Court that the Dattaka Chandrika is in this Court a leading authority on the subject of adoption: see *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (2). The learned Judge bases his decision upon the assumption that under the Mitakshara Law in the case of a partition the primary division is *per stirpes* irrespective of the quality or quantity of the members belonging to each *stirps*, and therefore, the first division must and can only be half and half as if Bhagwandas and Harkissondas had equally vested interests in the joint family property. This line of reasoning was rejected by Markby, J., in *Raghubanund Doss* v. *Sadhu Churn Doss* (1) and is inconsistent with the law enunciated in *Debi Parshad* v. *Thakur Dial* (3) after a careful examination of the Mitakshara. The opinions expressed in those cases are in accord with the fifth verse of Nilkanth in section 1 of the Mayukha where he says: "Now the pre-existing undefined ownership of more than one brother, etc., is defined by partition."

That portion of the Mitakshara, with which we are concerned, is divided into two chapters, the first of which after some definitions deals with what is described as inheritance not liable to obstruction, while the second chapter deals with inheritance liable to obstruction. The whole of the two chapters is stated in the first placitum to be an explanation of the partition of heritage and heritage is stated to signify wealth which becomes the property of another solely by reason of his relation to the owner. According to placitum 3, inheritance not liable to obstruction is the wealth of a father and of the paternal grandfather which becomes the property of his sons and grandsons in right of their being such sons and grandsons. Property liable to obstruction is property which devolves upon other relations upon the death of the owner in default of male issue, and the existence of such a son and the existence of the owner are, therefore, obstructions to such inheritance.

Chapter I, therefore, being concerned with inheritance not liable to obstruction deals successively with the rights on partition of the inheritance of different classes of sons. Section II of that Chapter deals with the case of a partition made by the father in his life-time, in which event he is entitled to give the eldest the best share, the other sons being equal sharers. That class of partition is now obsolete. (It is, moreover, in section V, v. 7, limited by Vijnaneshwara to the father's self-acquired property.)

Section V deals with the allotment of shares to grandsons, and here the author applies the principle of distribution *per stirpes* which the learned Judge doubtless had in mind in that part of his judgment to which reference has been made. The text of Yajnavalkya, upon which the dissertation is based, is as follows: "But among grandsons by different fathers the allotment of shares is according to the fathers." Vijnaneshwara in commenting upon the text says: "Although the ownership by birth of the grandsons in the wealth of the grandfather is without distinction from that of sons, yet the determination of their shares in the grandfather's wealth is through the door of the father only and not with reference to their ownselves." This translation is baldly literal. The meaning is illustrated as follows: "If any separated brothers die leaving male issue and the number of sons be unequal, one having two sons, another three and a third four, the two receive a single share in right of their father; the other three take one share

(2) 14 B. 249 at p. 259.
(3) 1 A. 105.

appertaining to their father; and the remaining four similarly obtain one share due to their father. And the sons of deceased brothers receive the shares of their own fathers." This is a rule which lays down the maximum share to which as a group grandsons begotten by the same father are limited. It does not in terms lay down that grandsons of different qualities will necessarily have equal rights in the ancestral estate. Section VI relates to the rights of a posthumous son and of one born after partition. Section VIII relates to the unequal interests of sons born by wives of the same father who belong to different castes of unequal position. Section X relates to the rights of the Dvyamushyayana or son of two fathers; that is, his natural and his adoptive father. Section XI deals with sons by birth and sons by adoption. That is the heading of the section in Colebrooke's translation, and for practical purposes the heading will suffice, although the section really deals with twelve classes of sons; for the sons by birth and the sons by adoption are the only two classes of sons recognised at the present day. And this was so even in the 17th century, the time of Nilkantha, the author of the Mayukha, who says (section IV v. 46) that with the exception of the given son secondary sons are set aside in the Kali or present age. In this connection Sir Henry Maine in his Early Law and Custom, page 100, observes: "The growing popularity of adoption, as a method of obtaining a fictitious son, was due to moral dislike of the other modes of affiliation which was steadily rising among the Brahman teachers in the law-schools." Regarding adoption by a widow after the death of her husband, he remarks on page 108: "That the capacity of the widow to produce a son to her deceased husband through the Levirate has.....led to the power very generally vested in her by Hindu Law and usage of taking a son to her deceased husband by simple adoption."

The eleventh section is important for the purposes of this suit, for it distinguishes between the shares of sons by birth and other sons of inferior "quality" (to use the expression of the learned Judge in the passage above cited). The first placitum of that chapter is as follows: "A distribution of shares, among sons equal or unequal in class, has been explained. (That is a reference to section VIII). Next, intending to show the rule of succession among sons, principal and secondary, the author describes them." Then is set out the classification of sons into twelve classes according to Yajnavalkya. After comments upon each class described by Yajnavalkya that Sage's succeeding text is set out and discussed. The text is: "Among these, the next in order is heir and presents funeral oblations on failure of the preceding." In placitum 22 the commentary proceeds: "Of these twelve sons above mentioned, on failure of the first, respectively the next in order, as enumerated, must be considered to be the giver of the funeral oblation or performer of obsequies, and taker of a share or successor to the effects." Placitum 23: "If there be a legitimate son and an appointed daugther, Manu propounds an exception to the seeming right of the legitimate son to take the whole estate." Placitum 24: "So the allotment of a quarter share to other inferior sons, when a superior one exists, has been ordained by Vasishtha: 'When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part.'" Placitum 25: "Accordingly Catyayana says: 'If a legitimate son be born, the rest are pronounced sharers of a fourth part, provided they belong to the same tribe; but if they be of a different class, they are entitled to food and raiment only.'" It will here be seen that Vijnaneshvara takes the text of Vasishtha to be an authority for the allotment of a quarter share to an inferior son when a superior one exists. The inferiority of the adopted son to the natural born son is forcibly illustrated by a text of Vrihaspati (XV, 34): "As in default of ghee, oil is admitted by the virtuous as a substitute at sacrifices, so are the eleven sons admitted as substitutes in default of a legitimate son of the body and of an appointed daughter." It is also well illustrated by the discussion in the Mayukha (a comparatively modern commentary and one of special authority among Gujaratis to which division the parties to this suit belong) regarding the Dvyamushyayana, the son of two fathers, section V, pl. 25: "If both (the natural and the adoptive father) have legiti-

mate sons he offers an oblation to neither but takes a quarter of the share allotted to a legitimate son of his adoptive father from this text of Vasishtha: 'When a son has been adopted', etc."

It is upon this text of Vasishtha that the passage in the Dattaka Chandrika to which we are asked to give effect is based. Mr. Golapchandra Sarkar in his Treatise of Hindu Law, page 171, (4th Edition), thus concisely describes the effect of the passage: "But the author of Dattaka Chandrika extends this rule of difference in shares to cases of partition between male descendants in the male line down to the great-grandson where there is competition between an adopted and real descendant. He does so by analogy which would make the rule applicable to all cases in which there is competition between a real and an adopted relation." It appears to us that there is nothing in the chapter of the Mitakshara relating to inheritance not liable to obstruction which is in conflict with the rule evolved by the author of the Dattaka Chandrika, for, as we have pointed out, section V of the Mitakshara in dealing with the allotment of shares among grandsons is in no way concerned with the 'quality' of the individual sharer; while section XI affirms most distinctly the inferiority as a sharer of the adopted to the natural born legitimate son of the owner of the inheritance. But it is argued that the owner of the inheritance in this case is Nagardas and that the discussion of sons in section XI does not warrant the application to grandsons of the disabilities of sons. It is, however, to be observed that placitum 22 declares that the right to share and the right to give the funeral oblation go together. It cannot be, and is not, disputed that of the two competitors in the present case Bachoo is the proper descendant to offer the funeral cake to his grandfather Nagardas. Nor can it be disputed that the word 'son' (*putra*) in various passages in Yajnavalkya and Mitakshara includes grandson. We are of opinion that the discussion relating to sons in section XI should be taken to relate to grandsons also. The offering of the funeral cake can be made by sons, grandsons and great-grandsons. There is, therefore, nothing illogical in the conclusion arrived at by the author of the Dattaka Chandrika.

We vary the decree of the lower Court by directing the Commissioner to partition the ancestral estate between the plaintiff and the defendant by allotting one share to the plaintiff and four to the defendant.

Costs of this appeal out of the estate.

Decree varied.

Attorneys for the Appellant: Messrs. *Mulji and Thakoredas.*

Attorneys for the Respondent: Messrs. *Edgelow, Gulabchand, Wadia & Co.*

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL NO. 122 OF 1911.
January 7, 1914.
Present:—Mr. Justice Ormond and Mr. Justice Parlett.

MA TIN LUN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MA DWE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Buddhist Law—Inheritance—Exclusion of children—Filial neglect—Burden of proof where no divorce and separation—Act of father—No exclusion of children from inheritance.

Where no divorce is proved or admitted, and the separation between father and children is entirely the act of the father, the separation cannot deprive the children of their right to inherit.

There must be some filial neglect to exclude children from inheritance, and the burden of proving exclusion lies on the person who asserts it.

Mr. *Giles*, for the Appellants.

Mr. *McDonnell*, for the Respondents.

JUDGMENT.

PARLETT, J.—The history of the parties as it appears from the record is as follows:—The plaintiffs are the children of Maung Po Aung by his first wife Ma Hnin Yin, Ma Tin Lun, being born about a year after their marriage, while the couple were still living with Ma Hnin Yin's parents in Rangoon. In the year 1245 B.E. (1883 84) when Ma Tin Lun was five years old her parents moved to Prome to trade in tea. It appears that Ma Hnin Yin's father, U Paw Gyi, was one of Po Aung's partners in that business. The next year they returned to Rangoon to U Paw Gyi's house where

Maung Ba Hla, the 2nd plaintiff, was born shortly afterwards. About three months later the family returned to Prome. The witnesses differ as to how long they stayed there; according to plaintiff's witness, Maung In, it was until 1248, but according to the defendant's witness, Mung Po Maung, Po Aung had been living alone in Prome for about two years in 1248 (1886-87). At any rate he got tired of his wife, who was older than he and had an unpleasant voice and he brought her and the children down to Rangoon to her father's house, but refused to go there himself. He and his father-in-law fell out, ostensibly over business matters, and he was unsuccessfully prosecuted for misappropriation. Then he returned to Prome and in 1248 married Ma Gyi, a well-connected lady, after assuring her father that he had divorced Ma Hnin Yin. In 1249 (1887-88) Maung On Kin, the 2nd defendant was born. Ma Gyi died in 1251 or 1252 (1890 or 1891), and Ma Hnin Yin in 1255 (1893-94). The latter and Po Aung had no communication with each other since they last came from Prome, some seven years or more before her death. The plaintiffs lived with their mother till her death, and afterwards with her relations. Po Aung came down to Rangoon again with his son On Kin and lived for two or three years with his cousin Po Zon. In 1897 he married Ma Dwe, the 1st defendant, and lived with her and Maung On Kin till his death in 1906. In the present suit the plaintiffs claim a one-eighth share of the joint property which he left at his death. Any such joint property as there may be was acquired during the marriage with Ma Dwe, as it is admitted that Po Aung brought no property whatever to that marriage.

The defence is that Po Aung and Ma Hnin Yin were divorced and that plaintiffs having gone to live with their mother are not entitled to inherit from their father, and further that in any case they have forfeited their right of inheritance by reason of their failure to maintain filial relations with their father.

It is admitted in this appeal that if there was a divorce, plaintiffs are, under the circumstances of this case, excluded from inheriting from their father. The District Court, however, held that the divorce was not established. The defendants challenge this finding in appeal. It is true that the parties were separated for six or seven years before Ma Hnin Yin's death and that Maung Po Aung gave out to Ma Gyi's relatives in Prome that he had divorced her, but there is no evidence that she ever consented to it, or ceased to regard herself as his wife. Nor is there any evidence that a division or surrender of property accompanied the separation from which a divorce might be inferred. It is true that Po Aung had nothing left by 1897 when he married Ma Dwe, but there is no evidence that he had nothing when he married Ma Gyi. He probably had property then, but if he had not, its absence was as likely due to the unfortunate outcome of his business venture with his father-in-law, as to his having surrendered it to Ma Hnin Yin. The latter's relations appear to have been quite welloff to support her and her children without her receiving anything from Maung Po Aung. I agree with the District Court that the divorce was not established.

That Court, however, held that plaintiffs were not entitled to inherit from Po Aung as they lived separately from him and ceased to maintain filial relations with him. It is admitted that they never associated with their father after he and their mother separated; they invited him to the ceremony of Maung Ba Hla's initiation into the Buddhist priesthood but he neither came nor contributed to the expenses. They also attended his funeral. There is evidence that Po Aung thanked their uncle, Maung In, for taking care of them and asked him to keep them till he was settled. It appears to me that the separation was entirely the act of the father and not of the children and that it lay upon him to terminate it if he wished; that it was not open to them to force themselves upon him, or to do more than they did. It is quite clear, however, that he did not want them back, though they, on the other hand, continued to regard him as their father. It cannot be said that they voluntarily separated themselves from him or that the cessation of filial relations between them was due to any act or omission on their part. In all the cases relied on by the Distret Judge there had been a divorce, and they, therefore, are not directly applicable to a case like the present where no divorce is proved or admitted. No doubt

under Burmese Buddhist Law the duties of a child to a parent are more exacting than those of a parent to a child, but it has long been held that only when desertion or neglect is proved against those entitled to inherit can they be excluded, *Nga San Yun* v. *Nga Myat Thin* (1), In *Maung Su So* v. *Ma Paw* (2) it was held that living apart from parents and not attending in illness does not of itself rupture family ties or disqualify children from inheriting, and this apparently would be the rule even if the separate living was the voluntary act of the children and not, as in the present case, entirely the act of the parent.

Again in *Ma Taik* v. *Ma Nyun* (3) it was laid down that there must be some filial neglect to exclude and that the burden of proving exclusion lies on the person who asserts it. That case, like the present, was one in which there was no divorce. The rule has since been held to apply to step-children in *Maung Kyaw Yon* v. *Maung Po Win*(4). In my nion in the present case there has been no estrangement or neglect on the part of the children, who did all that could be expected of them and were apparently ready to renew filial relations with their father. The separation, however, was entirely his act and he showed clearly that he wished to have no more to do with them. Such conduct cannot deprive them of their right to inherit, nor do I consider that they have done anything to forfeit it. I would reverse the decree of the District Court and instead would hold that plaintiffs are entitled between them to a 1/8th share of thejoint property of Maung Po Aung and Ma Dwe left by Maung Po Aung, and would direct the District Court to decide the 6th and 7th issues and pass a decree accordingly.

I would order respondents to pay the costs of this appeal.

ORMOND, J.—I concur.

Decree reversed.

(1) S. J. 46.
(2) U. B. R. (1902—03) 2, Probate and Administration 7.
(3) U. B. R. (1897-01) 2, 193.
(4) U. B. R. (1904-06) 2, Bud. Law, Inheritance 1.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2307, 2597 AND 2598 OF 1911.

April 16, 1914.

Present:—Justice Sir Herbert Carnduff, KT., and Mr. Justice Chapman.

MATHURANATH GHOSHAL AND OTHERS —DEFENDANTS—APPELLANTS

versus

RATNESWAR SEN—PLAINTIFF—RESPONDENT.

Bengal Land Revenue Sales Act (XI of 1859*), ss.* 36, 37, *Excep.* (4)—Benami *purchase—Real purchaser, if can sue for possession and annulment of incumbrance—"Purchaser," meaning of, in section* 37*—Burden of proof —Exemption—Benefit of 4th Excep. to s.* 37.

Section 36 of the Bengal Land Revenue Sales Act, 1859, does not bar a suit for possession of lands as appertaining to a *taluq* purchased at a revenue sale in the name of a *benamdar*.

Raj Chander Chuckerbutty v. *Dina Nath Saha*, 2 C. W. N. 433, distinguished.

The language of the section should be given a restricted interpretation and not extended to cases not manisfestly covered by it.

Moizuddi Biswas v. *Ishan Chandra Das Sarkar*, 7 Ind. Cas. 849; 15 C. W. N. 706 at p. 708; 13 C. L. J. 793, relied upon.

The word "purchaser" in section 37 of the Act does not mean only "a certified purchaser or his heirs or assignees." The real purchaser is a purchaser within the meaning of the section, and is entitled to avoid incumbrances.

In a suit to avoid incumbrances (*howlas*) under section 37 of the Bengal Land Revenue Sales Act, 1859, the defendants are bound to prove something more than the existence of the *howlas* and their long possession, and must establish that the lands in suit actually appertain to the *howlas* named or that the *howlas* still exist and that the defendants are owners of them or at least have been in possession of them for a sufficiently long period on assertion of their title under the *howlas*.

Nityanund Roy v. *Banshi Chundra Bhuiyan*, 3 C. W. N. 341, referred to.

Where a defendant claims exemption from the provisions of the Revenue Sale Law which entitle a purchaser to annul incumbrances in respect of land in his possession, the benefit of the 4th exception to section 37 of the Act of 1859 must be limited only to such portions of land as are covered by buildings, tanks, etc. and cannot be extended to cover those lands included in the lease on which no permanent works have been constructed.

Wahid Ali v. *Rahat Ali*, 12 C. W. N. 1029, relied upon.

Kiron Chunder Roy v. *Naimuddi Talukdar*, 30 C. 498, referred to.

Appeals from the decree of the Sub-Judge of Dacca, dated April 22nd, 1911, modifying that of the First Munsif of Munshigunge, dated September 21st, 1910.

MATHURANATH GHOSHAL *v.* RATNESWAR SEN.

Mr. *U. N. Sen Gupta* and Babu *Birendra Kumar De*, for the Appellants.

Mr. *S. R. Das*, Babu *Hem Chandra Sen* for Babu *Gunoda Charan Sen* and Babu *Manmathanath Roy* for Babu *Mohendra Nath Roy*, for the Respondent.

JUDGMENT.

CARNDUFF, J.—These appeals arise out of three suits in which the plaintiff sued to recover possession of certain lands as appertaining to a *taluq* purchased by him at a revenue sale in the name of a *benamdar*.

The plaintiff's case was that on seeking to obtain possession of the lands, he found the defendants in occupation and unwilling to make way for him. He accordingly sued for a declaration of his title to the lands free of all incumbrances, and for *khas* possession.

The defence was that the lands in suit appertained to a *howla* existing from the time of the Permanent Settlement and that they were protected by clause (1), as also by clause (4) of section 37 of the Bengal Land Revenue Sales Act, 1859 (XI of 1859).

The suits were decreed, and these appeals have been peferred by the defendants.

The first point taken on behalf of the appellants is that the suit was not maintainable by the plaintiff, he having purchased the lands *benami* and his *benamdar* being the certified purchaser. The contention is that section 36 of the Bengal Land Revenue Sales Act, 1859, bars such a suit. The section referred to provides that "any suit brought to oust the certified perchaser...on the ground that the purchase was made on behalf of another person not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." The learned Counsel's argument is that, although this suit was not brought expressly to eject the *benamdar*, who amittedly has never been in possession and was made a defendant merely *proforma*, the title to the lands rests with him as being certified purchaser under the Act, and that, unless and until that title is displaced, the plaintiff cannot have any title in himself or any right to bring a suit in his own name; in other words he must oust the *benamdar*, not from actual possession of the land, but from his position as the person really entitled to the land. The only authority which the learned Counsel is able to cite in support of this argument is the case of *Raj Chunder Chuckerbutty* v. *Dina Nath Saha* (1). But, so far as I can see, that case at most decides that section 36 of the Act of 1859 does not bar suits based on the fraud of a *benamdar* who is the certified purchaser at a revenue sale, and that in cases in which no fraud is alleged, the section must be construed strictly so as not to apply even to the assignee of a certified purchaser. The ruling, therefore, does not appear to help the appellants. The case clearly does not fall within the language of the section, which as was indicated in *Moizuddi Biswas* v. *Ishan Chandra Dat* (2) should be given a restricted interpretation and not extended to cases not manifestly covered by it.

In this connection it is further contended that the plaintiff's prayer for a declaration that the lands are free from incumbrances ought not to be allowed because the word "purchaser" in section 37 of the Act of 1859 can mean only "a certified purchaser or his heirs or assignees." The case of *Moizuddi Biswas* v. *Ishan Chandra Das Sarkar* (2), to which I have just referred, is a direct authority to the contrary, and I have no hesitation in holding that the real purchaser, as in the present case, is a purchaser within the meaning of the section.

The next point taken by the learned Counsel is as to what he describes as the misplacement of the burden of proof by the lower Appellate Court. The contention is that the moment it was found that *howlas* such as those alleged by the defendants existed at the time of the Permanent Settlement and that the defendants had been for some time in possession of the lands in suit, they had discharged the onus resting upon them, and it was for the plaintiff to show that the lands in suit did not appertain to the *howlas* referred to. In other words, it is argued that the learned Subordinate Judge in the Court of Appeal below is wrong in holding that "the defendants were bound to prove something more

(1) 2 C. W. N. 433.

(2) 7 Ind. Cas. 849; 15 C. W. N. 706 at p. 708; 13 C. L. J. 293.

than the existence of two *howlas* and their long possession, and must establish that the lands in suit actually appertain to the two *howlas* named, or that the two *howlas* still exist and that the defendants are the owners of them or at least have been in possession of them for a sufficiently long period on assertion of their title under the *howlas*." In support of his argument, the learned Counsel has referred to the case of *Nityanund Roy* v. *Banshi Chandra Bhuiyan* (3). In that case, however, the learned Judges were very careful to avoid laying down any general rule by pointing out that each case must be governed by its own merit. It seems to me that there is certainly nothing wrong in the law laid down by the learned Subordinate Judge in the passage which I have quoted, and, as regards the findings on the basis of that law, they are findings of fact with which we are here not concerned.

The third and last point taken on behalf of the appellants is that all the lands covered by the lease granted to the appellants by a previous auction-purchaser of the *taluq* and not the particular plots or parcels of those lands on which permanent structures have been erected and tanks dug, should be held to be protected by the 4th clause of section 37 of the Act of 1859. The fourth clause referred to gives protection to "leases of lands whereon dwelling houses, manufactories or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk."

Reliance is here placed upon the decision of this Court in *Kiron Chunder Roy* v. *Naimuddi Talukdar* (4). That judgment, when read with those of the two lower Courts, is, undoubtedly, in favour of the appellants; but the case was considered by this Court in *Wahid Ali* v. *Rahat Ali* (5), in which the learned Judges observed that they were not prepared to differ from the course which had been adopted by this Court in a long series of decisions, or to accept the contention that the Judges who decided the case of *Kiron Chandra Roy* v. *Naimuddi Talukdar* (4) intended to adopt any novel principle. They point out that the current of decisions of this Court had been in favour of the view that where a defendant claims exemption from the provisions of the Revenue Sale Law which entitle a purchaser to annul incumbrances in respect of land in his possession, the benefit of the 4th exception to section 37 of the Act of 1859 must be limited only to such portions of land as are covered by buildings, tanks, etc., and cannot be extended to cover those lands included in the lease on which no permanent works have been constructed. I consider that we also should follow the *cursus curiæ* and that this point also must fail.

Two cross-objections have been mentioned by the learned Counsel for the respondent; but they have not been pressed, and it is unnecessary to say anything regarding them.

The result is that, in my opinion, these appeals must be dismissed with costs.

CHAPMAN, J.—I agree.

Appeals dismissed.

(3) 3 C. W. N. 341.
(4) 30 C. 498.
(5) 12 C. W. N. 1029.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 435 OF 1911.
October 27, 1913.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

PUNNA LAL—PLAINTIFF—PETITIONER

versus

Seth COWSJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Revision—Civil—*Ex parte *decree set aside—Conditional on payment of costs—Costs taken and replication to defendants' pleas put in by plaintiff—Acquiescence—Revision of order by plaintiff—Discretion of Chief Court.*

An *ex parte* decree was set aside on the condition of payment of costs, which were paid and written statement in answer to the plaintiff's claim was filed. The plaintiff recieved the costs without protest and put in his replication to the defendants' pleas. About two months subsequent to this, the plaintiff filed a petition for revision of the order setting aside the *ex parte* decree:

Held, that the petitioner's conduct after the order, in accepting the costs without protest and in filing his replication to the pleas and in otherwise acquiescing in the orders subsequently passed by the Court in the course of the suit, showed that he did not consider himself materially prejudiced by the said order and, therefore, the Chief Court would not exercise its revisional jurisdiction.

Petition, under section 70 (1) (*a*) of Act XVIII of 1884, as amended by Act XXV

of 1899, for revision of the order of the District Judge, Sialkot, dated the 6th December 1910, granting application to set aside the *ex parte* decree.

Mr. *Badar-ud-din Kureshi*, for the Petitioner.

Lala *Tirath Ram* (for Bhai *Gurbakhsh Singh*), for the Respondents.

JUDGMENT.—This is a petition for revision under section 70 (1) (*a*) of the Punjab Courts Act, 1884, as amended by Act XXV of 1899. The facts which are material to the decision of the revision are briefly these:—On the 22nd April 1909, the petitioner brought a suit in the Court of the District Judge, Sialkot, against the respondents for recovery of Rs. 1,464-3-4. The respondents did not put in an appearance, and an *ex parte* decree was passed in favour of the petitioner against them on the 6th December 1909. On the 5th December 1910, the respondents applied to the District Judge for an order to set aside the *ex parte* decree. On the 6th December 1910, the said application was accepted and the *ex parte* decree was set aside by the District Judge conditional on the respondents paying to the petitioner Rs. 25 by way of costs. The respondents paid in the amount of costs on the 7th December and filed a written statement in answer to the plaintiff's claim. The petitioner received the costs without protest, and on the 8th December he put in his replication to the respondents' pleas. On the 10th December the case was made over to the Sub-Judge, Sialkot, for trial. On the 14th December the Court appointed a Commissioner to go through the accounts of the parties and to submit a report.

The present petition for revision was filed in this Court on the 6th February 1911 and was admitted to a hearing in Chambers on the 22nd March 1911.

Before the learned Chief Judge a preliminary objection was raised on behalf of the respondents, on the authority of *Hassan Ali Shah* v. *Salig Ram* (1), that no revision lay in this Court; and in view of the importance of certain questions of law connected with the preliminary objection the petition for revision has been referred to a Division Bench for disposal.

(1) 125 P. R. 1892.

Lala Tirath Ram on behalf of the respondents has urged before us that since it would be open to the petitioner, in an appeal from the final decree which might be passed by the lower Court against him in this case, to question the correctness or propriety of its order of the 6th December 1910 setting aside the *ex parte* decree of the 6th October 1909, it is not competent to him to come up to this Court on the revision side at this stage of the litigation with a prayer asking that the order of the 6th October 1909 be set aside, and in support of this contention he has relied on *Hasan Ali Shah* v. *Salig Ram* (1) and *Nand Ram* v. *Bhopal Singh* (2). He has further contended that even if a revision did lie in this Court, in view of the conduct of the petitioner in the Court below in acquiescing in the order under revision by accepting from the respondents Rs. 25 as costs and by filing his replication to their pleas, his petition for revision should not be entertained by this Court.

In connection with the first contention there appears to be a conflict of authority. Mr. Badr-ud-din for the petitioner relies, in support of his position that under the circumstances of this case a revision does lie in this Court, on *Ohintamony Dassi* v. *Raghoonath Sahoo* (3); *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (4) and *Tasadduq Husain* v. *Hayatun-nissa* (5); and these authorities would seem to lay down a rule of law different from that laid down in the decisions cited by the respondents' Pleader. It is, however, unnecessary for us to consider the correctness or otherwise of the contention thus raised, for, in our opinion, the second contention of the respondents' Pleader that in any case this petition for revision should not be entertained by this Court has much force and must prevail. The petitioner's conduct after the order of the 6th December 1910, in accepting Rs. 25 as costs from the respondents without protest and in filing his replication to their pleas and in otherwise acquiescing in the orders subsequently passed by the Court below in the course of the suit, shows that he did not consider himself materially prejudiced by the said

(2) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.
(3) 22 C. 981
(4) 9 C. W. N. 584.
(5) 25 A. 280; A. W. N. (1903) 39.

order of the 6th December 1910: and it is noteworthy that it was not until the 6th February 1911 that he filed the present petition for revision in this Court. We think that in these circumstances this Court should not exercise its revisional jurisdiction, which is intended to be exercised only in exceptional cases, in favour of the petitioner. We accordingly accept the preliminary objection and decline to go into the question of the correctness or propriety of the order of the 6th December 1910. The petition is dismissed with costs.

Pleader's fee Rs. 10.

Petition dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 16 OF 1912.

July 1, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

HANU SHEIKH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JURRO SHEIKH—PLAINTIFF—RESPONDENT.

Marriage—Muhammedan marriage—Proof of requirements of valid marriage—Suit for restitution of conjugal rights.

In a suit for restitution of conjugal rights by a Muhammedan husband against his wife, the plaintiff must establish the requirements of a valid Muhammedan marriage.

Where in the judgment of the lower Appellate Court it is not stated who gave the consent on behalf of the infant girl:

Held, that the judgment was defective.

Appeal, under section 15 of the Letters Patent, from the judgment of Mr. Justice Coxe, dated January 26th, 1912, in Second Appeal No. 880 of 1909.

FACTS.—The plaintiff-respondent brought this suit for restitution of conjugal rights. His case was that the defendant was his lawfully married wife, but that subsequently she had been given away in marriage by her mother, the second defendant, to the first defendant. The claim was resisted on the ground that there was no marriage in fact and that at any rate there was no valid marriage.

The Court of first instance dismissed the suit on the ground that there was no marriage established. Upon appeal that judgment was reversed by the District Judge who held that a marriage had been proved. This judgment on appeal to this Court was confirmed by Mr. Justice Coxe in his following

JUDGMENT.

COXE, J.—This is an appeal against a decree for restitution of conjugal rights.

It is argued on behalf of the appellant that the lower Appellate Court has not come to a distinct finding that the necessary formalities of a Mahomedan marriage were observed.

The judgments of the Courts below, however, show that the question whether the proper formalities had or had not been observed was not the subject of serious controversy. The only defect which is now alleged to exist in these formalities is that the Vakil of the bride was appointed by the *panchayat*, by which term I understand the marriage assembly and the person presiding in it. This apparently was not pressed before the learned District Judge and no authority has been shown me for holding that it would invalidate a Mahomedan marriage. I see no reason why a marriage should be invalidated by the fact that the *panchayat* asked one of the persons present to act as Vakil. Such a proceeding would, *prima facie*, be inconsistent with anything underhand. Moreover it is quite clear that the learned District Judge believed that, after the marriage, the girl lived for some time as the plaintiff's wife which shows that she fully accepted what the Vakil had done on her behalf.

This appeal fails and must be dismissed with costs.

From the above judgment, this appeal has been filed by the defendants.

Moulvi *Mahomed Isfaq* and Babus *Jyotish Chandra Sircar*, for the Appellants.

Babu *Jadu Nath Kanjilal*, for the Respondent.

The judgment in the Letters Patent Appeal was delivered by Mr. Justice Mokerjee who after stating the facts continued:

JUDGMENT.—On the present appeal it has been argued that the case was not properly tried by the District Judge and that it has not

been found that the plaintiff has established the requirements of a valid Mahomedan marriage. It has been pointed out particularly that it is not stated who gave the consent on behalf of the infant, and it has been argued that if the consent was given by the mother of the infant, the marrige was invalid. In our opinion the judgment of the District Judge is defective and ought not to have been confirmed. The formal requirements of a Muhammadan marriage are stated in sections 24 to 30 of Wilson's Anglo-Muhammadan Law and the question of guardianship for marriage is discussed in section 93. It is obvious that before the plaintiff can succeed he must establish that there was a valid marriage, in other words, that the requirements of a valid marriage had been complied with.

The result, therefore, is that this appeal must be allowed, the decrees of Mr. Justice Coxe and of the District Judge set aside and the case remanded to the District Judge in order that he may re-consider it on the evidence as it stands.

Costs will abide the result.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT

FIRST CIVIL APPEAL No. 187 OF 1912.

March 25, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

KANHAI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

License—Right to weigh in market—Exclusive privilege.

A weighman in an old market, if permitted by Government to continue the same calling in the new market opened at a different place, does not acquire any exclusive right to act as weighman in the latter market as his position is merely of a licensee.

First appeal from the decision of the Second Additional Subordinate Judge of Agra, dated 19th March 1912.

Mr. *Ryves*, for the Appellant.

The Hon'ble Mr. *Gokul Prashad*, with him Mr. *S. K. Dar*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed a declaration that they together with the *pro forma* defendants had a right of weighment on the lands of Halenganj in the District of Agra and a perpetual injunction restraining the Government and their lessees from making weighment on the land. They also claimed damages. The Court below has decreed the plaintiffs' claim. The Government appeals.

In the plaint the plaintiffs allege that they had a right of weighment on the land as a "permanent right of easement." The facts of the case are practically admitted. Many years ago there was a market at Halenganj, about the year 1877 Govenment closed that market and opened another market at what was considered a more convenient place and where the market continues to be held up to the present time. About the year 1879 after the new market had been opened, certain disputes arose between individuals who had evidently exercised the calling of weighmen in the old market. An application was made complaining that while the Tehsildar had said that the applicants might weigh in the new market, certain other persons were interfering with them. The result of this complaint was that the Tahsildar drew up an agreement between the parties and with their consent referred the question as to how the Ganj should be divided up to some arbitrators. We may assume for the purposes of this appeal that the Ganj was divided up accordingly and that the predecessors-in-title of the plaintiffs and the *pro forma* defendants continued to follow their calling as weighmen of specific portions of the market until sometime about the year 1910, when the Government made a lease of the right to weigh in the market to the defendant No. 2. The question is whether on these facts the plaintiffs-respondents have established a perpetual exclusive right to act as weighmen at Halenganj and take the fees against the will and without the consent of the Government. In our opinion they have not established such right. Even if we assume—and it would be a very big assumption—that they had a right in respect of the old market based upon the doctrine of a lost grant, it is quite clear

that in the new market they merely were permitted by the authorities to carry on their calling as weighmen. This was a bare license and certainly cannot be held to have created a perpetual right in the licensees and their descendants to the exclusive privilege of weighing in the market.

We must allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

MISCELLANEOUS CIVIL SECOND APPEAL NO. 71 OF 1911.

March 25, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

P. V. RAGHUNATHASAMI IYENGAR AND OTHERS—APPELLANTS

versus

JANAKI AMMAL—RESPONDENT.

Appeal—Execution proceedings--Second appeal—Party not allowed in second appeal to contest order setting off decree—Practice.

An appellant will not be allowed to raise for the first time in second appeal the contention that a decree obtained by one of his judgment-debtors against the appellant's father, on whose death the appellant was brought on the record as his legal representative, cannot be set off against a decree obtained by the appellant in his own right.

Appeal against the order of the District Court of Trichinopoly, in Appeal Suit No. 131 of 1910, preferred against that of the Court of the District Munsif of Srirangam in Execution Petition No. 386 of 1909, in Original Suit No. 62 of 1905.

Mr. *R. Rangaswami Iyengar*, for the Appellants.

Mr. *N. Rajagopalachariar*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs in Original Suit No. 62 of 1905, on the file of the District Munsif of Srirangam, against an order in execution proceedings allowing Janaki Ammal, the 2nd defendant in the suit, to set off against the plaintiffs' decree, the decree in Original Suit No. 86 of 1903 obtained by her. It is contended before us that the order allowing this set off is wrong in law because the decree in Original Suit No. 86 of 1903 was obtained against the appellants' father, on whose death the appellants were brought on record as his legal representatives, while the decree now under execution was obtained by them in their own right. It is also contended that Janaki Ammal, who seeks to set off the decree passed in her favour, is only one of the judgment-debtors in Original Suit No. 62 of 1905, while under Order XXI, rule 4, Civil Procedure Code, it is only if the decree had been against her singly that she is entitled to claim a set off. It is conceded that this contention was not raised in the lower Appellate Court. There the question was, whether the plaintiffs had their father's assets in their hands and were, therefore, bound to pay the decree-debt in Original Suit No. 83 of 1903. That point was decided against them. The further contention they advanced, that the sons were not liable for the costs incurred in litigation conducted by their father, was not allowed to be raised in appeal as it was a new ground. It was also contended in the lower Court that Mr. Hari Row who appeared for the appellants did not fill the same character in Original Suit No. 86 of 1903 as in Original Suit No. 62 of 1905. This also was disallowed. as it was a new ground not taken in the grounds of appeal. The same reasons apply to this contention also. Moreover, if it had been raised in the lower Appellate Court, the decree-holder, Janaki Ammal, might have taken steps to execute her decree against the present appellants and realize the amount to pay their debt. Some years have elapsed and she might now find it difficult, if not impossible, to execute her decree if this contention is allowed. We are not, therefore, prepared to allow this contention now to be raised in this Court and we dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No 21 OF 1912.

May 8, 1913.

Present:—Mr. Piggott, J. C.

JOKHAN SINGH—APPELLANT

versus

DEPUTY COMMISSIONER, FYZABAD —RECEIVER—APPLICANT AND JAGMOHAN SINGH—INSOLVENT—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 36—Transfer by insolvent made two years before adjudication—Order—Jurisdiction.

Under section 36 of the Provincial Insolvency Act, a Judge has jurisdiction only in respect of transfers made within two years of the date of his order of adjudication, and cannot annul a transfer made within two years preceding the date of presenting the petition in insolvency.

Appeal against the order of the District Judge, Fyzabad, dated 13th April 1912.

Mr. *Mohammad Wasim*, for the Appellant.

Babu *Nagendra Nath Ghoshal*, for the Respondent.

ORDER.—This is an appeal against an order of the District Judge of Fyzabad passed in the course of insolvency proceedings and it arises under the following circumstances:—On December the 13th, 1909, Jagmohan Singh executed a deed by which he purported to transfer for valuable consideration to Jokhan Singh the arrears of rent due to him from certain tenants in village Palia. On October the 25th, 1911, Jagmohan Singh presented a petition to be declared an insolvent and an order of adjudication was passed on the said petition on March the 1st, 1912. On March the 20th, 1912, the Manager of the Court of Wards in charge of the Ajudhiya estate, being the principal creditor of Jagmohan Singh, moved the District Judge in the exercise of his insolvency jurisdiction to annul the transfer in favour of Jokhan Singh by an order under section 36 of the Provincial Insolvency Act (III of 1907). To this it was objected that the provisions of the section in question could not be applied, seeing that the transfer was one made more than two years before the date of the order by which Jagmohan Singh was adjudicated an insolvent. The District Judge has met this argument by referring to the provisions of section 16, clause 6, of the same Act, according to which the order of adjudication takes effect from the date of the presentation of the petition on which it is made. He points out that the transfer sought to be impeached was one made within two years of the date of the presentation of Jagmohan Singh's petition in insolvency and he has accordingly discussed the question of the transfer on its merits and has passed an order annulling the same. In appeal it is contended before this Court on behalf of Jokhan Singh that the District Judge had no jurisdiction to deal with this matter under the provisions of section 36 of the Provincial Insolvency Act. I think this contention is well-founded and must prevail. All that clause 6 of section 16 of the Act in question provides is that, when an order of adjudication is passed upon an insolvency petition, the person so adjudged to be an insolvent becomes an insolvent, not from the date of the order of the adjudication, but from the date on which his petition is presented. When, however, we turn to the words of section 36 of the Act we find that the expression used is, "if the transferor is adjudged insolvent within two years after the date of the transfer." In this expression the words "within two years" qualify the verb "is adjudged," and the expression as a whole cannot without violence be interpreted to mean, "if the transferor is adjudged to have become insolvent within two years after the date of the transfer." The point is made clear by the wording of the following section. There the Legislature was making provision for avoiding certain other transfers in respect of which, for obvious reasons, a much narrower limit than one of two years was fixed. The fact that there might be an interval of time between the presentation of the petition in insolvency and the order of adjudication was present to the mind of the Legislature, and as it was proposed to provide against transfers made at a time when bankruptcy was imminent and a narrow limit of three months had to be fixed, it was considered advisable to calculate that period from the date of the presentation of the petition and not from the date of the order of adjudication. The Legislature, therefore, made its meaning clear by using, in section 37 of the Provincial Insolvency Act, the ex-

pression, "if such person is adjudged insolvent on a petition presented within three months after the date thereof." If the intention had been to calculate the period of two years referred to by section 36 backwards from the date of the presentation, of the petition in insolvency, and not from the date of the order of adjudication, there is no conceivable reason why the expression used in section 37 should not have been employed in the section immediately preceding.

I am satisfied, therefore, that the intention of the Legislature was only to give the Judge sitting in insolvency jurisdiction, under section 36 of Act III of 1907, in respect of transfers made within two years of the date of his order of adjudication. I accordingly set aside the order under appeal. The appellant, Jokhan Singh, will get his costs in both Courts from respondent No. 1.

Order set aside.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1260 OF 1913.

June 17, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT, and Mr. Justice Beachcroft.

HARI MOHAN *alias* HARI CHARAN PAL—APPLICANT—PETITIONER

versus

ATAL KRISHNA BOSE AND OTHERS—DECREE-HOLDERS—AND OTHERS—*Pro forma* DECREE-HOLDERS—AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), *ss.* 11, 18, 85, 170 *cl.* (3)—"*Transfer*", *whether includes lease—Sub-lessee under permanent tenure-holder or* raiyat *at fixed rate, whether may deposit money to prevent sale of holding in execution of rent decree.*

The term "transfer", as used in section 11 or section 88 of the Bengal Tenancy Act, includes a lease, as a lease is a transfer of an interest in immoveable property. Therefore, a permanent tenure-holder or a *raiyat* at a fixed rate of rent is competent to grant a sub-lease of his tenure or holding.

Consequently the sub-lessee may pay money into Court under section 170, clause (3), to prevent a sale of the tenure or holding.

The provisions of section 85 are subject to those of section 18, in other words, section 85 has no application to a case where section 18 applies.

Rule in the matter of Rent Execution Suit No. 844 of 1912 of the Third Munsif's Court at Satkhira.

Babu *Kali Mohan Sen*, for the Petitioner.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court below has refused an application made by the petitioner under sub-section 3 of section 170 of the Bengal Tenancy Act. It appears that the landlords in execution of a decree for rent against their tenants were about to bring to sale the defaulting tenure. Thereupon the present petitioner applied under sub-section (3) of section 170 as a person who had taken a sub-lease from the judgment-debtors on the 24th February 1889 and who had thus acquired an interest in the tenure voidable on the sale. The Court below has held that his position is that of an under-*raiyat*, and that he is not entitled to apply under sub-section (3) of section 170.

It is not disputed that on the 22nd November 1859, the landlords granted a lease to the predecessor-in-interest of the judgment-debtors. The interest thus created was transferred on the 23rd May 1869 to persons from whom the judgment-debtors have derived title. The question raised before us relates to the nature of the interest created by the lease of the 22nd November 1859. It has been found that the lease was for agricultural purposes; and it has also been held that the status of the tenant was that of a *raiyat*. The only point for determination is whether the grantee became a *raiyat* at a fixed rate of rent. In our opinion, there is no room for controversy that the grantee was a *raiyat* at a fixed rate of rent. The lease states explicitly that it was granted upon a rent of Rs. 5 a year, that the tenant would enjoy the land from generation to generation, and that the landlord would not claim more rent than what was settled. It is clear, therefore, that the lessee was a *raiyat* at a fixed rate of rent. Consequently, under section 18 of the Bengal Tenancy Act his interest was subject to the same provisions with respect to the transfer of and succession to the holding as that of a permanent tenure-holder. Now section 11 provides that every permanent tenure shall, subject to the provisions of the Act, be capable of being transferred and bequeathed " in the same manner and to the same extent as other immoveable property." The Court below has held that the term "transfer"

as used in section 11 or section 18 does not include a lease. In our opinion, there is no foundation for this view. A lease is a transfer of an interest in immoveable property, and there is no good reason why a permanent tenure-holder or a *raiyat* at a fixed rate of rent should be held competent to alienate absolutely the tenure or holding, and, at the same time be deemed to be under a disability in so far as the grant of a sub-lease is concerned. The Court below has held that if this view is adopted, section 85 cannot be reconciled with section 18. But it is plain that the proper method of construction is to hold that the provisions of section 85 are subject to those of section 18, in other words that section 85 has no application to a case where section 18 applies. In the case before us, as the lessor of the petitioner was a *raiyat* at a fixed rate of rent, the sub-lease granted by him on the 24th February 1889 is not subject to the operation of section 85. Consequently the interest created in favour of the applicant in 1889 is a valid interest, and as it is liable to be avoided on the sale to be held at the interest of the superior landlord, it is competent to the petitioner to seek protection under sub-section (3) of section 170 of the Bengal Tenancy Act.

The result is that this Rule is made absolute, the order of the Court below discharged and the application made by the petitioner to that Court granted. We make no order as to costs.

Rule made absolute.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1400 OF 1912.

April 18, 1914.

Present:—Mr. Justice Rafique.

DALTHAWAN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

AMARDEO SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Usufructuary—Not to be redeemed before 35 years—Not invalid in absence of fraud or duress—Redemption.

The mere provision in a usufructuary mortgage that the mortgage would not be redeemed before the expiry of 35 years from the date of the mortgage is not hard and unconscionable in the absence of fraud or duress.

Ram Prasad v. *Jagrup*, 15 Ind. Cas. 880; 10 A. L. J. 157, followed.

Bhawani v. *Sheodyal*, 1 A. L. J. 133; A.W.N. (1904). 60; 26 A. 479, referred to.

Second appeal from the decision of the District Judge of Jaunpur, dated 28th June 1912.

The Hon'ble Mr. *Gokul Prasad*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The facts of this second appeal are as follows: One Kumar Lohar executed a mortgage in favour of Kali Charan in lieu of Rs. 49 in respect of 1 *bigha* 11 *biswas* and 16 *dhurs* of land which he held as a fixed-rate tenant. The mortgage was with possession and the term fixed in the deed was 35 years. The plaintiffs-respondents are transferees of the equity of redemption of Kumar Lohar. The defendants-appellants are the heirs of Kali Charan, the mortgagee. The plaintiffs brought a suit in the Court of the Munsif of Jaunpur on the 27th of October 1911 for redemption of the property mortgaged by Kumar Lohar on the allegation that the mortgage was made on the 15th of July 1891 in lieu of Rs. 35. The defendants in their written statement denied the existence of any such mortgage, and stated that a mortgage was made by Kumar Lohar on the 29th of August 1892 in lieu of Rs. 49, and that it was a usufructuary mortgage for a period of 35 years which period not having expired the plaintiffs' suit was not maintainable. The plaintiffs amended their plaint on the information given in the written statement as to the date and the amount of the mortgage. In their amended plaint they stated that the mortgage being for a long term it was invalid, and that they could redeem it in any *khali fasil* before the expiry of the term. The learned Munsif found that the term of 35 years fixed by the mortgage-deed was unconscionable, and he decreed the claim. On appeal the learned District Judge affirmed the decree of the first Court. The defendants who are the heirs of the original mortgagee come up in second appeal to this Court and contend that the mere fact of the length of the term of the mortgage does not render it invalid or enable the mortgagor or his representatives to sue prior to the expiry of the term.

It must be noted here that there is no allegation of fraud or overreaching in the plaint. The only ground on which redemption is sought is that the length of the term of the mortgage by itself shows the bargain to be unconscionable and the contract to be invalid. The defendants-appellants, on the other hand, contend that the mere length of the term does not necessarily show that the bargain is invalid or unconscionable, where the right of the mortgagee to foreclose is also postponed for the term of the mortgage. The authority on the point is divided in this Court. In the case of *Bhawani* v. *Sheodihal* (1) it was remarked that where restraint upon redemption extends for a long period, say 30 years or upwards, the contract may, no doubt, be regarded by a Court of Equity as unconscionable and oppressive. On the basis of this case the learned Vakil for the plaintiffs-respondents contends that his clients have a right to obtain redemption before the expiry of the term of 35 years as the said term is obviously unconscionable. On the other hand the learned Vakil for the appellants relies on a later case, namely, that of *Ram Prasad* v. *Jagrup* (2), where the covenant in a mortgage-deed fixing 58 years for the mortgagor to redeem the mortgaged property was considered not to be hard and unconscionable in the absence of fraud or duress. The case of *Ramburan Singh* v. *Ramker Singh* (3) which went up in Letters Patent Appeal No. 73 of 1911 has also been relied on by the appellants in support of this contention. As the later cases of this Court are in favour of the appellants, I must allow their contention. The result is that I allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiffs' suit with costs in all Courts.

Appeal allowed.

(1) 1 A. L. J. 133; A. W. N. (1904) 60; 26 A. 479.
(2) 15 Ind. Cas. 880; 10 A. L. J. 157.
(3) 10 Ind. Cas. 243.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1554 OF 1912.

February 10, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

Seth RADHA KISHEN—PLAINTIFF—APPELLANT

versus

THE FIRM OF GANGA RAM-RADHA KISHEN—DEFENDANTS—RESPONDENTS.

Insolvency Act (11 *and* 12 *Vic. C.* 21), *s.* 39—*Provincial Insolvency Act (III of* 1907), *s.* 30—*Insolvency — Set-off—Fraudulent claim—Notice of available act of bankruptcy committed by debtor.*

The right of set-off is a doctrine of equitable jurisdiction and its object is not merely to avoid cross-actions but to do substantial justice. Therefore this doctrine would apply to prevent the great injustice which would arise if a person who is the insolvent's creditor on one account and his debtor on the other is compelled to pay 16 annas in the rupee on what he owed to the insolvent and to receive less than that amount on what the insolvent owed him, but it cannot be extended to cover cases where at the time of insolvency the debtor of the insolvent, with full knowledge that the latter has become hopelessly involved, buys up a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debt:

Held, also, that the transaction relied upon by the defendants being a bogus one, the set-off claimed could not be allowed. The English Law on the subject discussed.

Dickson v. *Evans*, 3 R. R. 119; 6 T. R. 57; *In re Milan Tramway, Co., Ex parte Theys*, 25 Ch. D. 587; 50 L. T. 545; 32 W. R. 601; 53 L. J. Ch. 1008, referred to.

First appeal from the order of the Subordinate Judge, Amritsar, dated the 29th of June 1912, dismissing plaintiff's claim.

The Hon'ble Mr. *Shadi Lal* and Mr. *Santanam*, for the Appellant.

Mr. *Morton*, Rai Bahadur Pandit *Sheo Narain* and Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—The defendants, Ganga Ram-Radha Kishen, a firm carrying on business at Amritsar, were indebted in September 1906 to the firm of Shiv Nath Rai-Panna Lal and Harkishen Das-Bhagwan Das. In the same month the latter firms (which were really one firm trading under separate names) became financially embarrassed and on the 18th of November executed and registered a deed whereby the whole of their property was transferred to 10 persons as trustees for the creditors of the firm. Insolvency proceedings thereafter took place in the Court at Amritsar and also in the Courts at Bombay and on the 31st of May 1907, the firms in question were declared

insolvent by order of the High Court of Bombay and the property vested in the Official Assignee. Disputes arose between the Official Assignee so appointed and the Official Receiver appointed by the Amritsar Court and the case eventually came before their Lordships of the Privy Council who decided in favour of the Official Assignee [See *Official Assignee, Bombay* v. *Registrar, Small Cause Court, Amritsar* (1)].

On the 2nd of January 1911, the outstandings due to the insolvent firms were sold by public auction by the Official Assignee and were purchased by the plaintiff for Rs. 70,000.

Plaintiff instituted the present suit on the 30th of May 1911 and claimed to recover (1) Rs. 4,544-12-9, principal and interest, on account of the debt due from defendants to the firm of Shiv Nath Rai-Panna Lal, and (2) Rs. 2,780-6-3 principal, and interest, on account of the debt due from defendants to the firm of Harkishen Das-Bhagwan Das. The defendants raised various pleas contesting plaintiff's right to recover and on the merits urged that the amount due from them to the firm of Shiv Nath Rai-Panna Lal was Rs. 2,926-13-0 and not the sum claimed by plaintiff. They further urged that a sum of Rs. 26-3-0 was due to them on account of brokerage, that they were not liable to pay interest, and that they held three *hundis* of the total value of Rs. 5,300 drawn by Shiv Nath Rai-Panna Lal in favour of a firm called Nanak Chand-Malawa Mal, but purchased by defendants on *Maggar Badi* 15th, *Sambat* 1963, equal to 16th November 1906. This sum the defendants claimed to be entitled under the provisions of the Indian Insolvency Act, section 39, to set-off against the claim of the plaintiff. As a matter of fact after issues had been framed and the books of the defendants examined by the plaintiff the latter agreed to accept the allegation of the defendants as to the actual amounts due from them to the insolvent firm of Shiv Nath Rai-Panna Lal and the parties further agreed that the sum of Rs. 200 should be taken as representing the commission due to defendants for brokerage. The two points remaining in dispute between the parties were, therefore, (1) whether the defendants were entitled to set off against the claim of the plaintiff the sum of Rs. 5,300 due on the *hundis* above referred to, and (2) whether the defendants were liable to pay interest and if so, at what rate. The District Judge held that the defendants were liable to pay interest to plaintiff at the rate of Re. 0-7-6 per cent. per mensem, but he dismissed the suit on the ground that the set off claimed by the defendants was permissible under either section 30 of Act III of 1907 or under section 30 of the Indian Insolvency Act, inasmuch as there were mutual dealings between the insolvent and the defendants.

Plaintiffs have appealed to this Court, and we have heard the case argued at considerable length on their behalf by Mr. Shadi Lal and by Messrs. Morton and Sheo Narain on behalf of the respondents. Practically the sole question before us is whether the set-off claimed by the defendants was rightly allowed.

Section 39 of the Indian Insolvency Act runs of as follows:—

"And be it enacted, that when there has been mutual credit given to the insolvent and any other person or persons, one debt demand may be set off against the other."

Section 30 of the Provincial Insolvency Act, 1907, is expressed in rather fuller terms, but it is practically to the same effect. As a general rule the debt, credit or dealing which is set-off and the debt, credit or dealing against which it is set-off must be between the same parties and in the same right, but it has been held that the acceptor of a negotiable instrument gives credit to the drawer of that instrument, and that every holder of it also gives credit within the meaning of this provision of law to the drawer [*Collins* v. *Jones* (2)]. This right is in England subject to the proviso that a person shall not be entitled to claim the benefit of the set-off against the property of a debtor in any case where he had, at the time of giving credit to him, notice of available act of bankruptcy committed by the debtor. Neither the Indian Insolvency Act, section 39, nor section 30 of the Provincial Insolvency Act makes mention of the effect of notice of bankruptcy upon the right of person claiming to set-off,

(1) 6 Ind. Cas. 273; 14 C. W. N. 569; 17 A. L. J. 357; (1910) M. W. N. 177; 12 Bom. L. R. 395; 11 C. L. J. 443; 68 P. W. R. 1910; 7 M. L. T. 417; 45 P. R. 1910; 37 C. 418; 20 M. L. J. 432.

(2) 34 R. R. 572; 10 B. & C. 777; 109 Eng. Rep. 638.

and the contention before us has been that in this country it is open to a person who owes money to an insolvent to obtain the right of set-off by giving credit to him (*e. g.*, by buying an acceptance of his or a note drawn by him) even after he has had full notice of the bankruptcy of the latter or of any act of bankruptcy committed by him. It is conceded, however, that this right probably does not exist once the insolvent's property has vested in the Official Assignee or in the Official Receiver as the case may be.

We have given this difficult question our most careful consideration, but we are unable to accept the contention that this right of set-off is as unlimited and as absolute as Mr. Sheo Narain argues. It is a doctrine of equitable jurisdiction, and its object is not merely to avoid cross-action but to do substantial justice and to prevent the great injustice which would arise if a person who is the insolvent's creditor on one account and his debtor on the other is compelled to pay 16 annas in the rupee on what he owed to the insolvent and to receive less than that amount on what the insolvent owed him (Chariar's Law of Insolvency and Bankruptcy, Part 2, page 91). We cannot believe that this principle can be extended to cover cases where at the time of insolvency one person owes a debt to the insolvent and with full knowledge that the latter has become hopelessly involved buys up a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debt. In the present case we have no doubt that the transaction which took place between the defendants and the firm of Nanak Chand-Malawa Mal was practically a bogus one. The three *hundis* were drawn in favour of the firm of Nanak Chand-Malawa Mal on *Asauj Sudi* 7th, *Sambat* 1963 (26th September 1906) and were respectively for the sums of Rs. 1,600, Rs. 2,500 and Rs. 1,200. They were payable 60 days after date, *i.e.*, on the 23rd November 1906.

Defendants, according to the evidence of Radha Kishen (P. W. No. 10), the principal defendant, were doing business with the insolvent firms up to the 14th November 1906, *Maghar Badi* 13th, *Sambat* 1963, and the witness admits that the shop of Shiv Nath Rai-Panna Lal is only at a distance of 15 shops from the shop of his own firm and of four shops from his own house. That the drawers of the *hundi* were in financial straits about this very time (*i.e*, the 14th November 1906) is obvious from the fact that on the 18th November 1906 they executed the deed assigning all their property to ten trustees, and in the ordinary course of things their embarrassed position must have been evident to all and sundry some days before they were in a position to make this transfer to trustees who would naturally have to be consulted before such transfer could be effected. In their written statement (page 66 of the paper-book, para. 6) defendants admit that "the business of the insolvent was completely closed on *Maghar Sudi* 1st, *Sambat* 1963" (*i.e.*, the 17th November 1906). We cannot believe that the defendants, who carried on business in the immediate neighbourhood and had dealings with the insolvents, were profoundly ignorant of what was going on and knew nothing about the condition of affairs in the insolvents' firms.

But according to Nanak Chand (P. W. No. 23), the head of the firm of Nanak Chand-Malawa Mal, defendants were in need of money on the 16th November 1906, and apparently asked him for a loan of Rs. 10,000. He had, he says, come over that day from Jullundur to Amritsar in order to realise certain debts, and though these particular *hundis* were not then payable, had brought them with him, and as he could not give the defendants more than Rs. 5,000 in cash, he made up the deficiency by selling them the three *hundis* in question. Defendants "who stood in need of money" bought the three *hundis* at their full face value, though they were not payable until the 23rd November and though, as we have said, it must have been obvious to any one in the market that the drawers were at the time hopelessly bankrupt. We must assume that defendants are ordinary men of business and fully alive to all that is going on round them, and in the circumstances we find it impossible to believe that they and Nanak Chand entered into this transaction in the honest belief that the drawers of the *hundis* were in a position to meet their liabilities thereon on the 23rd November. And in this connection it is important to remember (1) that Nanak Chand is the uncle of Ganga Ram, one of the partners in the defendants' firm, and (2) that by a curious coincidence he had, on the 16th,

November, brought with him from Jullundur to Amritsar *hundis* which he well knew were not payable tillthe 23rd November.

But this is not all Defendants are in need of money and have (as they allege) honestly bought *hundis* for their full value, believing that they would be duly met on the 23rd November. They discover in a day or two that the drawers are insolvent and have committed an act of bankruptcy by assigning all their assets to trustees. Now, if the transaction between them and Nanak Chand had been, on their part at all events, honest and innocent, what course would they have adopted? Obviously, they would have insisted on returning the *hundis* to Nanak Chand. That such is the ordinary course of business is evident from the evidence of Mr. Cook (P. W. No. 12); Tirath Ram (D. W. No. 2; page 94 of paper-book); Sheikh Ghulam Sadiq (P. W. No. 11, page 101); Bali Mal (P. W. No. 75, page 105) and Chhota Mal (P. W. No. 16, page 106). But so far from acting in this reasonable manner, defendants ask us to believe that though they subsequently found that they could not get payment of the *hundis* from the insolvent drawers, they nevertheless paid the full amount due thereon to Nanak Chand, who had sold the *hundis* to them at a time when the drawers were on the eve of finally closing business (see Radha Kishen's evidence, page 89, line 30). And yet the last named witness admits that he would not have bought the *hundis* had he known that the drawers were insolvent. But having bought them, he apparently preferred to take his chance of setting these *hundis* up as a set-off against his own debt in preference to insisting upon Nanak Chand taking them back; he pays their full value to the latter and cheerfully runs the risk of inevitable litigation by electing to hold them as a set-off against his own debt.

The conduct of defendants as above set forth is sufficiently surprising, but there are other facts which also excite comment. Admittedly defendants and Nanak Chand were duly notified by the Official Assignee of the insolvency of the drawers of the *hundis*. Unfortunately neither defendants, nor Nanak Chand, are able to produce these notices, but they admit that they received them. And yet neither of them informed the Official Assignee, until about August 1911 (see Exhibit P. 14, page 11), that the *hundis* in question had been assigned to defendants. No doubt, defendants were not bound to give this information, but in view of the fact that if they were *bona fide* holders of the *hundis*, the insolvents' estate would have been indebted to them and not they to the said estate, it is somewhat curious that they did not take the trouble to notify the Official Assignee that so far from their being indebted to the estate, the estate was in fact indebted to them.

Such are the peculiar circumstances of the alleged sale of the *hundis*, and we find it impossible to believe that the transaction between Nanak Chand and the defendants was a genuine transfer for consideration. It appears to us that on the 16th of November Nanak Chand realized that his securities would be (comparatively speaking) of little value when they matured on the 23rd of that month. On the other hand, these securities, if in the possession of defendants as holders, would, it was thought, be of very considerable value inasmuch as it was hoped by their names to relieve defendants of the necessity of paying up over Rs. 4,000 which defendants owned to the insolvents' firms. It is not surprising, therefore, to find that Nanak Chand, the uncle of one of the defendants, was ready to transfer the *hundis* to the defendants' firm, both he and the latter no doubt trusting that the assignment would effect its object and enable the defendants to set off the Rs. 5,300, due on the *hundis*, against their own debt.

We cannot regard a transaction of that kind as being within the spirit of section 39 of the Indian Insolvency Act or of section 30 of the Provincial Insolvency Act; nor can we accept the contention that the defendants when taking the *hundis* gave credit to the drawers whom they knew at the time to be on the verge of bankruptcy. In this connection we would refer to the case of *Dickson* v. *Evans* (3). In that case Lord Kenyon made the following remarks:—

"The words of the Statute 5, Geo. II, c. 30, section 28, are express, that if it shall appear to the Commissioners that there has been mutual credit given by the bankrupt, or

(3) 3 R. R. 119; 6 Term Rep. 57.

mutual debts between the bankrupt and any other person at any time before the bankruptcy, the Commissioners shall state the account, etc., and what shall appear to be due, etc., shall be claimed or paid. That Act was founded on good sense; and it provides that the assignees shall not recover against a debtor of the bankrupt what was due to the bankrupt on one side of the account, without also taking into consideration the other side of the account, and seeing on which side the balance lies. That is the justice of the case. But it would be most unjust indeed if one person, who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties."

In the same case Grose, J., remarked as follows:—

"The Statute 5, Geo. II, c. 30, seems peculiarly adapted to this case; one object of the Act was to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy, and then pretending that he was a creditor at the time of the bankruptcy."

In a more recent case [*In re Milan Tramways Company; Ex parte Theys* (4)], Lord Selborne, while admitting that the right to a debt proved in bankruptcy might be assigned, added:—

"This may be law; but if so, it is only matter of positive law not resting on any principle of justice, and we have now to decide whether it is law. It is urged that by the Judicature Act of 1875 the rules in bankruptcy are made applicable to companies in liquidation. The 10th clause of the Judicature Act, 1875, refers only to a Company unable to pay its debts, but I am of opinion that it must be treated as applicable to any Company in liquidation until it is shown that the assets are sufficient for payment of the debts in full. Now under section 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions.....

"Suppose after the proof is made it is assigned to some one who is indebted to the Company, can that person set off the debt proved against the claim which the Company has against him? In my opinion, clearly not. It is impossible that a person, who at the time of the bankruptcy owes a debt to the bankrupt and has no right of set-off, can acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt."

As a result of our findings and in reliance upon the authorities cited, we hold that there was in the present case no such mutual dealings between the insolvent firm and the defendants as to enable the latter to rely on the provisions of either section 39 of the Indian Insolvency Act or section 30 of the Provincial Insolvency Act. We accordingly accept the appeal and grant plaintiff a decree for Rs. 4,924 13-3 with interest at the rate of Re. 0-7-6 per cent. per mensem up to the date of suit and thereafter at the rate of Rs. 6 per cent. per annum up to date of realization. Defendants will pay costs throughout.

Appeal accepted.

(4) 25 Ch. D. 587; 53 L. J. Ch. 1008; 50 L. T. 545; 32 W. R. 601.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2641 OF 1911.

March 30, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

GOBINDA NATH *alias* NRITTYA GOPAL ROY—PLAINTIFF—APPELLANT

versus

MOHINI MOHUN MOJUMDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Hindu widow—Suit by widow—Decree, when binding on reversioner—Invalid transfer by widow—Permissive or adverse possession—Transferee's title by adverse possession.

The heirs of a Hindu widow are bound by a decree fairly and properly obtained against her.

Kattama Naucherar v. *Raja of Shivaganga*, 9 M. I. A. 539; 2 W. R. (P. C.) 31; 19 Eng. Rep. 843, relied upon.

Where the property in suit had been in the defendants' ancestors' possession for more than half a century under an invalid transfer by a Hindu widow to her brother, and the plaintiffs' case for possession entirely depended on this possession being permissive,

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which the Courts below held he had entirely failed to show:

Held, that, as there is one continued chain of succession in the defendants' family without any title, the plaintiff's suit must fail, as the defendants have got title by adverse possession.

Appeal from the decree of the District Judge of Rajshaye, dated August 7, 1911, confirming that of the Additional Sub-Judge of Rajshaye, dated June 21st, 1909.

Babus *Sarat Chandra Roy Chaudhuri* and *Krishna Kamal Moitra*, for the Appellant.

Babus *Mohendra Nath Roy*, *Rama Kanta Bhattacharyya* and *Jotindra Nath Lahiree*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff for declaration of his title and recovery of possession of 7½ *gandas* of an estate of which a female life-tenant, Hara Sundari, whose grandson the plaintiff is, recovered possession by suit in a litigation which began in 1862 to the extent of 1 anna 2½ *gandas* out of 1 anna 10 *gandas*, leaving 7½ *gandas* now in dispute in the hands of the defendants' ancestors.

It appears that one Kamal Lochan Chaudhuri, the original owner of the estate, died in 1804 leaving two widows, Uma Debi and Subhadra Debi, who held the property in equal shares of 15 *gandas* each. Subhadra made over her share to her brother, Biseswar Mazumdar, as a gift and died in 1806. Meanwhile disputes had arisen between Uma Debi and her co-widow as the former alleged that she had authority to adopt a son after her husband's death and the right to possess all the property. However that may be, Subhadra remained in possession, as the plaintiff says, with Uma Debi's consent and made the alienation to Biseswar without her authority apparently. It was not till 1812, six years after the death of Subhadra Debi, that Uma Debi exercised her right of adoption and adopted Ishwar Chandra Chaudhri, who attained majority in 1830 and brought a suit against his adoptive mother, Uma Debi, and his sister, Rajeswari, wife of Rajeswar Mazumdar, son of Biseswar, for recovery of the 7½ *gandas* held by them. Uma Debi was apparently made a party on the ground that it was by her permission that Rajeswar was holding. Iswar withdrew this suit on the ground that as long as his adoptive mother was alive he had no right to possession. Iswar died in 1849 leaving Hara Sundari, his widow, and Drabamayi his daughter. The plaintfff's allegation as to what followed is that Rajeswari and her sons Gobinda and Ram Sundra, the ancestors of the defendants, dispossessed Hara Sundari on the footing of the gift to Biseswar of 7½ *gandas* and certain invalid *ijaras* in respect of 2½ *gandas* and 6¼ *bighas* of Brahmattur. Nothing is said in the plaint as to the remaining one anna of the property which we are left to imagine was indisputably in the possession of Hara Sundari as life-tenant of the estate of Iswar. But the records of the case which are before us show, and that is the footing upon which it has been dealt with by both the Courts below, that Hara Sundari sued for the whole 1 anna 10 *gandas* and recovered 1 anna 2½ *gandas*, it being held that she was barred by limitation in respect of the 7½ *gandas* given to Biseswar by Subhadra Debi. On appeal to the High Court the case was dismissed, but on review there was a remand for fresh finding as regards the 7½ *gandas*. Hara Sundari instituted this suit in 1862 and in 1866 after the remand she stated by a petition that she had got her dues for costs and *wasiat* in respect of the property decreed and that she gave up her claim to the remaining portion, namely, 7½ *gandas*.

Uma Debi died in 1857 and the principal contention between the parties is whether there was adverse possession running against the present reversioner, to whom the estate opened on the death of Drobamayi in 1907, between 1857 and 1873, the date when the Limitation Act of 1871 came into force. There is, however, also a clear finding by both the Courts below that adverse possession was running against Uma Debi and her successors from 1806, for Biseswar's holding of 7½ *gandas* was certainly adverse to all of them. The Subordinate Judge's view of the matter is that all the parties in 1866 accepted the decree of the High Court before the order of remand as the final decision in the case without further litigation. This was no alienation; and he relies on the case of *Gaya Pershad v. Heet Narain* (1) to show that in order to save limitation by reason of adverse possession, the possession must arise directly from invalid alienation by the widow. But in this case possession began long before Hara Sundari got her right to sue, which

(1) 9 C. 93.

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carries us back to 1806, since which time Biseswar's possession followed by Rajeswari's possession, has been undisturbed.

To get rid of this the plaintiff has to assert that the possession of Rajeswar was permissive, because Uma Debi allowed him to hold it in consideration of his having married Iswar's sister Rajeswari. To this the reply of the learned Judge is that even in the life-time of Uma Debi she was not in possession of the 7½ *gandas*, but Subhadra and her brother Biseswar, the ancestors of the defendants, were; and there is nothing to show that Subhadra entered into possession and held the land on behalf of Uma Debi by her permission or consent. Clearly the brother of Subhadra, Biseswar held the land adversely to Uma Debi. The premature intervention of Iswar in 1832 cannot affect this proposition, as he died in 1849 and Uma Debi continued as life-tenant till her death in 1857. Upon this finding, which is based upon the fact of there being no evidence that Rajeswar's possession was permissive, the plaintiff's case goes, and the question what the effect of the litigation from 1862 to 1866 would have upon the adverse possession between 1857 and 1873 becomes purely academical.

As, however, this question was hotly debated between the parties we may say that we agree with the lower Courts that Hara Sundari's litigation in 1862 did not interfere with the running of adverse possession. We have considered the cases cited to us; *Sheo Narain Singh* v. *Khurgo Koerry* (2), *Mahadei* v. *Baldeo* (3) and *Raj Lakshmi Dasee* v. *Katayani Dasee* (4) and we do not dispute the proposition that a Hindu widow who is a limited or qualified owner cannot be a party to a consent decree. But the cases are clearly distinguishable, as the widow was not out of possession in these cases for fifty-eight years before suit as in this case; and in this case it so happens that there was no decree except the final decree of the High Court before remand. We have also considered the case of *Kattama Nauchear* v. *Raja of Shivaganga* (5) and the case of *Hari Nath Chatterjee* v. *Mathura Mohan Goswami* (6) and the authorities discussed therein and we can find nothing to justify the proposition that adverse possession ceased to run by reason of the suit of 1862 which ended adversely to Hara Sundari after a fair trial. It is true she obtained a remand, but she abandoned a re-investigation of the plea of limitation which had been decided against her. What their Lordships of the Judicial Committee said in *Sivaganga's* case (5) was that "unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the *zemindari* at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though in some respects for a qualified interest: and until her death it could not be ascertained who would be entitled to succeed. The same principle, which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." The plaintiff cannot say that there was not a fair fight in which the Hindu widow lost. There was no decree passed after the High Court decree of 1862. The order on the petition of withdrawal of the review was, "File with the record." The point of limitation was adjudicated in several Courts and it was found that she was barred as regards the 7½ *gandas*; and this only brings us back to the finding in this suit which is also to the effect that she was, as a matter of fact, barred long before 1862. This property had been in the defendants' ancestors' possession for more than half a century under an invalid transfer by Subhadra to Biseswar and the plaintiffs' case entirely depends on this possession being permissive which the Courts below have held he has entirely failed to show. There is one continued chain of succession in the defendant's family from 1806 to this day without any title.

(2) 10 C. L. R. 337.
(3) 30 A. 75; 5 A. L. J. 43; A. W. N. (1908) 16.
(4) 12 Ind. Cas. 464; 38 C. 639.
(5) 9 M. I. A. 539; 2 W. R. (P. C.) 31; 19 Eng. Rep. 843.
(6) 21 C. 8; 20 I. A. 183.

Rajeswari's marriage is made a jumping off point for the unfounded allegation of permissive possession, because it was in 1817, only eleven years after Biseswar's adverse possession began to run. But it is futile to aver without evidence that Uma Debi allowed Rajeswar to continue in possession, which he had already held for many years, merely because he married her adopted son's sister. We consider that it would be disastrous to disturb the title which has matured for over a century by allowing the plaintiff to re-open the matter now. If he did we should expect the strictest proof of the alleged permissive possession. Both the lower Courts have found it shadowy and unsupported by any evidence.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 467 OF 1912.

February 12, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

MUHAMMAD KHAN—PLAINTIFF—APPELLANT

versus

DALEL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Alienation—*Awans *of Talagang Tehsil, Attock District—Powers of father.*

An *Awan* of the Talagang Tehsil, who has sons living, has not unlimited powers when dealing with ancestral property.

Second appeal from the decree of the Divisional Judge, Attock Division at Campbellpur, dated the 9th November 1911, reversing that of the Subordinate Judge, Attock District at Rawalpindi, dated the 15th May 1911, decreeing plaintiff's claim.

Mirza *Jalal Din*, for the Appellant.

Mr. *Badr Din*, for the Respondents.

JUDGMENT.—One Dalel, an *Awan* of the Talagang Tehsil, which now forms part of the Attock District, but was formerly within the Jhelum District, on the 27th June 1899, by registered deed sold certain lands in *Mauza* Dher Wand in the said Tehsil to one Gul Sher, for an alleged consideration of Rs. 1,500. In the present suit, one of the two sons of Dalel, the said vendor, prays for a declaration that the said sale was without consideration and for no necessary purpose and is, therefore, not binding upon him as the next heir of the vendor.

The Subordinate Judge found (1) that out of the alleged consideration Rs. 1,250 the price of 12 camels had not been proved, (2) that necessity for the sale had not been established, and (3) that defendants had failed to prove that an *Awan* of the Talagang Tehsil, who had sons living, was, by custom, competent to alienate his ancestral land except for necessity. He further found that the suit, which was instituted on the 19th August 1910, was within time and that it had not been established that plaintiff, who was a minor at the date of sale and only 19 years of age in 1911, had done anything to estop himself from claiming the relief now sought. He accordingly granted him the declaration for which he prayed.

Defendant appealed to the Divisional Judge, who found that consideration had been proved in full, that there was no necessity for the sale, but that plaintiff's suit must nevertheless fail inasmuch as an *Awan* of Talagung Tehsil has by custom power to dispose of ancestral land even in the presence of sons at his will and without necessity. He further held that the suit was brought in collusion with the vendor and that it would be inequitable to grant plaintiff the relief claimed, as parts of the land sold have in the meantime been alienated to third persons. He, therefore, dismissed plaintiff's suit with costs.

Plaintiff applied to this Court under clause (*b*) of section 70 (1) of the Punjab Courts Act, as amended by Act XXV of 1899, for revision of the Divisional Judge's decree and his application was admitted thereunder as a further appeal. We must, therefore, accept the findings of fact in this case and hold (in concurrence with the Courts below) that defendant has failed to prove that the sale in his favour was for necessary purposes. In the circumstances the ordinary rule of custom, as propounded in the Full Bench ruling reported as *Gujar*

v. *Sham Das* (1), must apply and the sale be held to be ineffective against plaintiff unless the defendant can satisfy us, that the vendor had an unrestricted power of disposition of his ancestral holding, or that the suit is time-barred or that there are circumstances which disentitle plaintiff to relief.

In a very similar case (Civil Appeal No. 170 of 1912) decided by us to-day, we have found that an *Awan* of Talagang Tehsil, who has sons living, has not unlimited powers when dealing with ancestral property. This appeal and the one to which we refer were argued before us at one and the same time, and our finding upon this question applies equally to this case, though the matter is discussed more fully and with reference to the authorities in our judgment in that appeal.

The only features peculiar to the present case are (1) that evidence has been given to the effect that in this village a large number of alienations have been effected since 1886 and have not been contested and (2) that the suit was instituted eleven years after the date of sale.

As regards the first point it is unnecessary to say more than this that the circumstances of the various alienations are unknown. Many of them were probably by sonless proprietors and of the others it is possible that many were assented to by the alienor's sons cases similar to, *e. g.*, that reported as *Khuda Yar* v. *Fatteh* (2). Such instances are of no practical value in dealing with a question of the kind before us and defendants have admittedly not been able to cite a single case in which it has been definitely held that an *Awan* of this Tehsil who has sons can dispose of ancestral property at his pleasure. On the other hand we have definite authority refered to in our judgment in Civil Appeal No. 170 of 1912 to the contrary.

As regards the second point, we are unable to discover any ground for refusing to grant plaintiff relief. He was admittedly a minor in 1899 when the sale was effected and there appears to be no reason to doubt the correctness of the Subordinate Judge's finding, that he was only nineteen years of age in 1911. The sale was effected within twelve years of the institution of the suit, and the suit is, therefore, within time, under the provisions of the Punjab Limitation (Ancestral Land Aleination) Act of 1900. It has not been proved that plaintiff by any act on his part acquiesced in the sale, and the facts that his elder brother made no attempt to impugn it and that the vendee has been dealing with the property as its owner cannot affect his right to contest it.

We accordingly accept the appeal and setting aside the decree of the Divisional Judge, we restore that of the Subordinate Judge, with costs in plaintiff's favour throughout.

Appeal accepted.

(1) 107 P. R. 1887.
(2) 8 P. R. 1906; 64 P. L. R. 1906.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 33 OF 1913.
February 2, 1914.
Present:—Mr. Lindsay, J. C. and Mr. Kanhaiya Lal, A. J. C.

LIEUT. E. G. A. PRINS AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

MESSRS. MURRAY & CO., LTD.—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 60 (1), cl. (i), s. 60 (2), cl. (b), s. 2, cl. 17—Public officer—"While serving under the Government" meaning of—"Affect," interpretation of—Attachment of salary of Honorary Commissioned Officers employed in Indian Subordinate Medical Department, power of executing Court as to—Army Act (44 and 45 Vict., Chap. 58), ss. 136, 144 and 190—Construction of enactment, principle of.

The salary of Honorary Commissioned Officers employed in the Indian Subordinate Medical Department is attachable under the provisions of section 60, sub-section (1), clause (*i*), Civil Procedure Code, since they are "public officers" as defined in section 2, clause 17, Civil Procedure Code, and are also "officers" as defined in section 190 of the Army Act, so that they are not protected by section 144 of the latter.

Section 60, sub-section (2), clause (*b*), Civil Procedure Code, does not amount to a declaration that the provisions of section 60, sub-section (1), Civil Procedure Code, do not constitute a law passed by the Governor-General of India in Council authorising deductions to be made from the pay of an officer of His Majesty's Regular Forces.

Calcutta Trades Association v. *Ryland*, 24 C. 102; 1 C. W. N. 138 and *Watson* v. *Lloyd*, 25 M. 402, followed.

Colonel Lecky v. *Bank of Upper India Ld.*, 9 Ind. Cas 1023; 8 C. L. J. 487; 33 A. 529., and *Velchand Chaga*

PRINS, E. G. A. *v.* MURRAY & CO., LTD.

Lal v. *Bourchier*, 17 Ind. Cas. 13; 14 Bom. L. R. 777; 37 B. 26, dissented from and distinguished.

Murray and Co., Ld. v. *Prins, E. G. A.*, 10 Ind. Cas. 719; 14 O. C. 82, referred to and explained.

Appeal against an order of the Subordinate Judge, Lucknow, dated 5th May, 1913.

Mr. *St. G. Jackson*, for the Appellants.

Mr. *E. Manuel*, for the Respondent.

JUDGMENT.—The appellants in these cases are two judgment-debtors both of whom are Honorary Commissioned Officers employed in the Indian Subordinate Medical Department.

Decrees were obtained against them by Messrs. Murray & Co., Ld., Lucknow, and in execution of those decrees orders were passed for the attachment of the salary of these officers to the extent of one-half. The question which has to be decided in these cases is whether under the provisions of section 60 of the Code of Civil Procedure read along with section 136 of the Army Act (44 and 45 Vict., Chap. 58) the orders for attachment were such as the executing Court was competent to pass. The case came in the first instance before one of the Judges of this Court. By his order dated the 30th of June 1913 he has referred the appeal to a Bench for decision in view of a conflict of judicial authority upon the question involved. The decree-holders support the orders of the Court below upon the authority of the rulings reported as *Calcutta Trades Association* v. *Ryland* (1) and *Watson* v. *Lloyd* (2). The judgment-debtors on the other hand rely upon the decisions reported as *Colonel Lecky* v. *Bank of Upper India Ld.*, (3) and *Velchand Chagan Lal* v. *Bourchier* (4). Section 60, sub-section (1), clause (*i*), of the Code of Civil Procedure, allows attachment to be made of the salary or allowances of a public officer while on duty to the extent, in certain cases, of one moiety. In the present instance the judgment-debtors are, as has been said, officers holding commissioned rank in the Indian Subordinate Medical Department and this being so we are clearly of opinion that they are public officers within the meaning of that expression as defined in section 2, clause 17 of the Code of Civil Procedure. They are "Commissioned Officers in the Military Forces of His Majesty while serving under the Government." It was suggested in the course of argument by the learned Counsel for the appellants that they did not come within this definition. The contention was that the expression "while serving under the Government" means serving in some Civil Department of Government apart from military employ, but, in our opinion, this contention cannot be sustained. We take these words to mean that the officer to whom they apply is still in the service of Government, that is to say, has not been put upon the retired list. We start, therefore, with the fact that both the judgment-debtors here are public officers and this being so *prima facie* it is competent for a Civil Court under section 60 of the Code of Civil Procedure to attach their salary to the extent of one-half. The question then arises whether either by reason of the provision contained in section 60, sub-section 2, clause (*b*), of the Code of Civil Procedure, or of anything contained in the Army Act the pay of these officers is exempt from attachment. The history of the amendment of the Army Act of 1881 has been set out in the Calcutta and Madras judgments above referred to. It appears that previous to the year 1895 section 151, sub-section 3, of the Army Act provided as follows:—

"A Civil Court or Court of Small Causes, upon adjudging payment of any sum by any persons subject to Military Law other than a soldier of the Regular Forces, may either award execution thereof generally or may direct specially that the amount named in the direction, being the whole or any part of the said sum, shall be paid by instalments or otherwise out of any pay or other public money payable to the debtor and the amount named in the direction not exceeding one-half of such pay and public money shall, while the debtor is in India, be stopped and paid in conformity with the direction."

Section 136 of the same Act provided that "The pay of an officer or soldier of His Majesty's Regular Forces shall be paid without any deduction other than the deductions authorised by this or any other Act or by any Royal Warrant for the time being." In the year

(1) 24 C. 102; 1 C. W. N. 138.
(2) 25 M 402.
(3) 9 Ind. Cas. 1023; 33 A. 529; 8 A. L. J. 487.
(4) 17 Ind. Cas. 13; 37 B. 26; 14 Bom. L. R. 777.

1895, section 151 of the Army Act was repealed and in section 136 the following words were inserted, namely, or "by any law passed by the Governor-General of India in Council." The result, therefore, is that under the law as it now stands and as laid down in section 136 of the Army Act the pay of an officer or soldier of His Majesty's Regular Forces must be paid without any deduction other than deductions authorised by this or any other Act, or by any Royal warrant for the time being, or by any law passed by the Governor-General of India in Council. In discussing the effect of the above amendments the Madras High Court in *Watson* v. *Lloyd* (2) remarked that it was important to bear in mind that the words which were added to section 136 under the Amending Act, 1895, were added by the same Act which repealed section 151 *in toto*. Their Lordships remarked that the amendment in section 136 appeared to be consequential on the repeal of section 151 and that the Legislature in adding the words just mentioned would seem to have had in view the fact that the provisions of the repealed proviso to section 151 were substantially the same as the provisions of the Code of Civil Procedure, sections 266-268. The view which has been taken both by the Allahabad and Bombay High Courts is that the language of section 60, sub-section 2, clause (*b*), of the Code of Civil Procedure, renders the provisions of section 60, sub-section 1, inapplicable to any cases to which section 136 of the Army Act applies. The important word in section 60, sub-section 2, clause (*b*), is the word "affect" and the interpretation which the Bombay and Allahabad High Courts have placed upon clause (*b*) is that it amounts to a declaration that the enactment contained in section 60, sub-section 1, is not to be treated as a law passed by the Governor-General of India in Council authorising any deduction from the pay of an officer of His Majesty's Regular Forces. On the other hand it is contended that this interpretation of the word "affect" is too wide and that the real sense of that expression is that the provisions of section 60, sub-section 1, are not to apply if they are expressly in conflict with any of the provisions of the Army Act. It is said that the word does not import that section 60 is not to be taken in any way as a part of an Indian Statute so far as the Army Act is concerned. We have, therefore, to choose between these two conflicting views of the law and it seems to us after a full consideration of the history of the amendment of the Army Act that we ought to pronounce in favour of the contention which has been put forward on behalf of the decree-holders-respondents. If the true principle is that every enactment must be so construed, as far possible, as to be consistent with every other which it does not in express terms modify or repeal then we think we ought to give full effect to the provisions of section 60, sub-section 1, unless it is apparent that they are expressly in conflict with the provisions of section 136 of the Army Act. In our opinion there is not necessarily any conflict between the terms of these two sections. It is possible to conceive of a conflict between the provisions of section 60 of the Code of Civil Procedure and other provisions of the Army Act. An instance of this occurred in a case which was before this Court and which is reported as *Murray & Co. Ld.* v. *Prins, E. G. A.* (5). In that case the same two judgment-debtors who are now before us were concerned. At that time they had not been given the commissioned rank which they now enjoy. They were, however, "Gazetted Officers in the military forces of His Majesty", although they held no commission. *Prima facie*, therefore, they were public officers within the meaning of the definition contained in the Code of Civil Procedure, but as was pointed out by Mr. Chamier in that case although these gentlemen were Gazetted Officers they were not officers as defined in section 190 of the Army Act of 1881. For the purposes of the Army Act these judgment-debtors were at that time merely warrant officers who, according to the definition contained in the Army Act, are treated as "soldiers." Mr. Chamier then proceeded to point out that being soldiers under the Army Act their pay was exempt from attachment under the provisions of section 144 (1) of that Act.

Here we have an instance in which the terms of the Code of Civil Procedure were in conflict with the provisions of the Army Act and the consequence was that the law as contained in

(5) 10 Ind. Cas. 719; 14 O. C. 82.

the Code of Civil Procedure had to give way by virtue of the declaration contained in section 60, sub-section 2, clause (*b*), of the Code of Civil Procedure. To have allowed the attachment in that case would have been to permit the terms of section 60 to "affect" the provisions of the Army Act. The judgment-debtors, although public officers for the purposes of the Code of Civil Procedure, were not officers of His Majesty's Regular Forces for the purposes of section 136 of the Army Act. A similar situation might conceivably arise in the case of a public officer of the description mentioned in section 2, sub-section 17, clause (*e*), of the Code of Civil Procedure. Under that clause every person who holds any office by virtue of which he is empowered to place or keep any person in confinement is a public officer. It might very well be that a person holding a position of this kind was a warrant officer employed as a jailor. He would under the Code of Civil Procedure be a public officer whose salary *prima facie* might be attached under the provisions of section 60, but being by virtue of the definiton contained in the Army Act only a soldier, the provisions of section 144 of the Army Act would prevent the operation of section 60 of the Code of Civil Procedure. We are unable, therefore, to adopt the view of the law which has been taken in the Allahabad and Bombay cases, namely, that section 60, sub-section 2, clause (*b*), of the Code of Civil Procedure, amounts to a declaration that the provisions of section 60, sub-section 1, do not constitute a law passed by the Governor-General of India in Council authorising deductions to be made from the pay of an officer of His Majesty's Regular Forces. We do not think it necessary in these cases to consider whether the Allahabad and Bombay cases are distinguishable from these cases on the ground that the officers concerned there were officers of the British Army. It may be argued that officers of this class who are said to receive their pay from the Crown under the provisions of an Act of Parliament are not public officers in the sense in which that expression is used in the Code of Civil Procedure because they do not serve under the Government. The expression "Government" in this definition means either the Local Government or the Government of India, but no such argument could be raised in favour of the two appellants here. They are employed in the Indian Subordinate Medical Department and we have no doubt draw their pay from the revenues of the Government of India. They are, therefore, strictly within the definition just mentioned. The conclusion, therefore, that we come to is that the pay of these appellants was liable to attachment and that the orders passed by the lower Court directing attachment were in accordance with law. We dismiss both the appeals with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1865 OF 1912.

February 4, 1914.

Present:—Mr. Justice Beadon.

Musammat HARNAMI—OBJECTOR—APPELLANT

versus

Musammat PARTAPI—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 7—Mother living in open adultery—Appointment of boy's paternal aunt.

The appointment of a minor's paternal aunt as guardian is proper when it is found that the minor's mother is living in open adultery and has borne children to a man to whom she is not married.

Miscellaneous first appeal from the order of the District Judge, Ambala, dated the 17th August 1912, appointing the respondent as guardian of the minor.

Pandit *Ram Bhaj Datta*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—I find *Musammat* Harnami, mother of the minor, is admittedly living in open adultery and has had children by one Nikka to whom she is not married. Under these circumstances I do not think that she is a proper person to be appointed guardian.

As the mother of the boy cannot be appointed I can see no good reason for interfering with the District Judge's selection of *Musammat* Partapi, who is the boy's paternal aunt.

I dismiss the appeal, but I do not think it necessary to make any order in regard to costs.

Appeal dismissed.

NUR MIA *v.* CHANDRA MOHAN ROY.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1426 OF 1913.
December 17, 1913.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
NUR MIA—JUDGMENT-DEBTOR—PETITIONER
versus
CHANDRA MOHAN ROY—DECREE-HOLDER—OPPOSITE PARTY.

Burden of proof—Occupancy holding, attachment of, in execution of money-decree—Burden on decree-holder to show transferability of holding.

When a decree-holder for money wants to sell an occupancy holding belonging to his judgment-debtor in execution of the decree, the onus of proof is on him to establish that the holding is transferable by custom or local usage.

Bhiram Ali Shaik v. *Gopi Kanth Shaha*, 24 C. 355; 1 C. W. N. 396, followed.

Rule against an order of the District Judge of Noakhali, setting aside that of the First Munsif of Sudharam.

Babu *Ram Doyal Dey*, for the Petitioner.

Babu *Bhudev Chandra Roy*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court of Appeal below, in reversal of an order of the Court of first instance, has directed the confirmation of a sale of an occupancy holding in execution of a decree for money, at which the decree-holder himself became the auction-purchaser. The sale was impeached as irregular and fraudulent, and was also attacked on the ground that the holding was non-transferable. The Courts below have concurrently held that the allegations of fraud and irregularity have not been established Upon the question of transferability of the holding, the primary Court held that the burden was upon the decree-holder to establish that the property was saleable, specially as the judgment-debtor had, before the sale, taken the objection and as the decree-holder had failed to discharge the onus, that Court set aside the sale. On appeal, the District Judge has taken what he calls a novel view, namely, that the onus is upon the judgment-debtor to prove the objection that the holding is non-transferable, and as in his opinion this has not been established, he has set aside the order of the Original Court. This order, in our opinion, cannot possibly be supported.

It is obvious that the burden of proof was on the decree-holder to establish that the occupancy holding was transferable by custom or local usage, as was laid down in the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (1). It is further clear that it was incumbent upon the judgment-debtor to urge this objection before the sale, if he was aware of the execution proceedings, as was laid down in the case of *Durga Charan Mandal* v. *Kali Prosanna Sarkar* (2). The objection, as a matter of fact, was taken before the sale but was not decided. The objection was urged again after the sale and prevailed in the Court of first instance. The District Judge, however, in appeal has held that the burden of proof was upon the judgment debtor. In this view he was clearly in error.

We may add that the petitioner has sought our interference in revision, inasmuch as a second appeal is barred under section 102 of the Code because the decree in execution of which the sale took place was made in a suit for money valued at less than Rs. 500 [*Narayan Permanand* v. *Nagindas Bhaidas* (3), *Mavula Ammal* v. *Mavula Maracoir* (4), *Sri Bullov Bhuttacharjee* v. *Baburam Chattopadhya* (5), *Lala Kandha Pershad* v. *Lala Lal Behari Lal* (6).]

The decree-holder auction-purchaser, however, has contended that this Court should not interfere, in view of the unexplained delay after which this application has been made. There is considerable force in this contention, but in view of the fact that the District Judge has based his conclusion on grounds entirely contrary to what has been the settled rule embodied in judicial decisions to which his attention does not appear to have been drawn, we are constrained to set aside his decision. But while we make the Rule absolute, we direct the petitioner to pay the opposite party (who was justified in the circumstances to enter appearance and to oppose the application) two gold *mohurs* as the costs in this Court. We further direct that the petitioner be deprived of his right to claim restitution of profits of the property sold in respect of

(1) 24 C. 355; 1 C. W. N. 396.
(2) 26 C. 727; 3 C. W. N. 586.
(3) 30 B. 113; 7 Bom. L. R. 641.
(4) 30 M. 212; 17 M. L. J. 376.
(5) 11 C. 169.
(6) 25 C. 872.

the possession of the opposite party up to this date. The costs payable under this order will be added to the decretal sum. The result of our decision will be that the sale will stand cancelled, the application for execution will be revived and the decree-holder will be at liberty to proceed with execution on the basis thereof.

Rule made absolute.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1333 OF 1913.

January 20, 1914.

Present:—Mr. Justice Scott-Smith.

DIWAN SINGH MINOR THROUGH *Musammat* JATTI—DEFENDANT—APPELLANT

versus

BISHNA—PLAINTIFF—*Musammat* SANTO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884) as amended by Act (IV of 1912), s. 40—Second appeal—Necessity—Previous mortgage.

Where a lower Appellate Court has found as a fact, after discussing each item of consideration, that no necessity has been proved, the Chief Court will not interfere with these findings on second appeal.

The fact that a previous mortgage is more than twelve years old is of no importance, unless it is shown that mutation with regard to it was effected more than 12 years before suit.

Second appeal from the decree of the Divisional Judge of the Sialkot Division, dated the 10th of June 1913, reversing that of the Subordinate Judge, 1st class, Sialkot, dated the 31st of January 1913, dismissing plaintiff's claim.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Nand Lal*, for the Plaintiffs-Respondents.

JUDGMENT.—I cannot see that there is any ground for a second appeal. The lower Appellate Court has decided that the mortgage was not for legal necessity; it has discussed each item and has found them to be not proved. I cannot go into its findings on question of fact. The previous mortgage in favour of Phula Singh is, no doubt, a little more than twelve years old, but it is not shown that mutation in regard to it was effected more than twelve years before the date of institution of the suit.

The appeal is dismissed with costs.

Appeal rejected.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 6 OF 1912.

April 6, 1914.

Present:—Mr. Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

MA AUNG BYU AND ANOTHER—DEFENDANTS APPELLANTS

versus

MAUNG THET HNIN—PLAINTIFF—RESPONDENT.

Buddhist Law—Divorce—Desertion—Convict, whether deemed to desert wife—Wife of convict taking another husband, effect of—Evidence—Arbitration proceedings—Clerk taking note of evidence—Note, whether admissible.

Under Buddhist Law a man sentenced to imprisonment is not to be deemed to have deserted his wife; nor does desertion *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage tie.

Therefore, the wife of a convict in possession of sufficient joint property to maintain herself and children is not entitled to take another husband to herself but if she does so, her conduct amounts to desertion and adultery and the husband on return is entitled to treat the marriage tie as at an end and to demand all the property.

Thein Pe v. *U. Pet*, 3 L. B. R. 175 (F. B.) and *Mam Thin* v. *Maung Kyaw Ya*, U. B. R. (1892), II, 96, referred to.

A note of evidence taken by a clerk in the course of abortive arbitration proceedings is not admissible in evidence.

Mr. *Hay*, for the Appellants.

Mr. *Dantra*, for the Respondent.

JUDGMENT.

TWOMEY, J.—The plaintiff-respondent, Maung Thet Hnin, was convicted of murder and sentenced to transportation for life in 1899; but in 1911 the remainder of his sentence was remitted and he was released. At the time of his conviction he left a wife Ma Aung Byu with four young children and the land and other joint property of the married couple was admittedly sufficient for the maintenance of Ma Aung Byu and the children. About three years after Thet Hnin's conviction Ma Aung Byu took another husband Kyaw Zan Hlaw with whom she has since lived. When Thet Hnin came back from transportation he demanded the joint property from Ma Aung Byu. She would agree only to give him a moiety of the joint property. There was a reference to arbitration, but nothing came out of it and Thet Hnin brought the present suit against Ma Aung Byu and Kyaw Zan Hla for th recovery of the property acquired during the marriage of Thet Hnin and Ma Aung Byu.

MA AUNG BYU *v.* MAUNG THET HNIN.

The plaintiff's case is that Ma Aung Byu had no right to take a second husband and that in doing so she was guilty of adultery and desertion. Ma Aung Byu, on the other hand, contends that she was entitled to take another husband when three years had elapsed from the time of Thet Hnin's conviction and that by taking a second husband she did not forfeit her share in the joint property.

There is no authority for holding that a man sentenced to imprisonment is thereby to be deemed to have deserted his wife. The Dhammathats do not provide for such contingency. But sections 242 to 249 and 393 of the Ex-Kinwum Mingyi's Digest deal with cases in which a husband goes on a journey or goes to war, and they show that the wife must wait indefinitely for her husband's return at any rate as long as she has adequate means of subsistence from the joint estate. Having regard to the spirit of these rules I think it is clear that Ma Aung Byu had no right to take a second husband and I would accept the decision of the District Court that her conduct in doing so amounted to desertion and adultery. It has been held, however, that desertion does not *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage tie. [*Thein Pe* v. *U Pet* (1)]. We have, therefore, to consider when the marriage tie was actually dissolved. Was it dissolved by the act of Ma Aung Byu in taking a second husband or did it subsist until 1911 when Thet Hnin returned from transportation? The Upper Burma case *Mam Thin* v. *Maung Kyaw Ya* (2) is good authority for the view that the deserting party cannot claim a divorce by pleading the desertion and Sir Harvey Adamson expressed himself in favour of the same view in *Thein Pe* v. *U Pet* (1) though the point was not decided in that case. I would follow the interpretation adopted by the learned Judicial Commissioner, Upper Burma, and hold that the marriage tie between Thet Hnin and Ma Aung Byu was not dissolved by her action in deserting him, but subsisted until Thet Hnin was released from Jail and demanded the joint property from Ma Aung Byu. By that express act he took his stand upon the fact of the desertion and treated his marriage tie with Ma Aung Byu as severed.

(1) 3 L. B. R. 175 (F. B.).
(2) U. B. R. (1892) II, 96.

It is admitted that in the case of a divorce on the ground of the wife's adultery the husband is entitled to all the property, and whereas in this case the husband treats the marriage as at an end on the ground of his wife's desertion and adultery there is no good reason to depart from the ordinary rule.

The District Court has decided that certain property to the value of Rs. 3,675 was in Ma Aung Byu's possession when she took Kyaw Zan Hla as her husband and a decree has been given against both the defendants-appellants for this property. As regards the Yindaw paddy land and the Payagon paddy land there is no dispute. The Kundaw garden land was admittedly bought in the interval between Thet Hnin's conviction and the second marriage and it was rightly treated as part of the joint estate. The house built by Ma Aung Byu at Kundaw was built before the second marriage and that also was rightly included in the joint property. The moveable property decreed in Thet Hnin's favour consisted of:

		Rs.
2 Tickals of gold valued	...	60
A cart	...	30
Cash	...	600
80 baskets of paddy	...	80
Debt paid by Ma To Le	...	500
Interest on this debt	...	150

As regard the gold and the cart and the paddy I think the value of these may be set against the expenses incurred by Ma Aung Byu in maintaining herself and the children after the second marriage. It is true that they also had the produce of the lands belonging to Thet Hnin. But even if this produce is taken into the account, the aggregate amount available for maintenance was not excessive. I would, therefore, disallow these three items of Rs. 60 and Rs. 30 and Rs. 80.

Against the amount of cash, Rs. 600, which was admittedly in Ma Aung Byu's hands should be set off the amounts which were given to the two eldest children when they were married. Po Chon received Rs. 150 and Ma Mya got jewellery to the value of Rs. 130: total Rs. 280. The item Rs. 600 should, therefore, be reduced to Rs. 320. I cannot agree with the District Judge that the defendants should pay Rs. 500 *plus* Rs. 150 in respect of the transactions with Ma To Le. In dealing with this item the learned Judge has relied on Ma Aung Byu's alleged admissions

in Exhibit B, a note of evidence taken by a clerk in the course of the abortive arbitration proceedings. Exhibit B was wrongly admitted in evidence. The proper course would have been to question Po Saw the writer, P. W. No. 2, as to what Ma Aung Byu said at the time. Po Saw could then have refreshed his memory by referring to Exhibit B under section 159, Evidence Act. As the case stands, Exhibit B must be excluded from consideration altogether. According to Ma Aung Byu's evidence she received interest at Rs. 30 per cent. per annum for two years on the loan of Rs. 200 to Ma To Le. In the third year Ma To Le failed to pay interest and gave her land in usufructuary mortgage for Rs. 500, which sum presumably consisted of the original debt of Rs. 200 *plus* one year's interest Rs. 60 *plus* cash Rs. 240, subsequently, a further sum of Rs. 300 was paid to Ma To Le who then sold the land outright to Ma Aung Byu and Kyaw Zan Hla. The second sum of Rs. 300 according to Ma Aung Byu was obtained by the sale of the produce of her lands. If it were proved that the additional advances paid to Ma To Le came out of the joint estate it would be reasonable to make Ma Aung Byu, who now has Ma To Le's land, refund the money to Thet Hnin. But there is no stisfactory proof on this point. Moreover Thet Hnin did not demand these amounts from Ma Aung Byu. He asked only for the original loan of Rs. 200. In the circumstances I would hold Ma Aung Byu responsible only for Rs. 200, the amount of the original loan to Ma To Le, and Rs. 60, the amount of interest which Ma To Le could not pay. Both these amounts were afterwards merged in the sum of Rs. 800 the price for which Ma Aung Byu took over the land from Ma To Le and I think she should pay these sums aggregating Rs. 260 to Thet Hnin as part of the joint estate.

I would, therefore, modify the decree of the lower Court by awarding to the plaintiff as against both defendants:

		Rs.
Yindaw paddy land valued at		1,600
Payagon paddy land	...	400
Kundaw garden land valued at		95
Kundaw house	...	160
Cash Rs. 320 *plus* Rs. 260	...	580

together with costs on the aggregate amount, Rs. 2,835.

I see no sufficient reason to allow the defendants' costs on the difference between the amount decreed and the amount Rs. 5,595 at which the relief claimed was valued in the plaint. The Court-fee payable on the plaint is Rs. 305 of which, however, only Rs. 170, the Court-fee on the amount now decreed, is payable by the defendants. The difference must be paid by the plaintiff. The Court-fees recoverable from the parties will be a first charge on the property decreed.

HARTNOLL, OFFG. C. J.—I concur.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 453 OF 1913.

February 26, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Seshagiri Iyer.

BHAVARAJU VENKATA SUBBA RAO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Sri Raja YENUMULA MALLU DORA GARU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (Mad. Act I of 1908), s. 60 *Sch., part A, Art.* 8—*Arrears of rent—Limitation—Time runs from end of* fasli—*Suit for possession—Limitation not saved.*

For a suit for arrears of rent under the Madras Estates Land Act limitation begins to run from the end of the *fasli*, when, in the absence of any contract to the contrary, the rent becomes payable. The pendency of a suit for possession does not save the limitation for the rent suit.

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suits Nos. 216 and 226 of 1912, preferred against that of the Deputy Collector, Ellore Division, in Second Suit No. 494 of 1911.

Mr. *B. Somayya* for Mr. *P. Narayanamurti* (with him Mr. *P. Somasundaram*), for the Appellants.

Mr. *V. Ramadoss*, for the Respondent.

JUDGMENT.—The decree of the lower Court, in so far as it awards arrears of rent which became due more than three years before date of suit, cannot be supported. Under Article 8, part A of the Schedule to the Madras Estates Land Act, the landholder must bring the suit within three years of the date when the arrear became due. The rent

in the absence of any contract to the contrary, became payable at the end of the *fasli* and, under section 60 of the Madras Estates Land Act, it then became an arrear of rent. Limitation commenced to run from that date. The pendency of the suit for possession is of no avail as it was open to the plaintiff to claim the rent due to him. See *Huro Pershad Roy* v. *Gopal Das Dutt* (1).

The decree of the District Judge is modified and the decree of the Sub-Collector is restored as regards the claim for *faslis* 1310 to 1317. The decree is confirmed as regards the other *faslis* 1318 to 1320. The plaintiff is entitled to interest for the rent due for these *faslis*. The parties will have their proportionate costs in this and in the lower Appellate Court.

Decree modified.

(1) 9 C. 255 (P. C.); 12 C. L. R. 129; 9 I. A. 82.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 349 OF 1912.

January 20, 1914.

Present:—Mr. Justice Lindsay.

Sheikh ABDUL RAHMAN—PLAINTIFF—APPELLANT

versus

KALE KHAN—DEFENDANT—RESPONDENT.

Oudh Laws Act (XVIII of 1876), *s.* 7—*Pre-emption —Presumption, statutory*—Wajib-ul-arz, *interpretation of—Claim for pre-emption relating to village decreed in absence of any defence as to non-prevalence of such custom whether establishes custom in village.*

The presumption as to a right of pre-emption is, in Oudh, a statutory presumption created by section 7 of the Oudh Laws Act which lays down that such a right is, in the absence of any custom or contract to the contrary, presumed to exist.

Where the entry in a *Wajib-ul-arz* stated that every co-sharer in the village was entitled to sell his share to whomsoever he liked:

Held, that the above entry was sufficient proof of a custom excluding the right of pre-emption in the village.

Where in a previous suit relating to a village a claim for pre-emption had been put forward and allowed, and it was contended in a subsequent suit for pre-emption relating to the same village that the previous decision proved the existence of the custom of pre-emption in the village, but it was found that in the previous suit no defence like that in the subsequent suit was put forward to the effect that the custom did not obtain in the village:

Held, that the above previous decision could not establish the custom of pre-emption in the village.

Appeal against the order of the District Judge, Lucknow, dated 23rd April 1912, upholding that of the Officiating. Munsif, North Lucknow, dated 14th August 1911.

Babu *Rajeshari Prasad*, for the Appellant.

Mr. *Wasim*, for the Respondent.

JUDGMENT.—The only point for determination in this case is whether or not a right of pre-emption should be presumed to exist in *Mouza* Dewamau, the village in which the property in suit is situated. The suit was one for pre-emption and one of the defence set up was to the effect that no custom of pre-emption prevailed in the village. This presumption of a right of pre-emption is a statutory presumption which has been created by section 7 of the Oudh Laws Act. That section lays down that a right of pre-emption is presumed to exist unless the existence of any custom or contract to the contrary is proved. In the present case an entry in the *Wajib-ul-arz* was put forward as proof of a custom to the contrary. The Courts below have held that this entry is proof of such a custom and that the presumption is thus over-turned. The words in the *Wajib-ul-arz* upon which reliance has been placed are as follows:—"*her ek hissadar ko apne hissa ke intikal ka bazarie bai ke ikhtiyar hai ki jiske hath chahe bai kare.*" Two cases have been referred to in the judgment of the Court of first instance, cases in which language similar to the language just set out has been held by this Court to be sufficient proof of a custom excluding the right of pre-emption. One of these cases is *Bholai Singh* v. *Toli Singh* (1) decided by Mr. Tracy on the 22nd of September 1885. The second case is *Sajjad Ali* v. *Lachman Prasad* (2) decided by Mr. Chamier on the 20th of August 1898. In this latter case Mr. Chamier refers to the decision of Mr. Tracy, and in the case before him in which the words used were somewhat similar to the words mentioned above he held that the clause in the *Wajib-ul-arz* was as clear as it could possibly be and that he

(1) Miscellaneous Appeal No. 132 of 1885.

(2) Second Civil Appeal No. 127 of 1896.

had no doubt that it was intended to record the fact that no right of pre-emption prevailed in the village. In the case before Mr. Chamier the wording was somewhat stronger than the wording of the clause of the *Wajib-ul-arz* now under discussion, for there were the words "*Kuch kaid hissadaran gaon ki nahin hai.*" Mr. Chamier compared this language with the language in the *Wajib-ul-arz* which was before Mr. Tracy and although the language of the clause in the case before him was stronger than in the case before Mr. Tracy, he held that Mr. Tracy's view of the law should be followed. I have been referred to a third case (First Civil Appeal No. 29 of 1906) which was decided on the 30th of May 1906 in which the language of the *Wajib-ul-arz* is exactly the same as in the case now before me. Mr. Griffin, who decided the case, relied upon Mr. Tracy's decision referred to above and was of opinion that such a clause in a *Wajib-ul-arz* was sufficient proof of the fact that no custom of pre-emption prevailed. The learned Counsel for the appellant has urged very strongly that the view taken in these decisions should be re-considered, but I am not inclined to disturb a course of authority which has obtained in this Court since the year 1885. The learned Counsel for the appellant also pointed to the fact that in one case relating to this village a claim for pre-emption had been put forward and allowed. It would appear that in that particular case no defence was put forward to the effect that the custom did not obtain in the village: so it cannot be said that this single instance is of any particular value to establish the case for the plaintiff that the custom does not prevail.

I think the decision of the Court below is perfectly right and I dismiss the appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL SECOND APPEALS NOS. 705 AND 706 OF 1912.

February 24, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

HARI ANNAJI DESHPANDE—APPELLANT

versus

VASUDEV JANARDHAN SATBHAI—RESPONDENT.

MAIBAI—APPELLANT

versus

BAGUBAI—RESPONDENT.

Hindu Law—Mitakshara *in Bombay Presidency—Succession—Sister and son of half brother*—Res judicata—*Co-defendants.*

According to the *Mitakshara*, as understood in the Bombay Presidency, the sister comes next after the grandmother and *a fortiori* after the half brother's son in the order of succession.

Bhagwan v. *Warubai*, 10 Bom. L. R. 389; 32 B. 300, followed.

In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants and that there was a judgment defining the real rights and obligations of the defendants *inter se.*

Ram Chandra Narayan v. *Narayan Mahadeo*, 11 B. 216, referred to.

Second appeals from the decision of the District Judge of Ahmednagar, in Appeals Nos. 32 and 31 of 1911, reversing the decree passed by the Joint Subordinate Judge at Ahmednagar, in Civil Suit No. 776 of 1910.

Mr. *K. H. Kelkar*, for the Appellants.

Mr. *D. R. Patwardhan*, for the Respondent.

JUDGMENT.—Two points of law have been urged in these second appeals, *firstly*, that a full sister is a nearer heir than a son of a separated half-brother according to Hindu Law, and *secondly*, that the question of heirship is *res judicata* in favour of the sisters.

As regards the first point, the competition is between the full sisters of the deceased Bhagwan and the son of his separated half-brother. The parties are admittedly governed by the Mitakshara and not by the Mayukha. The sister has been recognised as an heir under the Mitakshara by this Court in several cases, and it is beyond dispute that she is an heir under the Mayukha. The dispute really is about the position to be given to her in the list of heirs according to the Mitakshara.

This identical question has been fully considered and decided in *Bhagwan* v. *Waru-*

HARI ANNAJI DESHPANDE *v.* VASUDEV JANARDHAN SATBHAI.

bai (1). We are bound by this decision, and in spite of an attempt made by the learned Pleader for the appellant to question its correctness, I see no reason to doubt it. All the texts and the decided cases bearing on this question have been subjected to a critical examination in *Bhagwan's* case (1) and in the earlier case of *Mulji Purshotum* v. *Oursandas Natha* (2) which was a case under the Mayukha. It is needless to discuss them here over again.

While expressing my concurrence with the conclusion arrived at in *Bhagwan's* case (1), I shall briefly deal with the argument which has been pressed on behalf of the appellant on this occasion. Mr. Kelkar for the appellant concedes, and it must be conceded, that the sister has not been mentioned as an heir at all in the Mitakshara. He does not press for Balambhatta's interpretation of the word *bhratarah* in Yajnavalkya's text, as this Court has refused to accept Balambhatta's view, as it involves a complete departure from the order of succession accepted and advocated by Vijnaneshvara, and as it has been repudiated by Nilkantha in the Vyavahara Mayukha. But it is strenuously argued that the sister has been recognised as an heir under the Mitakshara as understood in this Presidency, mainly on account of her having been expressly mentioned as an heir by Nilkantha, and that, therefore, under the Mitakshara she should be given the same position in the order of succession, as has been given to her under the Mayukha. It is argued that as she comes before the half-brother under the Mayukha, she must come in before the half-brother under the Mitakshara, *i.e.*, before the brother's son, as the brother's son comes after the half-brother according to Vijnaneshvara. In my opinion this is a wholly untenable position. It is practically impossible to assign to the sister the same relative position in the list of heirs under the Mitakshara, as has been assigned to her under the Mayukha. Nilkantha gives her a distinct and definite position and brings her in after the grandmother and before the half-brother. Vijnaneshvara, however, gives a much higher place to the half-brother in the order of succession, and in several respects his order of succession is different from that adopted by Nilkantha. It is, therefore, clear that the sister cannot be placed after the grandmother and before the half-brother or before the brother's son at the same time under the Mitakshara. In fact it is not reasonably possible to reconcile the Mitakshara and the Mayukha so far as the relative position of the sister in the compact series of heirs is concerned.

There is a further difficulty in accepting the appellant's argument. It is not possible to place the sister before the half-brother without disturbing the compact series of heirs laid down by Vijnaneshvara. It is not right to disturb this compact series by introducing an heir who is not expressly mentioned by Vijnaneshvara.

Lastly it was urged that the sister cannot be included among the *gotrajas* as understood by Vijnaneshvara and, therefore, she cannot be appropriately brought in anywhere unless she is placed before the half-brother. But I do not see any force in this argument, as Nilkantha in bringing the sister in after the grandmother says that she has all the qualifications of a *gotraja*. After all the sister has been recognised as an heir under the Mitakshara even though not mentioned by Vijnaneshvara, mainly because Nilkantha has expressly assigned her a high place in the list of heirs. There is nothing to render Nilkantha's view that she has the qualifications of a *gotraja* inapplicable to the Mitakshara.

Quite apart from the consideration, however, whether under the Mitakshara the sister can be included among the *gotrajas* or not, it is clear that the sister cannot be placed higher than the grandmother. It has been held in *Rudrappa* v. *Irawa* (3) that she cannot be ranked any lower. The result, therefore, is that under the Mitakshara she comes next after the grandmother and *a fortiori* after the half-brother's son.

The second point relates to *res judicata*. In the previous litigation one Bhagirthibai, widow of Rangnath was the plaintiff. She had filed a suit to recover the arrears of maintenance and the possession of a part of the family house for residence from

(1) 10 Bom. L. R. 389; 32 B. 300.
(2) 2 Bom. L. R. 721; 24 B. 563.
(3) 5 Bom. L. R. 676; 28 B. 82.

Wasudeo, the separated brother's son, and the three full sisters of Bhagwan. Wasudeo, defendant No. 1, and one of the sisters, defendant No. 3, did not appear in the suit. The second sister, defendant No. 2, did not put in any written statement. The claim was contested by the third sister, defendant No. 4, on the ground that defendant No. 1 was in possession of the property. Though it was assumed by the trial Court in that case that the sisters—and not the nephew—would inherit Bhagwan's property, the question of heirship was neither raised nor decided. The present contesting parties were all arrayed as defendants in that suit. The defendant No. 1, Wasudeo, appealed against the decree, and it is significant to find that the sister co-defendants were not made parties to the appeal. The Appellate Court passed a decree against the joint family estate of Martand without deciding any questions relating to the defendants *inter se*. It was made clear in the decree by the Appellate Court that it would be open to defendants Nos. 2, 3 and 4 (*i.e.*, the sisters) to sue the first defendant in respect of any alleged wrongful possession during previous years. In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants and that there was a judgment defining the real rights and obligations of the defendants *inter se:* see *Ramchandra Narayan* v. *Narayan Mahadev* (4). On looking at the judgments in the previous litigation, it does not appear that the point as to who was Bhagwan's heir was really raised by the parties. At any rate the point was certainly not decided. Under these circumstances it is clear that the question of heirship is not *res judicata*.

In my opinion both the points fail, and the decree of the lower Appellate Court in each case is confirmed with costs.

HEATON, J.—I am quite satisfied on a perusal of the judgment in, and on a consideration of the circumstances of, the previous litigation that there is no *res judicata* here. Further, I am prepared to follow as an authority the case of *Bhagwan* v. *Warubai* (1). In the obscurity which lies around these matters where the Mitakshara and Mayukha are in conflict, it seems to me that when a clear and definite decision has once been arrived at, that decision ought to be maintained and followed.

I, therefore, concur that both these appeals should be dismissed and the decrees of the lower Appellate Court confirmed with costs.

Decree confirmed.

(4) 11 B. 216.

MADRAS HIGH COURT.

APPEALS NOS. 128 AND 210 OF 1911.

January 21, 1914.

Present:—Mr Justice Miller and Mr. Justice Tyabji.

ACHARATH PARAKKAT KUNHAMMAD AND OTHERS—(DEFENDANTS NOS. 1 TO 5)—APPELLANTS IN APPEAL NO. 128 OF 1911 AND DEFENDANTS NOS. 1 TO 13, 15 TO 27 AND 29 TO 35 AND 18TH DEFENDANT'S L. R.—RESPONDENTS IN APPEAL NO. 210 OF 1911

versus

ACHARATH BAPPAN KARANAVAN AND MANAGER OF ACHARATH TARWAD—APPELLANT IN APPEAL NO. 210 OF 1911 AND RESPONDENT IN APPEAL NO. 128 OF 1911.

Practice—Bombay High Court—Admission Court excusing delay—Order subject to objection.

An order of the Admission Court excusing delay in the payment of deficient Court-fees on an appeal is, according to the practice of the High Court of Bombay, made subject to objection before the Court hearing the appeal and its decision thereon.

Appeals against the decree of the Court of the Subordinate Judge of North Malabar, in Original Suit No. 8 of 1911.

Mr. *T. R. Ramachandra Iyer*, for the Appellants.

Mr. *J. L. Rosario*, for the Respondents.

JDUGMENT.

MILLER, J.—Before we heard the appeal objection was raised on behalf of the defendants that the Appeal No. 210 ought to be dismissed as barred by limitation. The order of the Admission Court is, "Delay excused." Mr. Rosario contended that the Court ought not to have excused the delay. The question was raised whether we have power to set aside the order of the Admission

Court excusing delay. For my part, so far as my knowledge of the practice of the Court goes, what is done and what I have done sitting in the Admission Court is to make the order, sometimes expressly subject to objection, always with the knowledge that should objection be raised, it would be dealt with by the Court hearing the appeal, to make the order, that is to say, on such *prima facie* evidence as may be offered by the appellant and leave it to the Court hearing the appeal, should that order be challenged, to decide the question. I do not know whether this practice is a desirable one to follow, but I understand that to be the practice of the Court.

In the present case, to my mind, it is unnecessary to decide whether we have power to deal with the order of the Admission Court, because I came to the conclusion yesterday that there is no really good ground for saying that the delay ought not to have been excused.

Now, as regards the appeals, the learned Subordinate Judge has dismissed the suit in respect of all the items, except items 7 and 11, and with regard to one of them, item 4, he has held the suit is premature. I do not think it necessary to discuss the evidence or the nature of the suit. I think it is sufficient to say that in no case do I find sufficient reason for differing from the conclusion arrived at by the Subordinate Judge. It may be desirable to make it clear in the decree as regards shop No. 295, that that is the property which the *tarwad* is entitled to recover on the expiration of the lease, Exhibit LXXVI. Apart from that, I see no reason to interfere with the decree of the Subordinate Judge. I would dismiss both the appeals with costs.

One of Mr. Rosario's contentions was that the lower Court was wrong in calculating the proportionate costs payable to the plaintiff and has given him too much. He was unable to show us, if a mistake has been committed, how it has been admitted and, therefore, I do not see how we can interfere with the order of the lower Court as to the amount of costs payable. It seems to me that he should have applied or should, if that course is open, still apply to the Court below to amend the decree if it is arithmetically wrong or calculated on a wrong basis, but he has not shown us what, if anything, is wrong with it.

As regards the items claimed by Mr. Rosario in Appeal No. 128, I am unable to agree with his argument that in regard to item 7 there is enough to show that the ladies were entitled to retain the house in their possession and the site on which the house is built; and as regards compensation I think, in the circumstances, the amount of compensation awarded by the Subordinate Judge was justified. It was not a case of an ordinary tenancy, no rent was paid, and the Subordinate Judge was justified, in the circumstances, in awarding only the amount of the cost price of the house and not its value, if indeed its value be more than Rs. 1,300, which does not seem to be clearly found. We cannot interfere with the decision of the Subordinate Judge with regard to item 7.

As regards item 11 there is really no evidence on which we could say that the grant was different from what the Subordinate Judge finds it to be. So that in the result, as I have said, I would dismiss both the appeals.

TYABJI, J.—I agree.

As regards the preliminary objection, the interpretation put on the order excusing delay by my learned brother is based on his experience of the practice of the Court, and, of course, I accept his interpretation. I, therefore, understand the order to mean that in the Admission Court no final order was made with reference to the application. But the applying party was allowed to go on with the appeal, on the understanding that the question would really be decided and an order finally passed with reference to it by the Court hearing the appeal. I assume that an order of that kind can validly be made and if so, of course, the Court hearing the appeal would have finally to adjudicate upon it. In that case the facts would be very different from those with which we had to deal in Second Appeal No. 1045 of 1907 where there was an order setting aside the abatement of the suit under Order XXII, rule 9. I have nothing to add to what my learned brother has said with reference to the merits of the appeals and I agree that the appeals should be dismissed with costs.

Appeals dismissed.

MI AH PU MA *v.* MI HNIN ZI U.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 90 OF 1913.
January 16, 1914.
Present:—Mr. Justice Twomey.
MI AH PU MA—DEFENDANT—APPELLANT
versus
MI HNIN ZI U—PLAINTIFF—RESPONDENT.

Buddhist Law—Inheritance—Child taken away by divorced mother—Tie of relationship severed—To claim inheritance, tie to be strictly proved—Immaterial whether property ancestral or otherwise.

When a child is taken away by her divorced mother, the relationship of the child with her father for purposes of inheritance is *prima facie* severed, and if she afterwards lays a claim to a share in the inheritance, whether of ancestral or non-ancestral property, it has to be shown by plain and unmistakeable outward signs that the tie of relationship with her father was maintained.

It is presumed in the absence of special circumstances that the affairs of people divorcing and re-marrying are settled definitely at the divorce or re-marriage, and the presumption becomes very strong where a long period has elapsed since the divorce and the wife has never taken any steps to claim a share in the property taken by her divorced husband to the second marriage.

Mr. *Guha*, for the Appellant.

JUDGMENT.—Maung Kyaw Bon, deceased, was married to three wives in succession and left issue by each of them.

The plaintiff Ma Hnin Zi U is the daughter of the 1st wife, Mi Tun Kra Pru, who was divorced from Kyaw Bon when Ma Hnin Zi U was a small child. Kyaw Bon's second wife died about 10 years ago, leaving a son who is not a party to this suit. Kyaw Bon's 3rd wife is the defendant, Ma Ah Pu Ma.

Ma Hnin Zi U sued Ma Ah Pu Ma for a half share of certain land and a house left by Kyaw Bon. It has been found by both the lower Courts that this property was aquired by Kyaw Bon during coverture with Mi Tun Kra Pru, the plaintiff's mother.

At the time of the divorce, 16 or 17 years ago, Mi Hnin Zi U was taken away by her mother Mi Tun Kra Pru and never afterwards maintained filial relations with her father, Kyaw Bon. There is some evidence that she occasionally visited her father and took him fruit and other eatables, but it is admitted that she never spent a night in his house. It is clear that filial relations were not restored.

As to the terms of the divorce the evidence taken on remand shows that no partition of property was effected. As pointed out in *Shwe Lin* v. *Mi Nyein Bu* (1) it is presumed in the absence of special circumstances that the affairs of people divorcing and re-marrying are settled definitely at the divorce or re-marriage. This presumption is very strong in such a case as this where a long period has elapsed since the divorce and the wife has never taken any steps to claim a share in the property taken by her divorced husband to the second marriage. It seems probable in the circumstances that (as conjectured by the District Judge) Mi Tun Kra Pru bought her husband's consent to the divorce by abandoning her share of the joint property. This view is favoured by the evidence of the plaintiff's own witnesses, Ni Aung and Myat No, who state that it was Mi Tun Kra Pru who wanted the divorce. It does not appear that she had any marital fault to allege against her husband, and in such a case if she desired a divorce she would have to resign all claim to the joint property.

The present case is similar to that of *Ma Yi* v. *Ma Gale* (2) which was recently decided by a Bench of this Court and in which it was held that the plaintiff, Ma Yi, could not share in the property taken by her father to his second marriage, because she failed to prove that she had any filial relations with him after his divorce from her mother. The Township Court held that the rule as to the resumption of filial relations was inapplicable in the present case because the property in suit was ancestral property. This view is shown to be incorrect in the leading Upper Burma case *Ma Sein Nyo* v. *Ma Kywe* (3). When a child is taken away by her divorced mother the relationship of the child with her father for purposes of inheritance is *prima facie* severed, and if she afterwards lays claim to a share in the inheritance it has to be shown by plain and unmistakeable outward signs that the tie of relationship with her father was maintained. Mr. Burgess considered that this rule should be applied, whether the inheritance consisted of ancestral or non-ancestral property, and his reasons are stated in the following extract from the judgment:—

"The judgments of the Courts below do not explain clearly why the plaintiff is quali-

(1) S. J. 175.
(2) 19 Ind. Cas. 85; 6 Bur. L. T. 75; 6 L. B. R. 167.
(3) U. B. R. (1892-98) Civil p. 159; 2 C. T. 360.

fied to inherit a share of that portion of her father's estate which has been distinguished as ancestral property and disqualified to inherit the other portion which has been found to be the joint property of himself and his wife, the defendant Ma Kywe. They have held that plaintiff has not maintained such a filial relation with her father as would entitle her to share in the joint property and subsequently it must be assumed that notwithstanding this failure of duty on her part, they consider that her claim to share in the ancestral property is not affected. It is apparently because plaintiff did not live with her father and assist in acquiring the property belonging to the second marriage that she has been excluded from the inheritance of such property, and this seems to involve the proposition that neglect of filial duty is immaterial when the inheritance claimed is not that of property acquired during the parent's last marriage, a proposition for which there seems to be no authority in Buddhist Law." I cannot find that this Court has ever taken a different view.

On these grounds I find that the plaintiff-respondent is not entitled to share in the property left by her father, Kyaw Bon. The decrees of the lower Courts are reversed and the plaintiff's suit is dismissed with costs in all Courts.

Decrees reversed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1 OF 1911.

January 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

C. W. SIMSON AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOKA JAGANNADHA ROW NAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), *s.* 73, *Ill.* (m)—*Damages, for breach of warranty—Vendee's previous contract with third person—No notice of this to vendor of goods—Vendor's liability.*

Where *A* entered into a contract with *B* in respect of unascertained goods, and afterwards entered into another contract with *C*, *C* not having been informed of the previous contract with *B*:

Held, that in a suit brought by *A* against *C* for damages sustained by *A* on account of the breach of warranty of quality, the proper basis for their calculation is the difference between the value of the goods as supplied and the market-value of the goods of the guaranteed quality on the date of breach, and not the special damages which *A* might have incurred through the breach committed by him of his own previous contract with *B* of which *C* had no knowledge;

(2) that illustration (*m*) of section 73 of the Contract Act (IX of 1872) did not apply, as in the illustration the sale was of ascertained goods and not of unascertained goods as in this case, and also the contract between *A* and *B* was made on the same occasion as that between *B* and *C*, and the basis of damages in both was to be the same.

Second appeal against the decree of the District Court of Godavari, in Appeal Suit No. 62 of 1907, preferred against that of the Subordinate Judge of Coconada, in Original Suit No. 53 of 1905.

Mr. *P. Narayanamurthi*, for the Appellants.

Mr. *K. Srinivasa Iyengar* (with him Mr. *M. Purushothama Naidu*), for the Respondents.

JUDGMENT.—We agree with the learned District Judge that the basis for the calculation of the damages sustained by the plaintiffs on account of the breach of warranty of quality committed by the defendants is the difference between the value of the goods as supplied and the market-value of the goods of the guaranteed quality on the date of breach and not the special damages which the plaintiffs might have incurred through the breach committed by them of their own contract made with a third person in respect of unascertained goods before the date of the contract with the defendants and of which contract no notice had been given to the defendants. Illustration (*m*) to section 73 of the Contract Act is not applicable as, on the facts mentioned in that illustration, the sale was of ascertained goods and not of unascertained goods as in this case. The contract between *A* and *B* in that illustration was made on the same occasion as that between *B* and *C* and the damages were to be apparently calculated on the very same basis as between *A* and *B* as they were to be as between *B* and *C*. Illustration (*a*) to section 73 is what exactly applies to this case.

The second appeal fails and is dismissed with costs.

The memorandum of objections is not pressed and is dismissed with costs.

Appeal dismissed.

THAKAR DAS *v.* RAM DAS.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1506 OF 1912.

December 17, 1913.

Present:- Mr. Justice Johnstone.

THAKAR DAS AND OTHERS—DEFENDANTS—PETITIONERS

versus

RAM DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 21—Award, revision of decree based on—Made without intervention of Court—Punjab Courts Act (XVIII of 1884), as amended by Act (IV of 1912), s. 70.

A decree based on a private award filed in Court is not open to revision by the Chief Court under section 70 of Act XVIII of 1884, as amended by Act IV of 1912.

Hansraj v. *Ganga Ram*, 8 P. R. 1902 (F. B.); 119 P. L. R. 1902; *Shankar Mal* v. *Nathu Mal*, 1 P. R. 1908 (F. B.); 58 P. W. R. 1907, followed.

A mere clerical error in an award can be put right by a Court under section 151, Civil Procedure Code of 1908.

Petition, under section 70 of the Punjab Courts Act, as amended by Act IV of 1912, for revision of the order of the Additional Divisional Judge, Shahpur Division, dated the 3rd July 1912, confirming that of the Subordinate Judge, Sargodha, dated the 31st May 1912, decreeing plaintiff's claim.

Messrs. *Nanak Chand* and *Gokal Chand Norang*, for the Petitioners.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—In this case litigation began by an application for filing an award and prayer for a decree upon it. This was contested but the claim was decreed in accordance with the award. Appeal was made to the Court of the Additional Divisional Judge, who went into the merits but also held that no appeal lay. Revision is now asked for here, and Mr. Nand Lal puts in a preliminary objection that no revision lies, and also an objection that, if it does lie, it has abated. In my opinion both of these objections are valid.

As regards the first point Mr. Nand Lal relies upon *Hansraj* v. *Ganga Ram* (1) and *Shankar Mal* v. *Nathu Mal* (2), which Mr. Nanak Chand tries to meet by contending (*a*) that the agreement to refer to arbitration was in itself invalid and, therefore, the award is a nullity;

(*b*) that the proceedings of the arbitrators were irregular;

(*c*) that the delay in delivering the award and the circumstances of the reference make it clear that no arbitration was really intended by the parties;

(*d*) that the award is so grossly unfair to his clients as in itself to show misconduct;

(*e*) that in connection with the partition of the *sehdara* the award is unintelligible on the map.

None of these contentions has any validity. The agreement to arbitrate is not on the record and, therefore, we have no intrinsic evidence that it is invalid: if petitioners wished to rely on any intrinsic evidence they should have got that document on the record. The objection may be taken up in connection with (*c*). The contention really is that at the time of the agreement the parties were on bad terms and the Police began to take proceedings under section 107, Criminal Procedure Code, for the protection of the public peace; and that the agreement to arbitrate was merely a pretence to throw dust in the eyes of the authorities. It is argued that the long delay in the delivery of the award shows that this was so. Let it be granted for argument's sake, that the arbitration was undertaken to put a stop to Police interference. Even so, it does not follow that a serious arbitration was not intended. The family was at sixes and sevens, and the house, being joint property, could not be left as it was, if any of the family was to have any comfort in it. In my opinion the arbitration was a genuine affair; if it had not been why did Harbhagwan, one of the petitioners, long after the section 107 case had blown over, actually join in the proceedings? The delay in issuing award is fully explained in the judgment of the lower Appellate Court.

Contention (*e*) is based on a mere clerical error, which the Court might have amended in its decree. "South" has been written for "North." This can be put right now by order of this Court under the powers conferred by section 151, Civil Procedure Code.

It is doubtful whether contentions (*b*) and (*d*) come into the question whether revision is competent or not; but as they have been put forward, I will deal with them. I can find no irregularity in the proceedings of the arbitrators. Harbhagwan, as stated above, was present at part at least of the proceedings, and his fellow-petitioners

(1) 88 P. R. 1902 (F. B.); 119 P. L. R. 1902.
(2) 1 P. R. 1908 (F. B.); 58 P. W. R. 1907.

could have been present had they cared to be so. As to (*d*), no doubt, Ram Das, respondent, has got under the award much more than the ordinary share of a son; but this was not done arbitrarily, without show of reason, by the arbitrators, who explain that when the father of the family separated off the petitioners, he kept a part of the house for himself and remained joint with Ram Das, and that by custom the share a father thus keeps with himself goes after his death to the son who remains joint with himself. It is immaterial that on the record there is no proof of such a custom: all we are concerned with is that *prima facie* the award was given in good faith. It follows that the two rulings quoted above fully apply and no revision lies.

I would thus find for Ram Das, respondent, and it is unnecessary to discuss at length the matter of the abatement of the revision, which would probably require a remand for its complete elucidation.

I dismiss the petition with costs.

Petition dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 244 OF 1911.

January 30, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

T. P. KOTHANDAPANI NAIDU—APPELLANT

versus

KUPPUSAWMY NAICKER AND OTHERS—RESPONDENTS.

Execution—Application by subsequent transferee of decree—Objection by judgment-debtor—Court's duty to inquire.

Where a subsequent transferee of a decree applies for the execution of the decree, and the judgment-debtor contends that the transfer is fraudulent, that the prior transferee owes him a sum of money and that the subsequent transferee took the assignment with the notice of his claim, the Court should inquire into the contentions and find upon them and should not summarily *refuse* to recognise the assignment.

Appeal against the order of the Subordinate Judge of Negapatam, dated the 7th July 1911, in Execution Petition No. 88 of 1911, in Original Suit No. 40 of 1903.

Mr. *S. Srinivasa Iyengar*, (with him Mr. *K. V. Krishnaswamy Aiyer*), for the Appellant.

Mr. *G. S. Ramachandra Aiyer*, for the Respondent.

JUDGMENT.—The appellant claims to execute the decree which, he says, has been transferred to him by a person who is himself an assignee of the original decree-holders. The 4th respondent, who is the judgment-debtor, contends that the decree itself is fraudulent, that the transferor of the present applicant is bound to pay him a certain sum of money which he is entitled to set-off against the decree-debt and the applicant, who is the son-in-law of the transferor, took the assignment with notice of his claim and that he had already instituted a suit against the transferor.

The lower Court, without deciding any of the questions in issue between the parties, held that the assignment should not be recognised as it was made after notice of the suit by the 4th respondent. We think this order is not right. We are of opinion that the Subordinate Judge should decide whether the transfer is valid and the petitioner entitled to execute the decree.

We, therefore, set aside the order of the Subordinate Judge, and direct him to restore the petition to his file and dispose of it according to law. Costs will abide the result.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 998 OF 1912.

November 13, 1913.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

A. R. ISWARAM PILLAI—PLAINTIFF—APPELLANT

versus

S. TAREGAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 2 (d)—Consideration—Third person's right to sue—Creditor and debtor—Debtor mortgaging property and directing mortgagee to pay creditor—Right of creditor to sue mortgagee upon basis of direction in mortgage-deed.

ISWARAM PILLAI v. TAREGAN.

S, a debtor of *B*, executed a hypothecation bond in favour of *C* for a consideration including the amount of the debt, which was kept with *C* to be paid to *B*. *B* sued *C* to recover the amount:

Held, that the plaintiff, being no party to the hypothecation bond, could not enforce it.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 406 of 1911, preferred against that of the District Munsif of Ambasamudram in Original Suit No. 582 of 1910.

Mr. *R. Narasimha Rao*, for Mr. *T. M. Krishnaswami Aiyar*, for the Appellant.

Mr. *S. Ramaswami Aiyar*, for the Respondent.

JUDGMENT.

TYABJI, J.—The plaintiff sues for a decree for a sum of Rs. 610, which includes the principal sum of Rs. 450 and interest. This sum is claimed as due on a hypothecation bond purporting to be executed on the 27th August 1907 to which the plaintiff was not a party, but which was executed by one Sahib Sheik Uduman Tharagan in favour of the 1st and 2nd defendants and of the father of the 3rd and 4th defendants, whom I shall refer for brevity as the defendants. Sheik Uduman Tharagan, the executant of that bond, was a debtor of the plaintiff and he asked the defendants (in terms to which I shall immediately refer) to pay off the sum of Rs. 450, which was due from Sheik Uduman Tharagan himself to the plaintiff.

The material portions of the hypothecation bond are as follows:—"The hypothecation bond executed on the 27th August 1907 to defendants..... the sum received on the hypothecation to you of the following properties belonging to me.....", then the particulars of the Rs. 2,000 are given which includes the following item "a sum of Rs. 450 is kept with you in order to be paid to and get a receipt from ..... the plaintiff" on account of the balance "due to him in respect of the purchase of yarn."

It will thus be seen that the plaintiff claims to have a contract enforced, to which he was not a party but which was entered into between his debtor and the defendants.

The defence is *first*, that the plaintiff being a stranger to the contract could not sue on it; and *secondly*, that, though the consideration for the hypothecation bond was originally fixed at Rs. 2,000, (including the payment of the sum now in question), yet that agreement was modified by a notice given by the defendant's Vakil 20 days after the date of the hypothecation bond; and that subsequent to that notice even as between the said Sheik Uduman and the defendants there was no contract that the defendants should pay the said sum to the plaintiff and that the charge created by the hypothecation in favour of the defendants was effective only in so far as the consideration had actually passed between the parties thereto at the date of the said notice, *viz.*, for Rs. 1,250. The endorsement of the hypothecation bond and a decree, Exhibit 4, which refers to it are relied upon as evidence of this modification of the terms of the hypothecation bond.

Both the lower Courts have dismissed the suit and the learned District Judge in doing so said, "the only question argued is whether there was privity of contract between the plaintiff" and the defendants.

It was argued before us that plaintiff was entitled to sue on the contract notwithstanding that he was not a party to it——and mainly on two grounds. The first argument was that by the terms of the hypothecation bond it was agreed that a trust should be created in favour of the plaintiff, and that if this was so the plaintiff could enforce the agreement. In the second place it was argued that the general rule of law that a person who is not a party to a contract cannot become entitled by that contract to demand the performance of any duty under it was no more applicable in India after the decision of the Privy Council in *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begam* (1) especially as that decision is explained and applied in *Deb Narain Dutt* v. *Ram Sadhan Mandal* (2), a decision of Sir Lawrence Jenkins, C. J., and Sir Asutosh Mukerjee, J., of the Calcutta High Court. It seems to me, however, that what were put forward as two distinct heads of arguments were in the circumstances of the present case indistinguishable and that both depend upon the consideration of the same

(1) 7 Ind. Cas. 237; 32 A. 410; 14 C. W. N. 865; 7 A. L. J. 871; (1910) M. W. N. 313; 8 M. L. T. 147; 12 C. L. J. 205; 12 Bom. L. R. 638; 20 M. L. J. 614; 37 I. A. 152.

(2) 20 Ind. Cas. 630; 17 C. W. N. 1143; 18 C. L. J. 603; 41 C. 137.

question. For it is admitted that if the terms of the hypothecation deed are given effect to in their entirety, the plaintiff would receive the money from the defendants. The consideration of the question whether the plaintiff is entitled to have the terms of the hypothecation deed enforced is not, it appears to me, materially advanced by determining whether, if they were enforced, the money would be payable to the plaintiff through a trust or otherwise, or, to use the terms of the Trusts Act, by determining whether the defendants agreed to annex to their ownership of the money the obligation of paying it to the plaintiff or he merely agreed to pay it to the plaintiff. Assuming that the money would be payable through a trust, the question would still remain whether the plaintiff can require that the trust should be completed. Assuming, in other words, that when the defendants agreed to pay to the plaintiff the sum claimed, they agreed to become the trustees of the plaintiff, the question still remains whether that agreement can be enforced by the plaintiff. Every trust requires at its creation an agreement between the trustee and the author of the trust (See section 10, Trusts Act.) It is true that such an agreement is not always expressed, but is often implied, and in the case of constructive trusts it may be imposed upon a person against his will. Here it is evident that it is sought to be imposed against the Will of the alleged trustee. It is necessary to mention that in the present case the trust can be imposed only if the agreement is enforced at the instance of the plaintiff, for here there is no property transferred to the defendants of which they agreed to become trustees, but all they agreed to do was at the most to allocate a certain sum in their own hands and to make that sum the trust fund. The principle of constructive trust can have no bearing on this point, for it cannot be contended that if *A* agrees with *B* to become a trustee for *C* the mere agreement between *A* and *B*, even if *B* afterwards repudiates it (and if *A* consents to such repudiation), will make *B* a constructive trustee for *C*. An agreement to become a trustee is not for the purposes of the present case and in respect of its enforceability distinguishable from an agreement to pay a sum of money. In such cases the trust can arise only after the contract has been performed; until the trust arises it is merely a contract to create a trust and so long as the trust is not complete it is what in another connection is called an executory trust as distinguished from an executed trust; and until the trust is executed there will be no trustee but only some person possibly "in progress towards being a trustee" [in the words used by Sir Thomas Plumer in *Wall* v. *Bright* (3)]. Even after he has completed his progress of being a trustee he may occupy a position such as the vendor in *Shaw* v. *Foster* (4) was held to occupy. That position is thus described by Earl Cairns: "The trustee was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property,—a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." (Page 338.)

The present case for these reasons seems to me to be quite different from others where a trust has already been created and the beneficiary seeks to enforce it.

I come, therefore, to consider whether the agreement referred to can be enforced at the instance of the plaintiff. In the decision of the Privy Council in *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begam* (1) the parents of a bride and bridegroom (who were both minors) entered into an agreement which the bride sought to enforce by suit. The marriage was recited as the cause leading up to the agreement. Their Lordships allowed the suit on the following grounds: "(1) that *Tweddle* v. *Atkinson* (5) was an action of assumpsit, and that the rule of Common Law on the basis of which it was dismissed is not..... applicable to the facts and circumstances of the case." Theystate, apparently, as the reason

(3) (1820) 37 Eng. Rep. 456; 1 J. and W. 494; 21 R. R. 219.

(4) (1872) 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907.

(5) (1861) 124 R. R. 610; 1 B. and S. 393; 30 L. J. Q. B. 265; 8 Jur. (N. S.) 332; 4 L. T. 468; 9 W. R. 781; 121 Eng. Rep. 762.

why *Tweddle* v. *Atkinson* (5) did not apply, (2) that the agreement executed by the defendant specifically charged immoveable property for the allowance which he bound himself to pay to the plaintiff; (3) that the plaintiff was the only person beneficially interested under it, and from this they draw the conclusion (4) that "although no party to the document, she was clearly entitled to proceed in equity to enforce her claim." After this they remark, (5) "in India and among communities circumstanced as the Muhammadans among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common Law doctrine were applied to agreements or agreements entered into in connection with such contracts." Their Lordships do not refer to section 23 of the Specific Relief Act which provides that "where a contract is a settlement on marriage—any person beneficially entitled thereunder" may obtain specific performance of the contract.

It seems to me that none of the circumstances on which their Lordships based their decision are present in the case now before us. The facts in *Deb Narain* v. *Ram Sadhan Mandal* (2) are somewhat similar to the facts of the case with which we are dealing; but there were present in that case certain very material circumstances which are not present here: (1) all the parties to the contract sued upon were on the record; (2) the contract was communicated to the plaintiff and he accepted the arrangement; (3) in consideration of such acceptance the plaintiff handed over a *patta* which had been deposited with him under the impression that by so depositing it a charge was created on the property in his favour; (4) by the agreement sued upon the plaintiff's debtors had parted with the whole of their property in moveable and immoveable to the 5th defendant; (5) the sum sued for "was allocated and held by defendant No. 5 for the benefit of the plaintiff so that in a sense the money was reified and earmarked for this purpose." Sir Lawrence Jenkins with reference to these facts states: "We have here then a position in which it would be, in accordance with the principles of justice, equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce this claim against defendant No. 5." Then he states that *Tweddle* v. *Atkinson* (5) does not bind the Indian Courts because (1) that decision was "on a form of action peculiar to the Common Law Courts in England and was influenced by the fact that no action in assumpsit could be maintained upon a promise unless the consideration moved from the party to whom it was made," whereas under the Indian Contract Act, section 2 (*d*) we have a definition of consideration, which is wider than the requirements of English Law; (2) Sir Lawrence Jenkins' second reason is stated in the following terms: "We now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle* v. *Atkinson* (5). That I take to be the result of the decision of the Privy Council in a recent case which is reported as *Nawab Khawaja Muhammad Khan* v. *Husaini Begam* (1). In the report of that case in the Calcutta Weekly Notes there is an interlocutary remark of Lord Macnaghton which indicates the limits imposed on a Court of Common Law. He there says: 'Supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in equity?' The answer of the learned Counsel was 'yes'....The bar then in the way of an action by the person not a direct party to the contract was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience." (3) After that Sir Lawrence Jenkins refers to three cases *Gregory* v. *Williams* (6), *Touche* v. *Metorpolitan Railway Warehousing Company* (7) and *Gandy* v. *Gandy* (8). And finally he concludes by saying "there is a valuable exposition of the law by Lord Hatherley...'The case comes within the authority that, where a sum is payable by *A B* for the benefit of *C D*, *C D* can claim under the contract as if it had been made with himself.' That appears to me to be a principle which is of distinct use in the consideration of this case."

It was argued before us, mainly on the

(6) 17 R. R. 136; 3 Mer. 582; 36 Eng. Rep. 224.
(7) (1870) 6 Ch. App. 671 at p. 677.
(8) (1885) 30 Ch. D. 57 at p. 67; 54 L. J. Ch. 1154; 53 L. T. 306; 57 W. R. 803.

authority of the ruling to which I have just referred, that the doctrine that a stranger to a contract cannot sue on it was no more applicable in India. With reference to this contention it is necessary to consider some of the remarks in the decision. It must be observed that the statement of Lord Hatherely in *Touche* v. *Metropolitan Railway Warehousing Company* (7) cited by Sir Lawrence Jenkins cannot be said to have been accepted by the Courts of Equity in England as a sufficient exposition of the law, See per Lord Bowen in *Gandy* v. *Gandy* (8). Sir Frederick Pollock refers to it (Contracts, 6th Edition, page 202) as having been overruled by the Court of Appeal in England and he cites *In re Rotherham Alum & Chemical Co.* (9), Lord Justice Lindley says in that case, "An agreement between *A* and *B* that *B* shall pay *C*, gives *C* no right of action against *B*. I cannot see that there is in such a case any difference between equity and Common Law, it is a mere question of contract. It is said that Mr. Peace has no equity against the Company because the Company has had the benefit of his labour. What does that mean? If I order a coat and receive it, I get the benefit of the labour of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work." See also *In re Empress Engineering Company* (10) per Jessel, M. R., in the course of the arguments and Lindley on Companies, page 148, cited by Pollock, Op. Cit.

Sir George Jessel says in the case last cited: "I know of no case where, when *A* simply contracts with *B* to pay money to *C*, *C* has been held entitled to sue *A* in equity." These decisions also show that this doctrine is not one merely based on the technicalities of Common Law procedure in England, but that it finds a place in the equitable principles which Sir George Jessel, M. R., and other eminent exponents of equity were not reluctant to enforce. This agreement between the rule of Common Law and equity is brought out also in the remarks of Brett, L. J., in *Wilson* v. *Bury (Lord)* (11), while the point where equity and Common Law differ is indicated by Cotton, L. J., in *Gandy* v. *Gandy* (8) and by Bowen, L. J., *ib.*, pages 69-70. The latter points out of that if the true intent and effect of a contract is to give to third parties a beneficial right under it, that is to say, to give them a right to have the covenants in the contract performed—and this can only happen [as pointed out by Sir George Jessel in *In re Empress Engineering Co.* (10)] when the parties have no power to coming to a new agreement the next day releasing the old one—then the stranger may be allowed in a Court of Equity to enforce his rights under the contract: but that the whole application of this doctrine depends upon its being made out that upon the true construction of the contract such a beneficial right is given. Cotton, L. J., says:—"Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of the two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with *A*, is intended to secure a benefit to *B*, so that *B* is entitled to say he has a beneficial right as *cestui que trust* under that contract; then *B* would, in a Court of Equity, be allowed to insist upon and enforce the contract." The distinction between Courts of Equity and Common Law does not exist in India. But the exception referred to by Cotton, L. J., necessarily pre-supposes that the trust has already been created, that the progress towards being a trustee has been completed, as I have already pointed out.

It would, therefore, appear that some of Sir Lawrence Jenkins' remarks in *Deb Narian's* case (2) might be misleading if they are not read in connection with the facts of the particular case.

In connection with the law as enforced by the Courts of Equity in England it may be

(9) (1883) 25 Ch. D. 103; 53 L. J. Ch. 290; 50 L. T. 219; 31 W. R. 131.

(10) (1880) 16 Ch. D. 125 at p. 127; 43 L. T. 742; 29 W. R. 342.

(11) (1880) 5 Q. B. D. 518 at pp. 526, 527; 50 L. J. Q. B. 90; 44 L. T. 454; 29 W. R. 259; 54 J. P. 420.

well to refer to *In re Empress Engineering Co.*, (10) which contains the following comment by James, L. J., on *Gregory* v. *Williams* (6) most nearly approaching to the contention put forward on behalf of the appellant: "In *Gregory* v. *Williams* (6) the man with whom the contract was made was one of the plaintiffs, and the only defence there would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour." In *Deb Narain's* case (2) the original promisee was not a plaintiff, but he was one of the parties to the suit.

The result may, therefore, be shortly stated that no case has been cited to us in which, unless the contract has been partly or fully performed, so that a trust has been already created, a suit on a contract has, under circumstances similar to those with which we have to deal, been allowed to be maintained without the presence on the record of all the parties to the contract, and no English case has been cited in which one of such parties is not a plaintiff.

It has been pressed upon us, however, that we are not bound necessarily to follow the law as laid down by the English Courts; that in the absence of legislative provisions the law of our Courts is that indicated by justice, equity and good conscience. One of the circumstances owing to which it has been suggested that the rule that ought to be followed by us must be different from that which prevails in England is that the definition of consideration contained in the Indian Contract Act, section 2 (*d*), does not require that consideration should necessarily move from the party seeking to enforce the contract. This circumstance may not be so relevant to the point under consideration as might at first appear; for the definition of 'consideration' in the Indian Contract Act has direct reference in its very terms to the parties to the contract who are referred to in the Act as the promisor and promisee. The effect of section 2 (*d*) is that if a promisee wishes to have the contract enforced, his promisor cannot object that the consideration proceeded from a third party, and not from the promisee seeking to enforce the contract. It does not seem to me to be equally clear that the definition can affect the question whether a third party (who is neither the promisor nor the promisee) can enforce the contract. If *A* and *B* agree that in consideration of *X* paying to *B* Rs. 100, *B* will repair *A*'s house, it is true that *A* can enforce the contract against *B*, who cannot object that he received the money from *X* and not from *A* (though if *X* does not pay, there may be a failure of consideration and *B* may be entitled to rescind the contract on that account). On this point the English Law does not seem to be different; *Davenport* v. *Bishopp* (12), *Gandy* v. *Gandy* (8). But is the definition of any assistance in considering whether *X* can sue on a contract by which *A* promises *B* that *A* will pay to *X* Rs. 100? The definition refers to the third party (*X*) as the person from whom the consideration moves; not as the person (being neither the promisor nor the promisee) for whose benefit the contract is made. The definition can, therefore, have only a remote bearing on the totally distinct question whether a person, who benefits by a contract but who is not the promisee, can sue on the contract.

Finally it has been contended that the rule against a stranger to a contract being allowed to sue is one merely of procedure and that we should not hesitate to disregard it in order to do justice. It is indeed described as a rule of procedure by Willes, J., in *Gray* v. *Pearson* (13), but in terms which are far from implying that, therefore, the rule is opposed to justice and should be disregarded. He says: "I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable to merely the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case of agents, auctioneers, or factors, these exceptions are in truth more apparent than real."

It was pressed before us, however, that the Privy Council have definitely stated that *Tweddle* v. *Atkinson* (5) was not applicable to the facts and circumstances of the case before them, and that serious injustice might result if the Common Law doctrine had been applied thereto and this supplied, (in

(12) (1843) 63 Eng. Rep. 201; 2 Y. and C.C. C. 451; 12 L. J. Ch. 492; 7 Jur. 1077; 1 Ph. 698; 65 R. R. 483.
(13) (1870) 5 C. P. 568; 23 L. T. 416.

the words used in *Deb Narain* v. *Ram Sadhan Mandal* (2), "ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle* v. *Atkinson* (5)." It seems to me with great respect that this argument is based on a misapprehension of the Privy Council decision. Their Lordships only say that the Common Law doctrine did not apply to the facts and circumstances of the case before them, but that doctrine would not, it seems to me, be applicable in England in a case where immoveable property is specifically charged for the sole benefit of a third party in consideration of her marriage and where she is a minor whose natural guardian is a party to the contract and when the marriage has already taken place and everything done to complete the creation of the trust. Their Lordships of the Privy Council do not purport to go beyond what the Courts of Equity would have done in England, this is expressly stated by them. Assuming, however, that they intended to say that the law prevailing in England should not be applied in disregard of the circumstances in India—and that would not be any new proposition—it is necessary to bear in mind that in any case a person who is not a party to the contract cannot be permitted to enforce it without being subject to all the equities which would be present between the parties themselves, and this would almost invariably necessitate that all the parties to the contract should be impleaded in the suit: the question whether the contract is revokable at the option of either of the parties or whether it has been altered by mutual consent or been performed in part, whether the parties can be restored to their original position and other similar questions would have to be considered and would affect the third party's claim. See *In re Empress Engineering Co.* (10) and the interlecutory remarks of Jessel, M. R., during arguments; and per Grant, M. R., in *Gregory* v. *Williams* (6).

In all these respects the plaintiff's suit is defective.

I am, therefore, of opinion that the principle that the proper person to bring an action is the person whose right has been violated [See per Willes, J., in *Gray* v. *Pearson* (13)], a principle recognised both by Common Law and Equity [See per Lord Lindley *In re Rotherham Alum and Chemical Company* (9)], applies in India also no less than in England and that, except in cases which are not material at present, the person who acquires a right to enforce a contract of such a nature as we have to deal with is the promisee and not a stranger to the contract, who may benefit under the contract, and that, therefore, the lower Courts were right in dismissing the plaintiff's suit.

The appeal will be dismissed with costs.

AYLING, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 233 OF 1912.
December 23, 1913.
Present:—Mr. Lindsay, J. C.
Thakur SARDAR SINGH—PLAINTIFF—APPELLANT
versus
GAJA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and Tenant—Possession of plots of land with trees thereon, suit for—Trees planted by tenant on his cultivatory holding before accrual of tenancy, effect of, ejectment decree upon—Groves, custom in respect of, as recognised in Oudh.

When a landlord obtains a decree for ejectment against a tenant, the latter is bound, in the absence of any special rule or custom to the contrary, such as that existing in the case of groves, to deliver over possession of the trees along with that of the cultivatory holding on which they stand, even though they were planted by him before he acquired the status of a tenant.

Chandi Singh v. *Syed Arjumand Ali*, 2 O. C. 281, followed.

Umrao Singh v. *M. Ali Raza Khan*, 1 O. C. 231, distinguished from.

Appeal from the decree of the Additional District Judge, Lucknow, dated 23rd March 1912, upholding that of the Munsif, South Unao, dated 13th April, 1911.

Dr. *Nazir-ud-din Hasan*, for the Appellant.

Babu *Probhat Chandra Gupta*, for the Repondent.

JUDGMENT.—This is a plaintiff's appeal out of a suit brought by him for possession of certain plots of land and of the trees standing upon them. The facts of the case are as follows:—The plots in question are situated in a *mahal*, called Mahal Sultan Singh, in the village of Sheikhpur Nari. According to the plaint the defendants were cultivators in possession of a number of fields situated in

this *mahal* from which they were ejected in the year 1908 under orders of the Revenue Courts. The plaintiff issued notices of ejectment to the defendants. The notices were contested and the case was fought out to the Board of Revenue. The notices were upheld and in execution of the decree possession of these plots was delivered to the plaintiff in June 1908. It was brought to notice in the course of ejectment proceedings that certain trees stood upon some of the plots in question. A plea was put forward apparently that these trees were the property of the defendants. The question as to rights in the trees was not determined in the Revenue Courts. It was left open for decision by the Civil Courts. After possession had been delivered through the Revenue Courts, it is alleged that the defendants unlawfully resumed possession of seven plots on which trees were standing and also of three plots Nos. 1431, 1432 and 1204/3 in which it would appear there are no trees at all. The plaintiff, therefore, sued for ejectment of these defendants as trespassers from the ten plots just referred to. The defence set up by these persons was that they were owners of the plots and of the trees. It has been proved, however, and accepted as a fact that these defendants were ejected by notice from the plots in suit by the Revenue Courts on the footing that the plaintiff was the landlord and that they were tenants. The first Court found that the plaintiff was the owner of the *patti* and that the defendants had been ejected in due course of law by the Revenue Courts. With regard to the trees, however, the Munsif came to the conclusion that they had been planted at a time when these defendants were owners of the lands in question. The Munsif was of opinion that the possession of the defendants over these trees was not unlawful inasmuch as the Revenue Courts had not decided any question as to the title to the trees. He, therefore, refused to decree the suit in so far as concerned the plots on which the trees were standing. He gave the plaintiff a decree for the ejectment of the defendants from the three plots Nos. 1431, 1432, and 1204/3, and also for a small amount on account of damages. This decree has been upheld in the Court of the Additional District Judge. The plaintiff comes here in second appeal and his case is that his claim ought to have been decreed in full, inasmuch as, it having been found that the plaintiff was the owner of the plots in dispute, it must be presumed that he is also the owner of the trees on the principle that trees which are planted on land go with the land. Both the Courts below have stated in their judgments with reference to certain litigation which took place in or about the year 1904 that it was found that the relation between the plaintiff and the defendants with respect to these plots was not that of landlord and tenant but of mortgagor and mortgagee. The lower Appellate Court seems to have come to the conclusion that subsequent to the year 1904, some contract was entered into between the parties by which these defendants became the tenants of the plots in suit. It appears now, however, that the litigation of 1904 did not in any way relate to the land which formed the subject-matter of the present case. Any discussion, therefore, of what was decided in the litigation which terminated in 1904 appears to be irrelevant. The learned Additional Judge was referred to a case reported as *Chandi Singh* v. *Syed Arjumand Ali* (1), in which it was held that the ejectment of a tenant from his holding extinguished the right in the trees which he had planted in it during the continuance of the tenancy. The learned Judge distinguished this case from the present case by pointing out that it seemed to be proved that here the trees had been planted before the tenancy of the defendants commenced. That is perhaps a valid distinction between the two cases. But it appears to me that the case must be decided on ordinary principles of law. I think it may rightly be said that in India the Courts have recognised the application of the maxim "*Quicquid plantatur solo, solo cedit*" and this being so, it would seem to follow that when a person described as a landlord obtains a decree for ejectment against other persons who are described as his tenants, the latter are bound to deliver over possession of the trees as well as of the land. That I think is the ordinary law, applicable to cases of this kind. The law, of course, may be modified by custom and the existence of a custom has been recognised in Oudh in respect of groves, *vide* the ruling of *Umrao Singh* v. *M. Ali Raza Khan* (2),

(1) 2 O. C. 281.
(2) 1 O. C. 231.

where it was laid down by one of the learned Judges that the general custom of the country is that where a tenant possesses groves in a village his right to retain the trees in those groves continues until he dies without heirs or absconds from the village with the intention of totally abandoning the trees, and that ejectment from the cultivatory holding or residence in a neighbouring village does not amount to an abandonment of the trees. That case, it will be observed, was one in which the plots covered by the groves were plots distinct from the plots which the tenants held in cultivation. In the present case, however, we must take it that the plots in dispute were all being cultivated and that none of them constituted a grove within the meaning of that expression as used in the case just referred to. Had the plots not been in the defendants' cultivation as tenants, the Revenue Courts would not have passed any order for ejectment. While, therefore, it may be said that under a custom obtaining in Oudh the rights of a tenant to trees in the groves situated on plots, which are distinct from the plots which he cultivates, are not extinguished by ejectment from the holding, there does not appear to be any special rule or custom which modifies the ordinary law with respect to trees which stand in fields which are in actual cultivation. This being so, I think this appeal should be allowed. I am unable to find that the defendants, who have been found to be tenants, after being ejected from plots in their cultivation are entitled in any way to retain possession of trees standing in these plots. I, therefore, allow the appeal and direct that the plaintiff be given a decree for possession of the plots in suit and of the trees standing thereon.

As regards damages, the amount awarded by the Court of first instance and in respect of which the plaintiff has made no appeal will stand. The appellant will get proportionate costs in all three Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2368 OF 1912.

February 13, 1914.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Teunon.

BONOMALI ROOJ—DEFENDANT—APPELLANT

versus

MOKUNDA LAL GHOSE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Easement—Light and air—Obstruction—Test of right—Nuisance—Substantial interference with comfortable enjoyment—Blocking up plaintiff's window to extent of three-fourths.

The test of the interference of the right to light and air is whether the obstruction complained of is a nuisance; in other words, whether there has been a substantial interference with the comfortable enjoyment of premises.

Colls v. *Home and Colonial Stores Ld.*, (1904) A. C. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475, followed.

The fact that a wall has been erected right against the window blocking it up to the extent of three-fourths would render it very probable that there has been a substantial interference with the access of light and air, but the question must be decided upon evidence when the defendant asserts that there has been no such obstruction. The mere fact that the wall erected by the defendant is in close proximity to the window of the plaintiff's house, is not decisive of the matter.

Appeal from the decree of the District Judge of Birbhum, dated July 22nd, 1912, reversing that of the Munsif of Suri, dated July 17th, 1911.

Babu *Bipin Bihari Ghosh*, for the Appellant.

Dr. *Dwarka Nath Mitter*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for the establishment of the right to light and air to a house belonging to the plaintiff and for injunction. The plaintiff alleged in the plaint that he had a prescriptive right to the light and air and the defendant by erecting a wall close to the window of his house had obstructed the light and air, which he had no right to do so. The defendant denied the right and also pleaded that the access of light and air had not been obstructed by the building erected by him. The only issue, however, on the merits framed in the case was whether the plaintiff had "any right of prescription, in respect of light and air". No issue was framed upon the question how far the light and air had been obstructed. The Munsif held in effect that the obstruction was not such as to

render the house unfit for the ordinary purpose of habitation or business, and accordingly dismissed the suit.

The learned Judge on appeal stated in his judgment that although there was a denial of all the material allegations in the plaint, the written statement did not contain the allegation that the walling up will not render the room uninhabitable. But the defendant in the 11th paragraph of his written statement stated that there was sufficient access of light and air to the plaintiff's house, and that there could be no obstruction to the same by the wall of the defendant's house. No issue, however, as pointed out above, was framed on the point.

Then the learned Judge says that three-fourths of the window to the east of the plaintiff's house had been blocked up and the effect of the Munsif's judgment will be that the window will be completely blocked up, that it is not a case of mere diminution of light and air, but of entire cessation, and that the authorities cited by the Munsif do not apply to a case where the obstruction is built right against the opening through which the easement is engaged, completely blocking it up.

It is not clear how the result of the Munsif's judgment will be that the window will be wholly blocked up or why the principle upon which the Munsif relied does not apply to a case where the obstruction is built right against the window. The defendant has built upon his own land and the question to be considered is whether by reason of the building erected by him the obstruction to light and air to the plaintiff's premises is such as to cause what is technically called a nuisance, in other words whether there has been a substantial interference with the comfortable enjoyment of the plaintiff's premises. The fact that a wall has been erected right against the window blocking it up to the extent of three-fourths would render it very probable that there has been a substantial interference with the access of light and air, but the question must be decided upon evidence when the defendant asserts that there has been no such obstruction. The mere fact that the wall erected by the defendant is in close proximity to the window of the plaintiff's house, is not decisive of the matter. A five storied building erected at a distance of three feet may cause obstruction to the light and air to a greater extent than a small one storied building erected at a distance of one foot only. Had the building erected by the defendant blocked the window of the plaintiff's house to the extent of one-fourth or one-third only, we do not think it could be contended that no enquiry was necessary whether there had been a substantial interference. If so, can it be affirmed as a matter of law that no enquiry is necessary in a case where the window is blocked up to the extent of three-fourths? The question is one of degree, and the determination of the matter in each case must depend upon whether, owing to the obstruction complained of in any particular case, there is such a deprivation of light and air as to make a dwelling house substantially less comfortable.

As pointed out in *Colls* v. *Home and Colonial Stores Limited* (1), "The test of the right is .....whether the obstruction complained of is a nuisance, and.....the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of". No doubt, the fact that the defendant has built right against the window blocking three-fourths of it will be a very material element in determining the question, but we do not think the case can be decided without going into evidence, having regard to the fact that the defendant denied the obstruction to light and air and the Court of first instance found that there was no actionable interference.

Under the circumstances we think an issue ought to be raised whether by reason of the defendant's having erected the building, there has been a substantial interference with the comfortable enjoyment of the plaintiff's house. The judgments and decrees of the Courts below are accordingly set aside, and the case sent back to the Court of first instance for re-trial. That Court will frame the issue indicated above, allow both parties to adduce evidence on the point and then decide the case upon the

(1) (1904) A. C. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475.

evidence according to law. Costs to abide the result.

Decree set aside; Case remanded.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 150 OF 1912.

April 8, 1914.

Present:—Mr. Justice Hartnoll, Offg. Chief Judge, and Mr. Justice Ormond.

NALLAN CHETTY AND OTHERS—APPELLANTS

versus

MUTHUSAWMY PILLAI—RESPONDENT.

Jurisdiction—Lower Burma Town and Village Lands Act (IV of 1898), ss. 15 (2), 41—Jurisdiction of Civil Courts.

Sections 41 (*a*) and 15 (2) of the Lower Burma Town and Village Lands Act do not debar a Civil Court from adjudicating the rights of two private persons litigating over land which is at the disposal of Government.

Mr. *J. R. Das*, for the Appellants.

Mr. *P. D. Patel*, for the Respondent.

JUDGMENT.

HARTNOLL, OFFG. C. J.—The appellants brought a suit against the respondent for a declaration that he had no right or title to or interest in a certain piece of land together with the house on it and for possession of the same. Their case is, in another suit they obtained a final decree against one Tangaperumal Pillai ordering the latter to give up possession of the properties covered by the said decree to them and that the property in suit is one of the properties included in the said decree. The respondent pleaded ignorance of whether the appellants had obtained the decree they alleged and said that he and Tangaperumal Pillai were great friends, that Tangaperumal represented to him that the land in question which was vacant belonged to him and that he (Tangaperumal) would make a gift of it to him as the land was of no use to him if he (respondent) cared to have it, that thereupon in the month of May 1904 he took possession of it, built a house on it and has been in occupation of the house ever since the year 1905. Amongst other grounds taken respondent alleged that Tangaperumal had no right, title or interest in the land, that it was a village site and belonged to the Government and he submitted that under section 15 (2) of the Lower Burma Town and Village Lands Act the question whether Tangaperumal had acquired a landholder's right in respect of the land should be referred to the Revenue Court. The District Judge sent the proceedings to the Deputy Commissioner, Hanthawaddy, in order that he might determine whether the site in dispute was at the disposal of the Government or whether a landholder's rights had been acquired under the Lower Burma Town and Village Lands Act. The Deputy Commissioner found that appellants were not in possession and he was, therefore, under section 12 of the Act unable to entertain their claim to a declaration that they had acquired a landholder's right in respect of the land. The Commissioner found that Nallan Chetty had not acquired a landholder's right in respect of the land. The District Judge then dismissed the suit on the ground that he had no jurisdiction to entertain it. An appeal is now laid and it is urged that he had jurisdiction to do so. If jurisdiction is barred, it is barred under section 41 (*a*) of the Lower Burma Town and Village Lands Act. I have just discussed the scope of that section in Second Civil Appeal No. 76 of 1913 and would hold the same in this case, namely, when two private persons are litigating over land which is at the disposal of Government the Civil Court is not debarred from adjudicating in the matter. Chapter V of the Lower Burma Town and Village Lands Act was not relied on in this case, but section 15 (2) was. I do not see how that section is applicable to show that the jurisdiction of the Civil Court is barred. It may be probably that no such question is necessary in deciding on the rights of the parties in this case between them also, but if it does arise and will govern the case, judgment must be given in accordance with the decision of the Revenue Officer. I would set aside the decree of the District Court and remand the case to be heard on its merits; costs to follow the final result.

I would also give appellants a certificate to receive back the value of the stamp paid on their memorandum of appeal.

ORMOND, J.—I concur.

Appeal allowed; Case remanded.

SANAI PERSHAD *v.* BALAK RAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 255 OF 1912.

November 27, 1913.

Present:—Mr. Lindsay, J. C.

SANAI PERSHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BALAK RAM—DEFENDANT—RESPONDENT.

Custom of village, proof of—Ikrar-i-malikan-e-deh *dictated by landlords alone, how far proof of custom recorded therein—Admissibility of evidence—Instances, citation of, in proof of custom, if indispensable—Trees, transferability of.*

The entries in *Ikrar-i-malikan-e-deh* recording a village custom as stated by the landlord is, in the absence of fraud or grievous error, binding upon persons whose interests are affected by reason of those entries, even though the said entries were not prepared in the presence of, and were not attested by, such persons.

Riasat Ali v. *Gokul*, Select Cases (Jwala Prasad,) Appendix, p. VII, followed.

Statements in *Ikrar-i-malikan-e-deh* and kindred documents regarding a custom are admissible in evidence to prove the custom.

It is not an indispensable condition to cite instances in proof of an alleged custom.

Appeal from the decree of the District Judge, Fyzabad, dated 14th May 1912, upholding that of the Munsif, Fyzabad, dated 15th February 1912.

Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Surendra Nath Roy*, holding brief for Babu *Aditya Prasad*, for the Respondent.

JUDGMENT.—The point for decision in this case is whether or not certain trees which were purchased by the defendant, Babu Balak Ram, in execution of a decree were capable of transfer. The decree was obtained against three persons, Gauri Shanker, Sheo Parshad and Thakur Parshad, the sons of Ganesh. The trees stand on No. 287 in a village which is admittedly the property of the plaintiffs in suit. The case for the plaintiffs was that the owners of these trees under the village custom as recorded in the *Ikrar-i-malikan* had no power to transfer them without the consent of the proprietor. This custom was denied by the defendant. Both the Courts below have found that the custom set up by the plaintiffs was not proved and have dismissed the suit. In appeal the argument is that the custom was sufficiently proved by the provisions of the *Ikrar-i-malikan*. It may be noted that both parties produced some oral evidence which did not carry any weight with the Courts below. In particular the defendant produced a large number of witnesses to prove the instances in which trees had been transferred by sale, but, as was remarked by the Court of first instance, these instances did not carry the defendant's case to the point of establishing the custom, inasmuch as there was no evidence to show whether the cases referred to were cases in which the permission of the *Taluqdar* was sought or whether again the persons who transferred the trees were grove holders who owned the land. Practically, therefore, the only evidence which was worth considering was the statement of custom as contained in the *Ikrar-i-malikan-e-deh*. The Court of first instance was of opinion that the provisions of this *Ikrar-i-malikan-e-deh* did not amount to a proof of custom inasmuch as the statements contained in it were dictated by the landlords and were thus, in the opinion of the Munsif, only an expression of the landlords' views. The Munsif pointed out that there was nothing to show that grove holders or other persons interested in trees assented to the various statements which were made in the *Ikrar-i-malikan*. He also was of opinion that the terms were hard. This view was also taken by the learned District Judge in appeal. He stated in his judgment that the plaintiffs ought to have given evidence to show on what terms the trees in suit had been allowed to be planted. He pointed out that the person who had planted these trees was not a tenant of the village but a man from one of the towns and that, therefore, it was not likely that he would have planted trees upon the same conditions which would be acceptable to the tenants in the village. So far as the provisions of the *Ikrar-i-malikan* are concerned they are without doubt in favour of the case set up by the plaintiffs. We have first a statement of the various rights of the proprietors of the village with respect to trees. Then we have another provision relating to those grove-holders who got decrees at the time of the Settlement and finally it is declared that owners of trees not holding under a decree have only the right to the *usufruct* of the trees and have no power to cut down or dispose of the trees without the permission of the superior propri-

tor. So far as the argument that the grove-holders were not consulted at the time of the preparation of the *Ikrar-i-malikan* is concerned, I think, that is disposed of by a ruling of this Court which is reported as *Reasat Ali* v. *Gokul* (1). In that case an argument was put forward that the entries in the *ikrar i-malikan* were not prepared in the presence of tenants and were not attested by them and were, therefore, not binding. As to this Mr. Capper observed that as tenants are not proprietors their assent was not required any more than, speaking broadly, it would be required to a statement as to how a *Taluqdar* managed his estate.

It was laid down that in the absence of fraud or of grievous error the entries in the *Ikrar-i-malikan* were binding on the tenants. I think this ruling ought certainly to be followed as touching any question of custom. It appears to me that the statements of the proprietors of the village, who are permanently settled there, would be far more valuable than the statemants made by tenants whose connection with the village is more or less precarious. There is no ground for suggesting that in the present case there was any fraud in connection with the preparation of this statement of custom, nor can it, I think, be said that the entries work any grievous wrong to the tenants. The provisions contained in the *Ikrar-i-malikan* appear to me to be in conformity with those which are generally found throughout Oudh, and I am not prepared to say that it is in any way unreasonable to lay down that a person who is permitted to plant trees in the ground belonging to the proprietor of the village should be restrained from disposal of them without the proprietor's consent. As regards the admissibility of statements in the *Ikrar-i-malikan* and kindred documents on a question of custom, I think, the law is now well settled and in the present instance I hold that the *Ikrar i malikan* was a sufficient proof of the custom which the plaintiffs set up. As regards the citation of instances in proof of a custom, there is a ruling of this Court to the effect that this is not an indispensable condition, and I am not, therefore, prepared to accept the *dictum* of the lower Appellate Court that the plaintiffs in the present case were bound to quote instances in support of the custom they put forward.

It would seem that all the possible instances of transfers of trees in this village were given by the defendant and there were none left for the plaintiffs to refer to, and I have already pointed out that both the Courts below discarded the instances put forward by the defendant as proof of a custom contrary to that alleged in the plaint. I hold, therefore, that the rights of this case are with the plaintiffs.

I allow the appeal, set aside the decision of the Court below and direct that the claim be decreed with costs in all Courts.

Appeal allowed.

(1) Select Cases (Jwala Parshad) App. VII.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 207 OF 1913.

April 9, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SHEO NAIK RAM—PLAINTIFF—APPELLANT

versus

SHEO RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Immoveable property—Rights and interests of grove-holder in grove—Registration.

Rights and interests of a grove-holder in a grove are rights and interests in immoveable property and a mortgage of these rights requires registration.

Mangal Sen v. *Musammat Naoli*, 9 Ind. Cas. 478, distinguished.

Second appeal from the decision of the Additional Judge of Allahabad, dated 18th November 1912.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Damodar Das*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought on foot of a mortgage dated the 14th of July 1906. The plaintiff seeks a sale of the mortgaged property which is described as a grove containing 19 mango trees and six *mahua* trees. The mortgage itself, on the face of it, is a mortgage of the grove. The boundaries are given and a statement is given where the mango trees are and where the *mahua* trees are. Both the Courts below have held that the deed in question was mortgage of immoveable property and requirea

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registration under the provision of section 59 of the Transfer of Property Act as amended by Act VI of 1904. It is admitted that the deed was not registered and the Courts below have accordingly dismissed the plaintiff's claim. The only question to decide is whether or not the deed constituted a mortgage of immoveable property. In our opinion the finding of the Courts below was correct. It is quite clear that what the mortgagor purported to hypothecate was his rights and interests as a grove-holder. In our opinion the interests of a grove-holder are something more than the rights in "standing timber." The rights of grove-holders vary in different villages according to local custom or contract, but such rights are rights in immoveable property and mortgage of these rights requires registration. We have been referred to the case of *Mangal Sen* v. *Musammat Naoli* (1). We have referred to the paper-book in that case and we find that the view the Court took of what was mortgaged in that case was that it was only the timber planted in his occupancy holding by the mortgagor. The facts of that case, therefore, are totally different from the facts of the present case. We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 9 Ind. Cas. 478.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1486 OF 1913.
January 6, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

UPENDRA CHANDRA MITRA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SATCOURI DHAR—DEFENDANT—OPPOSITE PARTY.

Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 19, sub-s. (1)—Suits Valuation Act (VII of 1887), s. 8—Court Fees Act (VII of 1870), s. 7, cl. V, sub-cl. (c)—Suit—Valuation—Interest claimed by plaintiff—Value of suit is value of interest claimed in suit—Jurisdiction.

The value of a suit is the value of the subject matter in controversy, that is, the value of the interest claimed by the plaintiff.

Ajoodhiya Chowbey v. *Daibee Singh*, 3 Agra H. C. R. (Rev. App.) 5, referred to.

Therefore, where a plaintiff seeks to establish his right as an occupancy *raiyat* in a garden and to recover possession thereof, the value of the suit must be determined with reference to the value of the interest claimed by the plaintiff, and not with reference to the entire interest in the land, that is, the interest claimed by the plaintiff as also the interest of the superior landlord; and if the value of the interest claimed by the plaintiff is less than Rs. 1,000 the suit is cognizable by a Munsif under sub-section (1) of section 19 of the Bengal, N.-W. P. and Assam Civil Courts Act, 1887.

Jeebraj Singh v. *Inderjeet Mahton*, 18 W. R. 109; *Nauhoon Singh* v. *Toofanee Singh*, 20 W. R. 33; 12 B. L. R. 113 and *Chunder Nath Bhuttacharjee* v *Brindaban Shaha*, 25 W. R. 39, relied upon.

Rule against the order of the Court of the Additional District Judge of 24-Pergannahs, affirming that of the First Munsif of Sealdah.

Babu *Hira Lal Chakravarti*, for the Petitioner.

Babus *Shib Chandra Palit* and *Nagendra Nath Ghosh*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order directing the return of a plaint to the plaintiffs for presentation to the proper Court on the ground that the Court had no jurisdiction to entertain the suit. The plaintiffs seek to establish their right as occupancy *raiyats* in a garden and to recover possession thereof. It has been found that the value of the occupancy right is Rs. 300; at any rate it is fairly clear that the value of the right which the plaintiff seeks to establish is less than Rs. 1,000. The Court, however, has held that the value of the suit must be determined, not with reference to the value of the interest claimed by the plaintiff, but with reference to the entire interest in the land, that is, the interest claimed by the plaintiff as also the interest of the superior landlord. In support of this proposition, reliance was placed by the Court below upon the cases of *Aukhil Chunder Sen Roy* v. *Mohiny Mohun Dass* (1) and *Furzand Ali* v. *Mohanth Lal Puri* (2). These cases, however, do not really bear out the view taken by the Court below. The question must be answered with reference to the terms of sub-section (1) of section 19 of the Bengal Civil Courts Act, 1887, which authorises a Munsif to entertain all suits of which the

(1) 5 C. 489; 4 C. L. R. 491.
(2) 32 C. 268.

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value does not exceed Rs, 1,000. Now what is the value of this suit? The value of the suit is clearly the value of the subject-matter in controversy, that is, the value of the interest claimed by the plaintiff. [*Ajoodhya Chowbey* v. *Daibee Singh* (3)]. Consequently the Court was competent to entertain the suit, as was laid down in the cases of *Jeebraj Singh* v. *Inderjeet Mahton* (4); *Nauhoon Singh* v. *Tofanee Singh* (5); *Chunder Nath Bhuttacharjee* v. *Brindaban Shaha* (6). Reference, however, was made on behalf of the opposite party to the terms of section 7, clause (5), sub-clause (*e*), of the Court Fees Act which has no application by reason of section 8 of the Suits Valuation Act. We, therefore, hold that the Court of first instance where the suit was instituted was the only Court where the suit could have been instituted and that the order for the return of the plaint was erroneously made.

The result is that this Rule is made absolute and the order of the Court of first instance, which was subsequently affirmed on appeal by the District Judge, set aside. The suit will be tried in the Court where it was instituted. As the whole evidence was taken by the Court, we direct that the record be sent down to the Munsif in order that he may pronounce judgment after he has heard further arguments on the merits. The plaintiff is entitled to his costs in all the Courts up to the present stage. We assess the hearing fee in this Court at two gold *mohurs*.

Rule made absolute.

(3) 3 Agra H. C. R. (Rev App.) 5.
(4) 18 W. R. 109.
(5) 20 W. R. 33; 12 B. L. R. 113.
(6) 25 W. R. 39.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 68 OF 1912.
July 28, 1913.

Present:—Mr. Kanhaiya Lal, A. J. C.

KALI PERSHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat THAKUR DEI AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 111, 114—Jurisdiction of Civil and Revenue Courts—Compromise, petition of, filed in mutation proceedings—Estoppel—Mutation proceedings, whether evidence of title—Consent to entry of one's name in revenue papers, effect of—Admission, gratuitous, withdrawal of—Revenue Court's decision on questions of title raised in partition proceeding bars Civil Court from re-opening those questions—Procedure, proper, not adopted by Revenue Court in deciding titular questions, effect of—Objection to partition filed beyond time fixed by Revenue Court, whether entertainable, if partition not yet granted—Partition, complete, effect of—Appeal from order of Revenue Court disallowing objection to partition on ground of opposite party being recorded co-sharer, forum of.

Where in a mutation proceeding the parties had filed a petition of compromise whereby the plaintiffs agreed to the substitution of the defendants' names in respect of a certain property:

Held, that the petition did not estop the plaintiffs from subsequently suing the defendants for recovery of possession of the property, because it did not purport to convey any title to the defendants or to induce them to alter their position on the strength of the mutation proceeding.

Muhammad Imam Ali Khan v. *Husain Khan*, 26 C. 81; 25 I. A. 161; 2 C. W. N. 737, referred to.

There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it, and a mere consent to the entry of the name of another in the revenue papers does not create any such obligation.

Jangi Nath v. *Janki Nath*, 2 A. L. J. 225, *Chokhey Singh* v. *Jote Singh*, 1 Ind. Cas. 166; 12 O. C. 288; 13 C. W. N. 274 (P. C.); 11 Bom. L. R. 69; 6 A. L. J. 100; 9 C. L. J. 151; 5 M. L. T. 167; 31 A. 73; 19 M. L. J. 123; 36 I. A. 38, referred to.

A Revenue Court being competent under section 111 of the U. P. Land Revenue Act to decide a question of title raised in the course of a partition proceeding, its decision upon such question, on becoming final, operates as a bar to the re-opening of the same matter in the Civil Court. The mere fact that the Revenue Court did not adopt the procedure, as laid down in the said section, does not detract from its value as a decision of a competent Court.

Nathi Mal v. *Tej Singh*, 29 A. 604; 4 A. L. J. 578; A. W. N. (1907) 196; *Jagan Nath* v. *Tirbeni Sahai*, 1 Ind. Cas. 696; 31 A. 41; A. W. N. (1908) 274, referred to.

A Revenue Court acting under section 114 of the U. P. Land Revenue Act is not precluded from dealing with an objection filed beyond the time fixed by it for filing objections, if it has not up to that time taken any action under that section.

Tulsi Prasad v. *Matru Mal*, 18 A. 210; A. W. N. (1896) 30, referred to.

A complete partition has the effect in law of vesting title in the party in whose favour partition has been carried out, and a Civil Court has no jurisdiction to go behind it.

Umar Khan v. *Khadim Husain*, 9 O. C. 76, *Jagan Nath Prasad* v. *Ram Dutt*, 11 Ind. Cas. 531; 14 O. C. 153, referred to.

Where a Revenue Court disallowed an objection raising a question of title merely on the ground that the opposite party was a recorded co-sharer in possession:

KALI PERSHAD v. THAKUR DEI.

Held, that the order was appealable to the District Judge or to the Judicial Commissioner, although it did not specifically deal with the question of title in the right spirit.

Chedi v. *Musammat Jaikora*, 4 O. C. 289, referred to.

Appeal against the order of the District Judge, Gonda, dated 30th November 1911, reversing that of the Subordinate Judge, Gonda, dated the 8th July 1911.

Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Aditya Prasad*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants in this case sued for the recovery of possession of certain property on the allegation that they lived jointly with Chandika Prasad, the husband of the defendants-respondents, that on the death of Chandika Prasad in October 1906 the names of the defendants were entered in the revenue papers with the consent of the plaintiffs for their consolation in respect of the share of their husband, that in January 1910 the defendants applied, on the strength of the entry of their names in the *khewut*, for a partition of the share standing in their names and commenced to interfere with the plaintiffs' possession. The defence was that Chandika Prasad, the husband of the defendants, was living separately from the plaintiffs, that according to a custom prevailing in the family the widows were entitled to succeed to the property left by their husband, that the plaintiffs were estopped from setting up an adverse title by reason of their assent to the entry of their names in the revenue papers and that the defendants had applied for a partition of their shares and were in possession of it by making collections in respect of the same.

The Court of first instance decreed the claim. The lower Appellate Court, however, held that the plaintiffs were estopped, by reason of their assent to the entry of the names of the defendants in the revenue papers and the order of the Revenue Court disallowing the objection to the partition, from denying the defendants' title.

It appears that on the death of Chandika Prasad, a petition of compromise was filed by the parties on the 4th March 1907 whereby the plaintiffs agreed that the names of the defendants might be substituted in the place of Chandika Prasad in respect of the property left by the deceased. That petition does not operate as an estoppel because as held by their Lordships of the Privy Council in *Muhammad Imam Ali Khan* v. *Husain Khan* (1) it did not purport to convey any title to the defendants or induce them to alter their position on the strength of the said proceeding. There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it and a mere consent to the entry of the name of another in the revenue papers does not create any such obligation. *Jangi Nath* v. *Janki Nath* (2) and *Chokhey Singh* v. *Jote Singh* (3).

The order of the Assistant Collector disallowing the objection of plaintiffs Nos. 1, 2 and 3 to the partition of the property in dispute operates, however, as a bar to the adjudication of the same matter in this case. The original application for partition was made by Dharkan and *Musammat* Inder Dei, two other co-sharers in the villages in question. The usual proclamation was issued and the 5th January 1910 was fixed for the filing of objections. On that date the present defendants filed a petition asking the Assistant Collector to partition the share standing in their names. Plaintiffs Nos. 1, 2 and 3 filed objections on the 3rd February 1910 to the granting of the said petition on the ground that they were living jointly with Chandika Prasad, the husband of the petitioners, and that the petitioners were not entitled to any share. The learned Assistant Collector disallowed that objection that very day on the ground that the petitioners were recorded as co-sharers in the *khewat*. The objectors then preferred an appeal before the District Judge, who held that the order of the Assistant Collector disallowing the objection was not appealable as a decree and that the proper remedy for the objectors was to have applied to the Revenue Court for an amendment of the *khewat* and for the postponement of the partition proceedings pending the decision of the partition case. The objectors did not appeal against that decision and allowed it to become final. The mere fact that the Assistant Collector did not adopt the procedure for the trial of the question of title laid down in section 111 of the U. P. Land

(1) 26 C. 81; 25 I. A. 161; 2 C. W. N. 737.

(2) 2 A. L. J. 225.

(3) 1 Ind. Cas. 166; 13 C. W. N. 274 (P. C.); 11 Bom. L. R. 69; 6 A. L. J. 100; 9 C. L. J. 151; 5 M. L. T. 167; 31 A. 73; 19 M. L. J. 123; 36 I. A. 38; 12 O. C. 288.

JADU NATH DAS v. MANINDRA CHANDRA NANDI.

Revenue Act (III of 1901) did not detract from its value as a decision of a competent Court. The Assistant Collector was competent to decide a question of title raised in the course of a partition proceeding under section 111 of the Act and whether his grounds were valid or erroneous, that decision, if allowed to become final, operated as a bar to the re-opening of the same matter in the Civil Court. The parties admit that the partition has since been completed and sanctioned by the Collector. The objection in the present instance was filed before the Court of Revenue had passed an order under section 114 of the Act declaring the nature and extent of the interests of the persons applying for partition, and of any other persons who may be affected thereby, and detailing how the partition was to be effected. In *Tulsi Prasad* v. *Matru Mal* (4) it was held that the Court of Revenue acting under section 113 of Act XIX of 1873 was not precluded from dealing with the objection brought before it by reason of such objection not having been filed within the time allowed by the Court for filing objections, the Court not having taken up to that time any action under section 113 of the said Act. In *Nathi Mal* v. *Tej Singh* (5), where a proclamation was issued calling upon any persons having an interest in the property in dispute to appear on a certain date and to state their objections, if any, to the partition and none of them appeared before the Revenue Court, but they subsequently filed a suit in the Civil Court asking for a declaration of their exclusive possession over part of the property which was the subject-matter of the application for partition in the Revenue Court, it was held that the suit was not maintainable. In *Jagan Nath* v. *Tirbeni Sahai* (6), where a plaintiff came into Court upon the allegation that a certain grove had, upon partition, been wrongly allotted to the defendant's *mahal* whereas it should have been allotted to the plaintiff's *mahal* and claimed a decree for his title and possession, it was held that the cognizance of such a suit by the Civil Court was barred. Plaintiff No. 4 was made a party to the objection proceeding but was not represented therein by a next friend or guardian *ad litem* who could file an objection to the partition. He, however, joined the other objectors through his next friend in the appeal from the order disallowing the objection. The appeal was unsuccessful.

A completed partition has the effect in law of vesting a title in the party in whose favour the partition has been carried out. *Umar Khan* v. *Khadim Husain* (7) and a Civil Court has no jurisdiction to go behind it. *Jagan Nath Parshad* v. *Ram Datt* (8).

In *Chedi* v. *Musammat Jaikora* (9), where an Assistant Collector disallowed an objection raising a question of title merely on the ground that the opposite party was a recorded co-sharer in possession, it was held that his order was appealable to the District Judge or to this Court, though the order did not specifically deal with the question of title in the right spirit.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(4) 18 A. 210; A. W. N. (1896) 30.
(5) 29 A. 604; 4 A. L. J. 578; A. W. N. (1907) 190.
(6) 1 Ind. Cas. 696; 31 A. 41; A. W. N. (1908) 274.
(7) 9 O. C. 76.
(8) 11 Ind. Cas. 531; 14 O. C. 153.
(9) 4 O. C. 289.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3788 OF 1912.
April 15, 1914.

Present:—Mr. Justice N. R Chatterjea and Mr. Justice Beachcroft.

JADU NATH DAS—DEFENDANT—APPELLANT

versus

Maharaja MANINDRA CHANDRA NANDI BAHADUR—PLAINTIFF—RESPONDENT.

*Landlord and tenant—Enhancement of rent—Homestead land—*Kabulyat *executed by tenant—Stipulation that increased rent would be paid on increased area found on measurement—Area in boundaries—Landlord, if entitled to additional rent on excess area being found to be in tenant's possession—Prevailing rate in vicinity—If rent stated in* kabulyat *to be enhanced according to prevailing rate in vicinity—Procedure to be adopted by landlord.*

Where there is an express stipulation in a *kabulyat* that the landlord is entitled to excess rent in case the area of the land let out and described within certain boundaries be found on measurement to be more than what is mentioned in the *kabulyat*, the landlord is entitled to rent for the excess land which the tenant is found to hold within the boundaries mentioned in the *kabulyat*.

JADU NATH DAS *v.* MANINDRA CHANDRA NANDI.

If the rent of a tenant in respect of a homestead land is not a fixed one and the rent paid by him is inadequate, the landlord can call upon him to pay such rent as is proper and if the tenant does not agree to this, the proper course for him is to give the defendant a proper notice to quit and then to sue him for ejectment.

A landlord is not entitled to a decree for enhanced rent on the ground that the prevailing rate of rent of similar rent on the lands in the vicinity was higher than the rate stated in the *kabulyat*.

Appeal from the decree of the District Judge of Nadia, dated August 21st, 1912, reversing that of the First Munsif of Krishnaghar, dated August 29th, 1911.

FACTS.—This was a suit for the enhancement of rents of some lands, non-agricultural homestead, held by the defendant from 1270 B. S. at the rate of Rs. 10 per *bigha* under the plaintiff. The plaintiff alleges that the land has recently been found to be more than 17 *cottas* as mentioned in the *kabulyat* and that the prevailing rate of rent for similar lands in the vicinity is Rs. 20 per *bigha*. The defence *inter alia* was that there had been no increase in the area of the holding and that the prevailing rate of rent was not as stated by the plaintiff. The Munsif found that the area of the land held by the defendant was 1 *bigha* 3 *cottas* and 6 *chattaks*, or 6 *cottas* and 6 *chattaks* more than what had been mentioned in the *kabulyat*, and he, the Munsif, allowed an enhancement of rent for this excess area at the old rate of Rs. 10 per *bigha*. The plaintiff appealed to the District Court. The District Court made the following remarks:

"It was said that the excess in area would not entitle the plaintiff to get an enhanced rent, inasmuch as the lands for which the defendants executed the *kabulyat* had specified boundaries and there had been no change in these boundaries since the time of the *kabulyat*. I do not think this contention can prevail in the present case. It is true that when there is a conflict in the description of a piece of land as given by its boundaries and that as given by the area, the boundary description is to prevail. But in the present case there was the distinct stipulation in *kabulyat* that the plaintiff would receive an enhancement of rent in case the area of the land would, on measurement, be found to be more than what was given in the *kabulyat*. I, therefore, hold, having regard to the stipulation and the terms in the *kabulyat*, that the defendant was liable to pay an enhanced rent on account of the increase in the area of the holding.

"Then the question is 'at what rate can the plaintiff claim rents from the defendants?' The Munsif has allowed a rate of Rs. 10 per *bigha*, the old rate prevailing at the time the *kabulyat* was executed. I do not think this was fair to the plaintiff. The defendant himself had to admit that the prevailing rate for similar lands in the vicinity was Rs. 20 per *bigha*. On principles of justice and equity, therefore, the plaintiff also was entitled to have this rate from the defendant. Defendant has, it is true, been holding the land at the rate of Rs. 10 per *bigha* from a very long time. But there is nothing in the *kabulyat* to show that the settlement with the defendant was of a permanent nature with a rate of rent fixed in perpetuity. I, therefore, hold that the plaintiff is entitled to realise rents from the defendant at the rate of Rs. 20 per *bigha* for the 1 *bigha* 3 *cottas* and 6 *chattaks* of land which the defendant has been found to hold under the plaintiff. The result, therefore, is that the appeal is allowed with costs. Plaintiff's suit will be decreed with costs."

From the above judgment, the defendant appealed to the High Court.

Babu *Tarakeswar Pal Chowdhuri*, for the Appellant, contended, *first*, that the land being described by boundaries given in the *kabulyat* and the area being described as 17 *cottas* more or less, the boundaries ought to prevail and the stipulation, that the landlord would be entitled to increased rent in case the area be found to be more than what is stated in the *kabulyat*, cannot be given effect to.

Secondly, the rent being for homestead land, the provisions of the Bengal Tenancy Act do not apply, and the Transfer of Property Act applies. In that Act there is no provision for the enhancement of the rent contracted for, on the ground that the rents in the vicinity of similar lands are higher. The landlord, therefore, cannot sue for enhancement, *Ranee Lalunmonee* v. *Rajah Ajoodhya Ram Khan* (1). The proper course for the plaintiff was to demand higher rent from the defendant and thus if he did not agree to sue him in ejectment.

(1) 23 W. R. 61.

CHIRANJI LAL *v.* BISWA NATH.

Babu *Ram Charan Mitra* (with him Babu *Jogesh Chandra De*) was called upon to argue on the second point:—Although the plaintiff may not be entitled to higher rent for the past years, he is entitled to it after suit. There was no necessity for the plaintiff to give any notice to the defendant, as the latter knew perfectly well what the present prevailing rate in the vicinity is, and a decree ought to be given against him at that rate for the years after the suit.

JUDGMENT.—This appeal arises out of a suit for rent of a homestead land upon a *kabulyat* dated 1270 (B. S.). In the *kabulyat* the land let out was described within certain boundaries and was stated to consist of about 17 *cottahs* of land, the rent payable being Rs. 9 and odd. The plaintiff in the present suit has claimed rent at the rate of Rs. 20 per *bigha* for one *bigha* and three *cottahs* of land, and a declaration that the defendant has no permanent right in the land. The question raised in the appeal is whether the defendant is liable to pay rent for 6 *cottahs* and 6 *chattaks* of land found on measurement to be in excess of that mentioned in the *kabulyat*.

Having regard to the express stipulation in the *kabulyat* that the plaintiff is entitled to excess rent in case the area of the land let out be found on measurement to be more than what is mentioned in the *kabulyat*, the plaintiff is entitled to rent for one *bigha* and three *cottahs* of land which the defendant has been found to hold within the boundaries mentioned in the *kabulyat* at the rate of Rs. 10 per *bigha*. The plaintiff claims rent at the rate of Rs. 20 per *bigha*, not upon any contract between himself and the defendant, but on the ground that the prevailing rate of rent of similar lands in the vicinity was Rs. 20. The learned Judge of the Court below has found that on principles of justice and equity the plaintiff is entitled to have rent at that rate. We are of opinion that the learned Judge is not right in this view. If the rent of the defendant was not a fixed one and the rent paid by him is inadequate, the plaintiff can call upon him to pay such rent as is proper and if the defendant does not agree to this, the proper course for him is to give the defendant a proper notice to quit and then to sue him for ejectment.

The learned Pleader for the respondent has asked us to make a declaration that the defendant has no permanent rights in the land. We do not think, however, that we should do so in the present case and we do not decide one way or the other whether the defendant has a permanent right or not.

The decree of the lower Appellate Court is accordingly modified. Each party will bear his own costs of this appeal.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 72 OF 1913.

June 17, 1913.

Present:—Mr. Subonadiere, A. J. C.

CHIRANJI LAL—DECREE-HOLDER—APPLICANT

versus

BISWA NATH—JUDGMENT DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 2, *cl.* 11—*Legal representative—Grove-holder and tenant dying without heirs—House and grove escheating to* zemindar—Zemindar's *liability for decree against grove-holder and tenant—Execution of decree.*

The judgment-debtor was a grove-holder and tenant possessing a dwelling-house in the *abadi*. On his death without heirs the grove and the house escheated under the village custom to the *zemindar*. The decree-holder sought to execute the decree against the *zemindar* by joining him in the proceedings as the legal representative of the judgment-debtor:

Held, that the *zemindar* was not the legal representative of the judgment-debtor.

Debi Sahay Singh v. *Sumer Singh*, 3 Ind. Cas. 519; 12 O. C. 197, *Collector of Masulipatam* v. *Cavaly Narainapah*, 8 M. I. A. 500; 2 W. R. (P. C.) 59; 19 Eng. Rep. 620, distinguished.

Application against the order of the Additional Judge of the Court of Small Causes, City Lucknow, dated 29th April 1912.

Babu *Pyare Lal Bhargava*, for the Applicant.

Babu *Prabhat Chandra Gupta* and *Mirza Mohammad Fasih*, for the Respondent.

JUDGMENT.—In this case the judgment-debtor was a grove-holder and tenant in a village and possessed a dwelling-house in the inhabited site of the village. He died without heirs. The decree-holder, the present applicant, has sought to execute the decree

against the opposite party by joining him in the proceedings as representative of the judgment-debtor, on the ground that he has acquired the grove and the materials of the house by village custom upon the death of Gangadin, the original judgment-debtor. The learned Judge of the Court of Small Causes has refused to regard the opposite party as a judgment-debtor, holding that he is not the legal representative of Gangadin. As defined in section 2, clause 11, of the Code of Civil Procedure, 'legal repersentative' means a person who in law represents the estate of a deceased person and includes any person who interemeddles with the estate of the deceased. The claim, under which the opposite party has acted, is that by a custom prevalent in the Province of Oudh, or by the terms on which the grove was planted and the house was built, the grove and the house on the death of their holder without recognizable heirs escheated to him in his capacity as owner of the soil on which they are situated. In fact his case is that the estate of Gangadin in the grove and the house ceased to exist when he died. He does not claim as a person to whom the estate passed, but as a person who had latent rights in the grove and the house which came to the front upon the death of Gangadin. There must have been some moveable property, household utensils, clothing, and the like belonging to Gangadin and the opposite party makes no claim to those. It seems to me that the relation or relations of Gangadin, or if he left none, the Crown, to whom these things must go on his death is or are his real legal representative or representatives. The case reported as *Debi Sahay Singh* v. *Sumer Singh* (1) is cited, but there the question of whether the *zemindar* should pay the debt is not in dispute. Another case cited was that reported as *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (2). In that case there is no definite decison of what liability passed with the estate. I do not think that either of those rulings is of any assistance in the present case. I do not wish to lay it down that the decree-holder applicant has no right to pursue the timber of the grove and the materials of the house in the hands, into which they have now fallen, in order to realize the sum which was due to him from Gangadin; but it seems to me that if he has such a right he must enforce it by a regular suit, and that he cannot take the summary remedy of substituting the opposite party for Gangadin and then proceeding with the execution of the decree. Because as already set out, I do not think that the opposite party is the legal representative of Gangadin, and as his case is that Gangadin's estate in the grove and the house has ceased to exist, he cannot be said by taking possession of them on Gangadin's death to have intermeddled with Gangadin's estate. I dismiss the application with costs.

Application dismissed.

(1) 3 Ind. Cas. 519; 12 O. C. 197.

(2) 8 M. I. A. 500; 2 W. R. (P. C.) 59; 19 Eng. Rep. 620.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 712 OF 1911.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

AMAR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SADHU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale—Perpetual lease—Plenary proprietary rights transferred—Nominal **malikana** *reserved.*

A deed, whereby all the proprietary rights in certain land have been transferred in consideration of the payment of a substantial sum of money, is in reality a deed of sale, although it purports to be only a perpetual lease creating occupancy rights in the transferee and although a small amount of *malikana* has been nominally reserved by the deed as being payable by the so-called lessee to the so-called lessor.

Lalji Misir v. *Juggu Tiwari*, 7 Ind. Cas. 930; 33 A. 104; 7 A. L. J 1022, relied upon.

Bhagwan Das v. *Sidhu*, 136 P. R. 1907, distinguished.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated 4th April 1911, reversing that of the Subordinate Judge, 1st class, Hoshiarpur, dated 2nd December 1910, decreeing plaintiffs' claim on payment of Rs. 1,870.

Mr. *Manohar Lal* and Lala *Balwant Rai*, for Rai Bahadur Lala *Sukh Dial*, for the Appellants.

Mr. *Sundar Das* and Lala *Beli Ram*, for the Respondents.

AMAR SINGH v. SADHU SINGH.

JUDGMENT.—This a suit brought by the plaintiffs-appellants for possession by pre-emption of 231 *kanals* 2 *marlas* of land on the allegations that it had been sold by the defendant-respondent, Lachman Singh, to the other respondents, Atma Singh and Kirpa Singh, by a deed dated 18th November 1908, and that the plaintiffs had a superior right of pre-emption in respect of the land sold. The principal plea of Atma Singh and Kirpa Singh was that the land in question had not been sold to them by Lachman Singh, but that they held the land as occupancy tenants under Lachman Singh upon certain terms set forth in the deed of the 18th November 1908, and that no right of pre-emption had accrued to the plaintiff in respect of the transfer of the occupancy right in the land. The main issue drawn by the first Court was as to whether there had been a sale of the land in suit or not; and on this issue the Court held that a sale of the land had really taken place by the deed, dated the 18th November 1908, but that the parties to the deed had disguised the nature of the transfer in order to stave off possible suit for pre-emption. The Court accordingly granted the plaintiffs a decree for possession of the land on payment of Rs. 1,870, which is the amount of consideration entered in the deed. On appeal the Divisional Judge came to the conclusion that the land had not been sold by Lachman Singh to Atma Singh and Kirpa Singh, that only occupancy rights in the land were created under the deed of the 18th November 1908 by the former in favour of the latter, and that the plaintiffs' suit for pre-emption was not, therefore, maintainable. As a result of these findings, the learned Judge dismissed the plaintiffs' appeal.

The sole point argued before us in further appeal is whether the deed of the 18th November 1908 evidences the sale of land by Lachman Singh in favour of Atma Singh and Kirpa Singh, or whether the deed only creates, according to its apparent tenor, rights of occupancy on certain terms in favour of the latter. After hearing arguments and carefully considering the terms of the deed in the light of attendant circumstances, we think that the real intention of the parties was to effect a sale of the land, and that it was with the object of defeating possible uits for pre-emption that the transaction was made to take the form of a perpetual lease of the land, and occupancy rights on certain terms were ostensibly created in favour of Atma Singh and Kirpa Singh. Lachman Singh, when examined as a witness for the plaintiff on the 25th January 1910, admitted that he had sold the land to Atma Singh and Kirpa Singh, and that the deed was executed by him as one of lease in perpetuity in order to enable the vendees to resist pre-emption claims. In his cross-examination on the 22nd March he adhered substantially to the same statement, though he added that the cost of clearance (of the *kul*) was entered in the deed as payable by him, which part of the statement is not borne out by the deed. It is also noteworthy that on the 9th February 1908 Lachman Singh had executed a deed of agreement in favour of Atma Singh in which he had agreed to sell to Atma Singh his share of land in three villages, Dahdi Kotwal, Bela Sariana and Hajipur, for Rs. 6,000 and on the 18th November following he executed the deed under consideration in respect of 231 *kanals* 2 *marlas* of land situate in the first mentioned two villages. It is, therefore, reasonable to presume that Lachman Singh was carrying out his original intention of selling at least part of his property to Atma Singh when he executed in his favour the deed of 18th November 1908. According to this deed, all rights in the land possessed by Lachman Singh were transferred by him to Atma Singh and Kirpa Singh for a consideration of Rs. 1,870, with this reservation that the latter had to pay to Lachman Singh by way of *malikana* annas 6 per rupee of the revenue assessed on the land. The amount of revenue as entered in the deed is Rs. 44-8, and, therefore, the *malikana* dues payable under the deed by Atma Singh and Kirpa Singh to Lachman Singh amounted to the nominal sum of a little over Rs. 4 a year. Under the terms of the deed the so-called occupancy tenants had power to plant and cut trees and to transfer their occupancy rights by sale, mortgage, etc., to any person they pleased without the permission of the landlord, subject to the right of the landlord to claim pre-emption in respect of the intended sale or mortgage. It was further stipulated that on the death of the occupancy tenants without leaving any widows their rights would devolve on their collaterals.

APARBAL SINGH *v.* NARPAT SINGH.

It will be observed that barring the reservation as to the very small amount of *malikana* dues which Atma Singh and Kirpa Singh had agreed to pay annually to Lachman Singh, the deed in question evidences a transfer of all rights of ownership in the land to the so-called occupancy tenants, and the record does not show that the amount payable by way of *malikana* has been paid to Lachman Singh since the deed was executed. It is also in evidence that Atma Singh and Kirpa Singh made a mortgage of part of the land to a third party, but no notice of the intended mortgage was ever given by them to Lachman Singh in conformity with the terms of the deed. The terms of the deed have not, therefore, been acted upon so as to show that a sale of the land was not intended and that only occupancy rights were created in favour of Atma Singh and Kirpa Singh. The facts of this case are very similar to those of the case reported as *Lalji Misir* v. *Jaggu Tiwari* (1), in which it was held that a deed which purported to be a perpetual lease of certain land in consideration of the payment of a substantial sum of money was in reality a deed of sale, notwithstanding that a nominal rent was reserved by the deed as being payable by the so-called lessees to the so-called lessors. *Bhagwan Das* v. *Sidhu* (2), which has been relied upon by the respondents' Pleader, is distinguishable from the present case, inasmuch as there "the stipulations embodied in the agreement (of perpetual lease) .....showed clearly that the transferor did not part in perpetuity with his full rights as an owner, but reserved valuable rights for himself. He reserved the right of reversion to himself as landlord in case the transferee died childless, thus excluding the collaterals of the transferee from succession, and further stipulated for an annual payment of cash rent by the transferee in lieu of enjoyment of possession." In the present case no right of reversion to himself as landlord has been reserved by Lachman Singh, and the annual cash rent agreed to be paid by the transferees to him is only nominal, and even that nominal sum has not been paid to Lachman Singh during the period that has elapsed between the execution of the deed and the institution of the present suit for pre-emption.

For the reasons given, we hold that the transaction embodied in the deed of 18th November 1908 was not one of creation of occupancy rights, but was in reality one of sale; and it follows that the plaintiffs can claim a right of pre emption in respect of the said transaction of sale. There has been no argument before us as to the amount of the money payable by the plaintiffs to the vendees, and we take it that the decision of the first Court on that point is correct.

We accordingly accept this appeal, and reversing the decree of the Divisional Judge we restore that of the first Court with costs throughout. The plaintiffs must pay into Court Rs. 1,870 on or before the 2nd April 1914, failing which their suit shall stand dismissed with costs throughout.

Appeal allowed

(1) 7 Ind. Cas. 930; 33 A. 104; 7 A. L. J. 1022.
(2) 136 P. R. 1907.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 133 OF 1912.
November 17, 1913.
Present:—Mr. Lindsay, J. C.

APARBAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARPAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof—Illegitimacy of plaintiff set up by defendant—Presumption—Khewat, *extract from, produced in proof of legitimacy—Admissibility of evidence—Relevancy.*

It is for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs are illegitimate, for, the legal presumption being in favour of legitimacy and marriage, the burden of proving illegitimacy lies on the person interested in making out the illegitimacy.

Kalian Singh v. *Maharaji*, A. W. N. (1905), 214, followed.

Where an extract from the *khewat*, showing that the plaintiffs were reputed to be the sons of a certain person, was put in evidence to prove the plaintiffs' legitimacy:

Held, that although it was not shown that the defendants were parties to the mutation proceeding upon which the *khewat* entry was founded, yet the extract was relevant in proof of the legitimacy inasmuch as it showed that the plaintiffs had succeeded to their reputed father's estate and had been regarded as entitled to succeed.

APARBAL SINGH *v.* NARPAT SINGH.

Appeal against the order of the Additional Subordinate Judge, Lucknow, dated 4th January 1912, upholding that of the Munsif, North Lucknow, dated 5th May 1911.

Mr. *A. P. Sen* and Babu *Salig Ram*, for the Appellants.

The Hon'ble Rai *Sri Ram Bahadur* and Babu *Har Dayal*, for the Respondents.

JUDGMENT—This appeal arises out of a suit brought by three plaintiffs, Aparbal Singh, Surji Singh and Ijrail Singh for redemption of a mortgage. The mortgage in suit was said to have been executed on the 13th of July 1852 in favour of one Ramdin Singh who is now represented by the defendants-respondents. There were four mortgagors who executed this deed, one of them being Tilak Singh. The case for the plaintiffs was that they were the sons of Tilak Singh and, therefore, entitled to redemption.

The plaintiffs put forward a pedigree in support of their title which was denied by the defendants. The Munsif who tried the case disposed of it by a very short judgment. He found that the plaintiffs were not the legitimate sons of Tilak Singh and, therefore, not his heirs. He ruled, therefore, that the plaintiffs had no title to ask for redemption and he dismissed the suit. This order has been affirmed by the Additional Subordinate Judge on appeal. The point taken here on behalf of these appellants is that the decision of the Court below is wrong. It is argued that the burden of proof was put on the wrong party, that it was for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs were illegitimate and that this burden has not been discharged. In my opinion this is a good ground of appeal and the appeal should be allowed. The law as to the incidence of the burden of proof in a case of this kind is very clear and I may refer to the statement of it contained in Messrs. Ameer Ali and Woodroffe's Law of Evidence p. 861, 3rd Eddition, where it is said: "There is a presumption in favour of legitimacy and marriage and therefore on any person who is interested in making out the illegitimacy of another is thrown the whole burden of proving it." This exposition of the law was quoted with approval in a case decided by a Bench of the Allahabad High Court in *Kalian Singh* v. *Maharaji* (1) where the learned Judge says that this is the law both in England and in India. If we turn to the written statement put in by the defence in this case it is apparent that the plea of legitimacy was never distinctly raised. In the 8th paragraph of the written statement the defendants denied the pedigree put in by the plaintiffs and asserted that they were not the heirs of the original mortgagors. It was not till evidence began to be taken that any allegation of illegitimacy was made and the first intimation of this plea came out in the evidence of defendant No. 1, Narpat Singh, who was examined by the plaintiffs as their first witness. In his evidence Narpat Singh said as follows: "Tilak Singh had no son." Then he corrected himself by saying that Tilak had two sons by a kept woman, namely, Surji and Ijrail (plaintiffs Nos. 2 and 3), Aparbal, plaintiff No. 1, he said, was not the son of Tilak. Further on Narpat stated that it was not till about four years before the bringing of this suit that he came to know of the illegitimacy of the plaintiffs Nos. 2 and 3. All he could say was that he heard of this fact from some person whose name he was unable to give. He also stated that up till four years previous he could not say whose sons he thought the plaintiffs to be. The other witnesses examined for the plaintiffs declared that they were the sons of Tilak. For the defence one witness was put forward whose statement was to the following effect: I know the plaintiff No. 1 (*i. e.*, Aparbal). He is a Thakur and the son of Tilak by an Ahir woman. Durjan told me this. He died 40 or 45 years ago. In cross-examination he stated that he had seen the woman who was kept by Tilak. He further added that the plaintiff No. 1 was born in the same house in which his father Tilak Singh resided. There is not a word in this witness's statement as to the descent of the other two plaintiffs, Surji and Ijrail. This is the only evidence which we have to consider in this connection and it seems to me quite clear that if the burden of proving the illegitimacy of the plaintiffs or any of them was on the defendants, they failed to discharge it. It would be preposterous to hold on evidence like this that the plaintiffs are illegitimate.

Another point which has been referred to by the learned Counsel for the appellants is that the Courts below did not take proper notice of a

(1) A. W. N. (1905) 214.

certain documentary exhibit, an extract from the *khewat*, which went to show that the three plaintiffs were reputed to be the sons of Tilak Singh. The Subordinate Judge who tried the appeal seems to have thought that this document was irrelevent and not binding upon the defendants, inasmuch as it had not been shown that they were parties to any mutation proceeding upon which the *khewat* entry was founded; but at any rate it can, I think, be argued that this argument does show that the plaintiffs succeeded to Tilak Singh's estate and that they were regarded as entitled to succeed as being his sons, and in this view I think the entry is relevent in proof of legitimacy.

I hold, therefore, that the Courts below were in error in throwing off burden of proving legitimacy upon the plaintiffs and that the judgment is in consequence unsustainable. I allow the appeal, set aside the order of the Courts below and direct that the case be sent back through the Subordinate Judge to the Court of the Munsif for disposal after decision of the issues which were left undetermined in the judgment. The respondents will pay the appellants' costs of this appeal.

Appeal allowed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1081 OF 1913.
November 21, 1913.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
Munshi ZILLAR RAHMAN *alias* RAJAH MEAH—PRINCIPAL DEFENDANT—PETITIONER
versus
Sayed GUZUNFFUR HOSSAIN AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 1, expl., and r. 6—Pauper suit—Defendant entitled to adduce evidence in disproof of plaintiffs' pauperism—Opportunity to be given to defendant to prove allegations—Plea that part of property in suit is in possession of plaintiff—Defendant to be allowed to prove his plea.

A defendant is entitled at the hearing to adduce evidence in disproof of the alleged pauperism of the plaintiff. Therefore, a Court should not allow a plaintiff to sue *in forma pauperis*, without opportunity afforded to the defendant to prove that the plaintiff is not a pauper.

If a defendant seeks to prove that part of the property sought to be recovered from him is really in the possession of the plaintiffs and that consequently the plaintiffs are possessed of sufficient means to enable them to pay the described Court-fee, the defendant is entitled to establish the truth of his allegation by evidence.

Dwarkanath Narayan v. *Mahdavrav Vishvanath*, 10 B. 207 and *Krishna Bai* v. *Manohar*, 30 B. 593; 8 Bom. L. R. 671, relied upon.

Rule in the matter of Pauper Suit No. 1 of 1913 pending in the Court of the Sub-Judge of Murshidabad.

Mr. *Zahed* and Babu *Probodh Chandra Mukherjee*, for the Petitioner.

Babu *Sajani Kanta Sinha*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court below has allowed the plaintiffs opposite party to sue *in forma pauperis*, without opportunity afforded to the defendant petitioner to prove that the plaintiffs are not paupers. It is plain upon the language of rule 6 of Order XXXIII of the Code of Civil Procedure of 1908, that the defendant was entitled at the hearing to adduce evidence in disproof of the alleged pauperism of the plaintiff. But it has been argued that the defendant is not entitled to prove that the plaintiffs are in possession of property sufficient to enable them to pay the institution fee, because the property alleged to be in their possession is sought to be recovered by the plaintiffs from the defendant. In our opinion there is no foundation for this contention. The explanation to rule 1 provides that a person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint, or where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit. The explanation thus furnishes two different tests to determine the pauperism of a person, according as the law does or does not prescribe the payment of fee upon the plaint. In the case before us, as the suit was for recovery of possession of immoveable property Court-fee was payable *ad valorem* upon the plaint. The case, therefore, falls within the first part of the explanation, and the question for determination is, whether the plaintiffs are or are not possessed of sufficient means to

enable them to pay the fee prescribed by law. The defendant seeks to prove that part of the property sought to be recovered from him is really in the possession of the plaintiffs, and that consequently the plaintiffs are possessed of sufficient means to enable them to pay the fee prescribed. The defendant is clearly entitled to establish the truth of his allegation by evidence. The view we take is supported by the cases of *Dwarka Nath Narayan* v. *Madhavrav Vishvanath* (1), *Krishna Bai* v. *Manohar* (2).

The result is that the Rule is made absolute and the order of the Court below set aside. The case will be remitted to the Court below in order that it may be re-investigated in accordance with law. The petitioner is entitled to the costs of this Rule, we assess the hearing fee at three gold *mohurs*.

Rule made absolute.

(1) 10 B. 207.
(2) 30 B. 593; 8 Bom. L. R. 671.

LOWER BURMA CHIEF COURT.

CIVIL REVISION APPLICATION No. 17 OF 1912.
June 13, 1913.
Present:—Mr. Justice Twomey.

BALLY SINGH—APPLICANT
versus
BHUGWAN DASS KALWAR—RESPONDENT.

Promissory-note—Pro-note insufficiently stamped—Suit not on pro-note—No independent cause of action—Plaintiff not to succeed—Admission of defendant as to execution of pro-note immaterial—Stamp Act (II of 1899), s. 35—Evidence Act (I of 1872), s. 91.

Where a plaintiff has no cause of action apart from an insufficiently stamped pro-note, he cannot succeed at all although he does not profess to sue on the pro-note and although the defendant admits the execution of the document.

Mr. *Bijapurkar*, for the Applicant.

Mr. *R. N. Burjorjee*, for the Respondent.

JUDGMENT.—The only argument urged before me is one that is not contained in the application for revision, namely, that the defendant having admitted that he executed a promissory-note for the amount claimed, it was unnecessary for the plaintiff to produce the document in evidence and the plaintiff was entitled to a decree on the failure of the defendant to prove payment.

It is admitted that the document itself could not be admitted in evidence or acted on because it is insufficiently stamped, and it is settled law that in such a case the plaintiff can succeed only if he can show that he has a cause of action independently of the document. The law on this subject is fully discussed in the Upper Burma case *Nga Waik* v. *Nga Chet* (1) cited in the judgment of the Township Court, and it is unnecessary to go any further.

It is clear that in the present case the plaintiff has no cause of action apart from the document. The promissory-note is the contract, and section 91 of the Evidence Act debars the production of any other evidence but the writing itself. It is true that the plaintiff did not profess to sue on the promissory note. He knew that he could not do so as it is not properly stamped. But as he had no cause of action apart from it, if he got a decree on the promissory-note, as the District Judge points out, that would be "acting on" the promissory-note in direct contravention of section 35 of the Stamp Act. [See the Upper Burma case *Ma Ein Min* v. *Maung Tun Tha* (2) and the rulings cited therein].

On these grounds, I think, the decision of the lower Court is correct. I am also of opinion that even if the decision were wrong, the case is not one in which this Court could properly interfere in revision according to the principle set out in *Zeya* v. *Mi On Kra Zan* (3). The facts and the law applicable to them have been duly considered by the lower Courts, which have come to a concurrent decision.

I have not referred to the second and third paragraphs of the application in which it is urged that the document in question is not a promissory-note at all but a mere receipt for money. This ground was not argued before me. It is a ground that apparently was never taken in the lower Courts and so far as I can see there is no force in it. The document appears to be a promissory-note as defined in section 4 of the Negotiable Instruments Act.

The application is dismissed with costs.

Application dismissed.

(1) U. B. R. (1907--09), 2, Evidence 5.
(2) U. B. R. (1887—01), 2, 556.
(3) 2 L. B. R. 333.

MADARI SINGH *v.* RAM RATAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 254 OF 1912.

November 27, 1913.

Present:—Mr. Lindsay, J. C.

MADARI SINGH—PLAINTIFF—APPELLANT

versus

RAM RATAN—DEFENDANT—RESPONDENT.

Ex parte *decree, cancellation of, suit for—Decree obtained by fraud—Claim, falsity of, effect of plaintiff's knowledge as to—Fraudulent conduct—Estoppel.*

If a plaintiff knowing his claim to be baseless puts a defendant into Court and succeeds in getting an *ex parte* decree, he cannot, in a subsequent suit brought by the latter for cancellation of the decree on the ground of its being obtained by fraud, plead that he was not guilty of fraudulent conduct. That very knowledge of the plaintiff amounts to fraud.

Appeal against the order of the Additional District Judge, Lucknow, dated 15th March 1912, upholding that of the Munsif, South Unao, dated 6th March 1911.

Mr. *A. P. Sen*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The facts of this case may be briefly stated as follows: In the year 1891 a suit for foreclosure was brought by Lachman Prasad, the father of the defendant-respondent Ram Ratan, against Rup Singh and his son Madari Singh, who is the plaintiff-appellant in this case. That suit was decided by a compromise dated the 12th of March 1891 and a decree passed in accordance with the terms settled between the parties. It was agreed by the plaintiff in that case that 12 *bighas* of land, 3 *bighas* of *muafi*, 6 *bighas* and 6 *biswas* grove and four houses out of the property mortgaged should be released to Madari Singh with full rights as proprietor and without any liability to pay anything by way of rent therefor. It was also stated that this right was heritable and was to be secured to Madari Singh and his descendants *naslan bad naslan*. In the year 1893 when a revision of the settlement was held the lands above referred to have been constituted a *sub-patti* of the village. Proceedings were taken before the Assistant Settlement Officer with a view to ascertaining who was the person who was to be made liable for the payment of the land revenue of the *sub-patti*. In those proceedings Ram Ratan was represented by his general attorney, Salik Ram, and Madari Singh also put in an appearance. It was stated before the Assistant Settlement Officer that the *sub-patti* was held without the payment of any rent and that the superior proprietor, that is to say, Ram Ratan, was liable for the revenue. The date of these proceedings is the 28th October 1893. In the year 1909 Ram Ratan sued Madari Singh for arrears of revenue for the years 1313-1316 *Faslis*, in respect of the lands just mentioned. The suit was decided *ex parte* against Madari Singh. He applied to have the *ex parte* decree set aside, but this application was refused. Madari Singh then brought the suit out of which the present appeal has arisen for cancellation of the decree of the Revenue Court on the ground that it had been obtained by fraud.

Both the Courts below have found that, as a matter of fact, Ram Ratan had no right whatever to demand the payment of revenue in respect of the lands in question. They refused, however, to set aside the decree on the ground that fraud had not been proved. Apparently the view taken was that as Madari Singh had failed to put in a defence and to raise pleas which would have shown that Ram Ratan's claim was entirely without foundation, there was no case of fraud made out on the part of Ram Ratan. It was stated, moreover, that it was no part of Ram Ratan's duty in that case to anticipate the defence which Madari Singh might elect to put forward. In my opinion the case is as clear a case of fraud as can be imagined. There can be no shadow of doubt whatever that Ram Ratan knew perfectly well that he was not entitled to claim from Madari Singh any revenue in respect of these lands, and if a person with a knowledge that his claim is altogether a baseless one chooses to put a defendant into Court and succeeds getting an *ex parte* decree he cannot, in my opinion, be heard afterwards to plead that he was not guilty of fraudulent conduct. There is no force in the arguments which have been addressed to the Court on behalf of the respondent, namely that Ram Ratan may have been in a doubt as to the validity of the compromise proceedings and of the proceedings taken before the Assistant Settlement Officer and that he may have had some doubts as to whether the admissions made before the Assistant Settlement Officer by his general attorney were binding upon him. I brush aside these arguments as being entirely unworthy of consideration. There cannot, as I have already said, be the slightest doubt that

Ram Ratan knew perfectly well that he had no right to make this claim. Indeed the conduct of Ram Ratan would seem to have been such as to render him liable to prosecution for the offence described in section 209 of the Indian Penal Code. I allow this appeal, set aside the judgment of the Court below and direct that the plaintiff's claim be decreed with costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL CIVIL NOS. 61 AND 62 OF 1913.

July 18, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

SHEW PROSAD BUNGSHIDHUR—APPELLANT

versus

RAM CHUNDER HARIBUX—RESPONDENT

AND

KALOORAM SITARAM—APPELLANT

versus

RAM CHUNDER HARIBUX—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 115—*Revision—Order of Single Judge—Judgment—Appeal—"Jurisdiction", meaning of—Letters Patent of* 1865, *cls.* 15, 16, 39—*High Courts Act (*24 *and* 25, *Vic. c.* 104), *s.* 13—*Presidency Small Cause Courts Act (XV of* 1882), *ss.* 6, 41.

Where a single Judge of a High Court interferes with a judgment of the Presidency Small Cause Court under section 115 of the Civil Procedure Code, his order is a judgment within the meaning of clause 15 of the Letters Patent and is appealable.

Chappan v. *Moideen Kutti*, 22 M. 68; 8 M. L. J. 231, followed.

Hira Lal v. *Bai Asi*, 22 B. 891, distinguished.

Girdharee Singh v. *Hurdoy Narain Sahoo*, 21 W. R. 263; *Secretary of State for India in Council* v. *British India Steam Navigation Company*, 9 Ind. Cas. 183; 15 C. W. N. 848; 13 C. L. J. 90, *Vankata Reddi* v. *Taylor*, 17 M. 100; 3 M. L. J. 259, referred to.

Where a Presidency Small Cause Court Judge refuses an application under section 41 of the Presidency Small Cause Courts Act for the recovery of possession of immoveable property on the ground that no relationship of landlord and tenant exists, his decision is on a question of law and there is no error of procedure to justify an interference by a High Court under section 115, Civil Procedure Code.

Amir Hassan Khan v. *Sheo Baksh Singh*, 11 C. 6; 11 I. A. 237, followed.

Brij Mohun Thakur v. *Rai Uma Nath Chowdhury*, 20 C. 8; 19 I. A. 154 and *Maharajah of Burdwan* v. *Apurba Krishna Roy*, 10 Ind. Cas. 527; 14 C. L. J. 50; 15 C. W. N. 872, distinguished.

Per *Woodroffe, J.*—The word "jurisdiction" in section 115 of the Civil Procedure Code means a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit.

Letters Patent Appeal from the decision of Mr. Justice Fletcher, dated 9th June 1913.

Mr. *S. P. Sinha*, (with him Mr. *P. R. Das*), for the Appellants.

Mr. *W. Jackson*, (with him Messrs. *B. C. Mitter* and *Sircar*), for the Respondent.

JUDGMENT.

JENKINS, C. J.—This is an appeal under clause 15 of the Letters Patent from a decision of Mr. Justice Fletcher. By that decision the learned Judge set aside an order of Mr. Dobbin, one of the Judges of the Presidency Small Cause Court, dismissing an application under Chapter VII of the Presidency Small Cause Courts Act. The learned Judge also purported to pass what is described as a decree. It is objected at the outset that no appeal lies. It is not said that Mr. Justice Fletcher's pronouncement was not a judgment, but it is said that it is not a judgment within the meaning of clause 15 of the Letters Patent. By that clause it is (among other things) ordained that an appeal shall lie to the High Court from the judgment of one Judge of the High Court or of one Judge of any Division Court pursuant to section 13 of the Charter Act. By section 13 of the Charter Act, it is provided that "subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice." This section and also the scheme of the Act and of the Letters Patent issued under the Act show that there is one principal division recognised in the jurisdiction of the High Court, its original jurisdiction and its appellate jurisdiction. Section 13, which must, from the very nature of things and from the subject with which it deals, have been intended to have exhaustive operation, recognises this division and no other. It is argued before us in support of the objection on behalf of the respondent

that inasmuch as the jurisdiction exercised by Mr. Justice Fletcher was one under section 115 of the Civil Procedure Code, it was a jurisdiction by way of revision and not of appeal and so not within the scope of clause 15 of the Letters Patent. Section 115 of the Code of Civil Procedure, which reproduces section 622 of the former Civil Procedure Code, provides that "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—(*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested, or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit." The High Court's revisional powers over decrees and orders of the Presidency Small Cause Court are sanctioned by section 6 of the Presidency Small Cause Courts Act, which provides that "The Small Cause Court shall be deemed to be a Court subject to the superintendence of the High Court of Judicature at Fort William...within the meaning of the Letters Patent,...dated the 28th day of December 1865,...and within the meaning of the Code of Civil Procedure;...and the High Court shall have, in respect of the Small Cause Court, the same powers as it has under the twenty-fourth and twenty-fifth of Victoria, Chapter 104, section 15, in respect of Courts subject to its appellate jurisdiction." For these powers then a Presidency Small Cause Court is placed in the same position as a Court subject to the High Court's appellate jurisdiction. I think the fair reading of the Charter Act, the Letters Patent and the Presidency Small Cause Courts Act leads to the result that the High Court has a right to interfere by way of revision, and if that interference takes the form of a judgment by a single Judge, then the High Court has the power to deal by way of an appeal with that judgment. In this connection reference may usefully be made to clause 39 of the Letters Patent which provides for appeals to the Privy Council, and ordains that any person or persons may appeal to His Majesty in Council from any final judgment, decree or order of the High Court of Judicature at Fort William in Bengal made on appeal. There is no express reference to an order made on revision and yet it has been decided as far back as 1874 in *Girdharee Singh* v. *Hurdoy Narain Sahoo* (1) that orders made in revision under section 15 of the Charter Act are subject to appeal to His Majesty in Council under clause 39. The same view has been expressed in *Secretary of State for India in Council* v. *British India Steam Navigation Company* (2) in reference to an order under section 115 of the Civil Procedure Code. Thus we have two instances in which the expression "judgments, decree, and orders in appeal" has been held to include judgments, decrees or orders made in revision. But the matter does not rest there: for there is an express decision on the point, with which we are now concerned, in *Chappan* v. *Moidin Kutti* (3), where it was decided by a Full Bench of the Madras High Court that an appeal will lie under clause 15 of the Letters Patent from an order under section 622 of the old Code, when such an order is a judgment within the meaning of clause 15 of the Letters Patent. And then, again, there is a decision of this Court in *Kali Charan Sirdar* v. *Sarat Chundra Chowdhry* (4), where the same view was involved though it was not made the subject of express decision. One of the Counsel in that case was Mr. Sinha who appears in the present case and he assures us that he argued this very point. A reference to the Court note makes it clear to my mind that he is not mistaken in this because there is a reference in that note to *Chappan* v. *Moidin Kutti* (3), which could only have been advanced for the purpose of an argument concerning appealability under clause 15 from an order passed under section 622. My confidence in the correctness of Mr. Sinha's recollection is not shaken by the fact that the authorised report unfortunately does not contain any reference to the citation of that authority. It is true that in *Hira Lal* v. *Bai Asi* (5),

(1) 21 W. R. 263.
(2) 9 Ind. Cas. 183; 13 C. L. J. 90; 15 C. W. N. 848.
(3) 22 M. 68; 8 M. L. J. 231.
(4) 30 C. 397; 7 C. W. N. 545.
(5) 22 B. 891.

there is a decision which appears to run counter to those with which I have already dealt, but the judgment of Mr. Justice Ranade is guarded. If I may say so with great respect, the result at which the learned Judges arrived in that case appears to be correct, but I should have preferred to base the conclusion on the fact that there was no judgment from which to appeal. The jurisdiction exercised by Mr. Justice Fletcher in this case is one he was only authorised to exercise by virtue of a rule purporting to be made under section 13 of the Charter Act, which authorises the High Court to provide by rules for the exercise by one or more Judges of the original and appellate jurisdiction vested in the Court. And clause 16 of the Letters Patent provides that "the High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulation now in force." It appears to me, therefore, that it may justly be said that the Presidency Small Cause Court is subject to this Court's appellate jurisdiction, and were we to place on the Charter Act and the Letters Patent the narrower construction for which the respondent contends, this predicament would ensue that there would be no such power as that contained in section 13 of the Charter Act, in relation to cases that come before the Court by way of revision. But it is the long-established practice of this High Court —a practice that has obtained, I believe, from its establishment to treat these revisional matters as properly allocated in accordance with rules made under section 13. This view is further borne out by the decision of the Madras High Court in *Venkata Reddi* v. *Taylor* (6), where Mr. Justice Muttusami Ayyar and Mr. Justice Best came to a similar conclusion in relation to cases under the Provincial Small Cause Courts Act.

In my opinion, therefore, we have here a judgment within the meaning of clause 15 of the Letters Patent and it is a judgment from which an appeal lies, as provided in that clause.

The next question is whether the judgment of Mr. Justice Fletcher was right or not.

The application was one under Chapter VII of the Presidency Small Cause Courts Act, which entitles a person to apply for an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant. What was determined by Mr. Dobbin to whom the application was made was that the plaintiff had failed to establish the relationship of landlord and tenant, and he had no right to eject the defendants. So far as he decided that the relationship of landlord and tenant had not been established he made a pronouncement on a question of substantive law, and it cannot be said that in that there was any error of procedure within the meaning of section 115 of the Code of Civil Procedure. The particular events which justify interference are, *first*, where the Court has exercised a jurisdiction not vested in it by law; *secondly*, where the Court has failed to exercise a jurisdiction which is vested in it by law; and, *thirdly*, where the Court has acted in the exercise of its jurisdiction illegally or with material irregularity.

The affidavit on which the application to Mr. Justice Fletcher was made suggests that the error, if error there was, came under either the second or the third of these two heads, for it is alleged that the Court failed to exercise a jurisdiction vested in it by law, or that the Court acted in the exercise of its jurisdiction with material irregularity. Those are the only two grounds on which the application was made. I assume the Rule was issued on those grounds and the opposite party was not called upon to answer any other.

But how can it be fairly said that the Court failed to exercise a jurisdiction vested in it by law? It dealt with the matter; it was prepared to exercise its jurisdiction, but the learned Judge considered as a matter of law that there was no relationship of landlord and tenant. The Court was entitled to come to that conclusion even if it was erroneous, and if it did come to that conclusion it cannot be said that the Court has failed to exercise a jurisdiction vested in it by law.

In so far as it is suggested that the Court

(6) 17 M. 100; 3 M. L. J. 259.

SHEW PROSAD BUNGSHIDHAR v. RAM CHUNDER HARIBUX.

acted in the exercise of its jurisdiction with material irregularity, I confess I am unable to follow the argument.

It was suggested before us in the course of argument that the Court acted in the exercise of its jurisdiction *illegally*, in so far as it came to an erroneous conclusion of law. That, however, is a contention which is not made in the application. But even if it had been made, it could not have succeeded and I am unable to see any kind of ground on which it can be said that Mr. Dobbin acted in the exercise of his jurisdiction illegally or with material irregularity within the meaning of section 115. It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section. If there was an error committed by Mr. Dobbin, it was an error of law and not of procedure, and, in my opinion, Mr. Justice Fletcher had no power to interfere. This view appears to me to be in accordance with the provisions of the section and the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (7).

In my opinion, therefore, we ought to allow the appeal and set aside the judgment of Mr. Justice Fletcher. The result of that will be that Mr. Dobbin's order will be restored.

The appellants will have their costs of the proceedings in the High Court.

WOODROFFE, J.—I agree in the conclusion that an appeal lies, for I think that the *revisional* is a form of the *appellate* jurisdiction.

Upon the second point the grounds suggested in the petition, for interference under section 115 are, *first*, that the Court failed to exercise a jurisdiction vested in it in refusing to eject the defendants; and, *secondly*, that the Court acted with material irregularity in the exercise of a jurisdiction which it did possess. The irregularity is alleged to be this that the Court held that it could not eject the defendants. It appears to me to be very clear that the order passed on revision cannot be supported on either of these grounds, and we have had a third ground of illegality placed before us to which I will later refer.

As regards the first ground there is no doubt that there is some variance of opinion as to the meaning of the term "jurisdiction" in section 115. According to one view the term "jurisdiction" is here used in the ordinary sense, that is a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. According to another view, the term may mean the legal authority of a Court to do certain things, namely, to make a particular order in a case over which it has jurisdiction in the sense stated. According to my own view the former construction is the preferable one. But it is clear that in neither view does the present case fall within the terms of the section. The Small Cause Court had jurisdiction to make the order complained of. What in fact the applicant complains of is that the decree is not that which he wanted. Then as regards the alleged irregularity, this according to the general trend of the cases applies to the commission of an error of procedure. There is none here, as the only irregularity alleged in the petition is that the Small Cause Court did not give the applicant the decree which he asked for. Neither of these grounds, therefore, in my opinion, apply. It has, therefore, been suggested that there has been illegality which, it has been held, is something more than the material irregularity referred to in the section. It is to be observed here that there has been nothing in the conduct of the suit which can be said to have led the Court to that which is alleged to be a wrong conclusion, for the allegation that the Court framed and determined a wrong issue is not made out. The issue which was determined was not an improper one, namely, whether the relationship of landlord and tenant existed. What in effect is said in the argument is that the learned Judge's grounds did not support his conclusion that such relationship did not exist. The learned Judge of Small Cause Court thought that no privity was created because there was no agreement in the lease entitling the plaintiff to eject. In so holding the learned Judge may have been right or wrong, but whatever may be the meaning which we should attach to the term "illegality" the Privy Council decision establishes that we cannot interfere on grounds of alleged error in law or fact, *Amir Hassan Khan* v. *Sheo Baksh Shingh* (7). In my opinion such cases as decided that the Court may interfere, provided the error is gross or palpable, run counter to this Privy Council decision.

(7) 11 C. 6; 11 I. A. 237.

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It has been argued, however, that there is another decision of the Judicial Committee, *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry*(8), which, it is said, goes the other way. But on an examination of that decision it is clear that is not so. This was a case in which the Court declined, as the Privy Council expressly says, to exercise a jurisdiction which it had, namely, to confirm the sale of a property which had been already put up to sale, and in which the Judge exercised a jurisdiction which did not belong to him, namely, the setting aside of the sale by a summary order which having regard to the inapplicability of sections 311—313 of the Code, he was admittedly not entitled to do. There was no alternative course open to the Court but to confirm the sale, which he did not do. He did not do so because he (as was held erroneously) thought that he had an inherent power to make the order he did which in fact he had not.

Reference has also been made on this point to a decision: *Maharajah of Burdwan* v. *Apurba Krishna Roy* (9). This also was a case of refusal to exercise jurisdiction and all that the Court held was that it was immaterial that such refusal was made upon a misapprehension of the true effect of the statutory provision on the subject. This appears to me to be obvious. The decision rests on the well-known principle that a Judge cannot assume as a matter of law that which in fact has no existence in law, and so give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of the statute deprive himself of the jurisdiction which properly belongs to him, and if he refuses jurisdiction in such a case, the High Court may interfere, whether the question has been rightly or wrongly decided by him. I, therefore, agree in the order which has been passed.

Appeal allowed.

Attorneys for the Appellants: Messrs. *Manuel & Agarwalla.*

Attorney for the Respondent: Mr. *C. C. Bose.*

(8) 20 C. 8; 19 I. A. 154.

(9) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1200 OF 1913.

January 30, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BROHMANDA NATH DEB SARKAR—DECREE-HOLDER—PETITIONER

versus

HEM CHANDRA MITRA AND OTHERS—*Pro forma* DEFENDANTS—AND OTHERS—PRINCIPAL DEFENDANTS—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), ss. 148 A, 158B—Civil Procedure Code (Act V of 1908), s. 115, O. XXXIV, r. 14—Usufructuary mortgagee, if can sue tenants for rent as landlord—Co-sharer landlords—Interest of each, whether should be of same degree—"Rent due," in s. 148 A, meaning of—Effect of order of District Judge—Jurisdiction of first Court.

A usufructuary mortgagee of a share of *zemindari* is entitled to receive rent and is empowered under section 78 of the Land Registration Act to sue for rent in his character as landlord and his suit is not barred under rule 14 of Order XXXIV of the Civil Procedure Code.

The co-sharer landlords are the entire body of persons who are entitled to collect rent. It is not essential that the interest of each should be of the same degree.

The expression "*rent due*", in section 148A of the Bengal Tenancy Act, means not the rent payable under the contract of tenancy, but the rent actually in arrears after deducting the amount, if any, which may have been actually paid to the landlord.

Therefore, a suit for the recovery of what to the information of plaintiff was the whole arrear due is in essence a suit for rent due to all the co-sharers within the meaning of section 148A; and if a decree is made in such a suit, the holding will pass to the purchaser in execution of the decree, under section 158B.

The plaintiff in such a suit obtained a decree for rent and applied for execution in accordance with sub-section (1) of section 158B. The first Court granted the application, but on appeal the lower Appellate Court directed the first Court to hold the sale under the Civil Procedure Code and not under the Bengal Tenancy Act:

Held, that the result of the decision of the lower Appellate Court is that the first Court has to proceed to sell the holding under the Civil Procedure Code, which it has no jurisdiction to do, and to refuse to sell the holding under the Bengal Tenancy Act, which it has jurisdiction to do; and that, therefore, the High Court will interfere with the decision of the lower Appellate Court in revision.

Jogodanund v. *AmritaLal*, 22 C. 767 at p. 783, *Sheo Prosad* v. *Ram Chandra*, 23 Ind. Cas. 977; 41 C. 323 at p. 341 and *Mathura Nath Sarkar* v. *Umesh Chandra Sarkar*, 1 C. W. N. 626, referred to.

Rule against the order of the District Judge of 24-Pergannahs, reversing that of the Third Munsif of Diamond Harbour.

BROHMANDA NATH DEB v. HEM CHANDRA MITRA.

Babu *Prokash Chandra Mozumdar*, for the Petitioner.

Babu *Atul Krishna Roy*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court of appeal below has directed execution of a decree for rent to proceed, not under section 158B of the Bengal Tenancy Act as had been ordered by the Court of first instance, but under the provisions of the Code of Civil Procedure. The circumstances under which the order in question has been made may be briefly narrated. The petitioner is a usufructuary mortgagee from a co sharer landlord who is interested in the property to the extent of one-fourth. The opposite parties are entitled to the remaining three-fourths share. The petitioner, as usufructuary mortgagee, brought a suit for rent against the tenant and joined the proprietors of the three-fourths share as also the mortgagor as parties defendants. He stated in the plaint that the entire rent payable to all the landlords was Rs. 42 annually and that the rent payable in his share was Rs. 10-8. He further alleged that the co-sharers refused his invitation to join as co-plaintiffs in the suit, and had declined to inform him whether any arrears of rent were due to them and if so, how much. He consequently instituted the suit under section 148A of the Bengal Tenancy Act, and prayed that the co sharers might be transferred to the category of co-plaintiffs if they so desired and that in any event if they stated that rent was due to them, the plaintiff would amend his claim and pay additional Court-fees. The co-sharers did not enter appearance and the plaintiff obtained a decree for rent. He next applied for execution in accordance with sub-section 1 of section 158B of the Bengal Tenancy Act. Thereupon under sub-section 2 notice of the application for execution was given to the co-sharers. They appeared and contended that the suit had not been properly framed under section 148A and that the execution could not proceed under section 158B. The objection was overruled by the Court of first instance. Upon appeal the District Judge has reversed that decision and has directed the Court of first instance to hold the sale, not under sub-section 2 of section 158B of the Bengal Tenancy Act, but in accordance with the Code of Civil Procedure on the footing that the decree obtained by the petitioner was a decree for money and was not capable of execution as a decree for rent under the provisions of the Bengal Tenancy Act.

The propriety of this order is now challenged before us, and we are invited to interfere in the exercise of our revisional jurisdiction, inasmuch as no second appeal lies in the present case. There is no question that the case falls within section 47 of the Code of Civil Procedure, because the matter arises between the parties to the suit and the question raised obviously relates to the execution of the decree. But a second appeal is barred under section 153 of the Bengal Tenancy Act, because the amount claimed in the suit was less than Rs. 100 [*Shyama Churan* v. *Debendra Nath* (1)]. Consequently if the order of the Court below is erroneous, the only course left open to the petitioners to obtain relief is by way of an application under either section 115 of the Code of Civil Procedure or section 15 of the Indian High Courts Act.

The order of the Court below has been sought to be supported on behalf of the opposite party on three grounds. It has been argued in the first place that the Bengal Tenancy Act does not apply because the decree was made in a suit by a person other than the landlord. It is difficult to appreciate the force of this argument, but the contention appears to be that a usufructuary mortgagee is not in the position of a landlord; in other words, if the relationship of landlord and tenant exists between *A* and *B*, the usufructuary mortgagee of *A* is not in the position of a landlord in relation to *B*. In our opinion this contention is wholly fallacious. The usufructuary mortgagee is entitled to receive the rent, as is clear from the definition of the expression "usufructuary mortgage" given in clause (*d*) of section 58 of the Transfer of Property Act. Reference has been made to clauses 3 and 4 of section 3 of the Bengal Tenancy Act, but they are clearly of no assistance to the opposite party. The term 'landlord' means a person immediately under whom a tenant

(1) 4 C. W. N. 269; 27 C. 434.

holds, and the term 'tenant' is defined to mean a person who holds land under another person, and is, or but for a special contract, would be, liable to pay rent for that land to that person. The usufructuary mortgagee is consequently a person immediately under whom a tenant holds. But it has been argued that this view cannot be supported, because a usufructuary mortgagee is a transferee of a portion only of the interest vested in the mortgagor. This clearly does not affect the question. An intermediate lessee is entitled to collect rent from the tenant—rent which but for the lease would have been payable to his landlord. On the other hand, section 78 of the Land Registration Act clearly contemplates that a usufructuary mortgagee in possession is entitled to sue for rent in his character as landlord. The first contention, therefore, fails.

It has been argued in the second place that a usufructuary mortgagee is not in the position of a co-sharer landlord within the meaning of section 158B, sub-section 1, clause (*c*) of the Bengal Tenancy Act, because he is the mortgagee from one of the proprietors, whereas the co-sharers are the proprietors themselves. This argument is obviously fallacious. The co sharer landlords are the entire body of persons who are entitled to collect rent. It is not essential that the interest of each should be of the same degree; for instance, it is conceivable that a *patnidar* of one-half share in the *zemindary* and a *dar-patnidar* of the other half share may be jointly entitled to collect rent from tenants in actual occupation, and when they are so entitled, they clearly constitute a body of co-sharer landlords. It has been contended further that section 158B has no application, because the suit as framed was not within the scope of section 148A. We have already described the nature of the suit, and it is clear from the decision in the case of *Nunda Lal* v. *Kala Chand* (2) that the plaintiffs substantially complied with the requirements of section 148A. It has been argued, however, that the suit was not brought for the entire rent due to all the co-sharers. We have been invited to construe the expression "rent due" as equivalent to "rent payable under the contract of tenancy." The argument in substance is that to entitle a person to claim the benefit of section 148A, he must include in the suit a claim, not for the rent actually in arrears, but the rent payable under the contract without the deduction of any amount that might have been actually paid to the landlord. This clearly is an entirely untenable contention. We may further add that it has not been suggested at any stage of the present proceeding, nor was the suggestion made in the course of the original suit that at the time of the commencement of the litigation there was an arrear of rent due to the co-sharer landlords. The plaintiff sued for the recovery of what to his information was the whole arrear due and that was in essence a suit for rent due to all the co-sharers, within the meaning of section 148A of the Bengal Tenancy Act. The second contention consequently fails.

It has been argued in the third place that the execution proceedings are barred under rule 14 of Order XXXIV of the Civil Procedure Code. This contention is based obviously on a misapprehension. Rule 14 provides that where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2. This rule is inapplicable on three grounds. In the first place, the mortgagee has not obtained a decree for the payment of money in satisfaction of a claim arising under the usufructuary mortgage. In the second place, he does not here seek to bring the mortgaged property to sale; the mortgagee seeks to bring to sale a tenancy subordinate to the interest of the mortgagor. In the third place, the decree has not been made for money in satisfaction of a claim arising under the mortgage. Consequently the suit is not barred under Order XXXIV, rule 14.

It is thus plain that the order of the District Judge cannot be supported on any of the grounds suggested. The only question for consideration is as to the competency of this Court to interfere with that order. On behalf of the opposite party it has been suggested that the District Judge has acted

(2) 8 Ind. Cas. 50; 15 C. W. N. 820.

in the exercise of his jurisdiction, as under the law an appeal did lie to him. He has, it is said, committed only an error of law, which, in the language of their Lordships of the Judicial Committee in the case of *Malkarjun* v. *Narhari* (3), he had jurisdiction to commit. This is a plausible view of the case, but upon a closer examination of the true nature of the order of the District Judge, the real position appears to be this. The order of the District Judge replaces the order of the Court of first instance. That is, in substance, the effect of the exercise of appellate jurisdiction by the Court below; if it finally disposes of the case, it makes the order which should have been passed by the Court of first instance. The result of the decision of the District Judge, consequently, is that the Court of first instance has to proceed to sell the tenure in accordance with the provisions of the Code of Civil Procedure, which it has no jurisdiction to do, and to refuse to sell the tenure in accordance with section 158B of the Bengal Tenancy Act, which it has jurisdiction to do. The circumstance that this result follows from an erroneous interpretation of the scope and requirements of sections 148A and 158B of the Bengal Tenancy Act is clearly no bar to the exercise of our revisional powers. [*Jogodanund* v. *Amrita Lal* (4), *Sheo Prasad* v. *Ram Chander* (5)]. The outstanding fact remains that if the original Court proceeds to carry out the direction of the lower Appellate Court, as it is bound to do, it will exercise a jurisdiction which it does not possess and will decline a jurisdiction which it does possess and such proceeding would obviously be liable to be set aside—an aspect of the matter which was not suggested to the Court in *Mathura Nath Sarkar* v. *Umesh Chandra Sarkar* (6). We are of opinion that this is plainly a case where it is competent to this Court to set aside the order of the Court below.

The result is that this Rule is made absolute, the order of the District Judge set aside and that of the Court of first instance restored. This order will carry costs in all the Courts. We assess the hearing fee in this Court at five gold *mohurs*.

Rule made absolute.

(3) 25 B. 337; 5 C. W. N. 10; 27 I. A. 216; 10 M. L. J. 368; 2 Bom. L. R. 927 (P. C.).

(4) 22 C. 767 at p. 783.

(5) 23 Ind. Cas. 977; 41 C. 323 at p. 341.

(6) 1 C. W. N. 626.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1482 OF 1912.

March 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Sheshagiri Aiyar.

CHELLAKKUTTI UDAYAN—PLAINTIFF—APPELLANT

versus

HIS HIGHNESS THE PRINCE OF ARCOT SIR GHULAM MUHAMMAD ALI KHAN BAHADUR, K. C. I. E., BY HIS AGENT KHAN SAHEB MUHAMMAD ANWAR-UDDIN SAHEB BAHADUR—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 30, 40—Commutation of rent—Discretion—Enhancement of rent—Limit of enhancement—Not applicable to commutation.

In fixing cash rent in commutation of grain rent, the Collector need not confine himself to the considerations set out in clause (3) of section 40 of the Act.

The limit prescribed in section 30, clause (1) (*b*) of the Estates Land Act for enhancement of rent does not apply to the commutation of rent fixed under section 40 of that Act.

Second appeal against the decree of the District Court of Trichinopoly in Appeal Suits Nos. 73 and 95 of 1911 preferred against that of the Court of the Assistant Collector of Trichinopoly in Summary Suit No. 6 of 1909.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *H. Balakrishna Rao*, for the Respondent.

JUDGMENT.—Section 40, clause (3) of the Estates Land Act, implies that some discretion and latitude have to be allowed to the Collector (and, of course, to the District Court on appeal) in fixing the rent in cash in commutation of grain rent. Three considerations are mentioned in the clause (3) itself, but the Collector is not confined to those three considerations though he should take into account those three considerations also.

The limit of the enhancement of the rent to two annas in the rupee imposed by clause (1) (*b*) of section 30 cannot apply to the commutation rent fixed under section 40 which deals with a different state of facts altogether.

We are not satisfied that the District Judge fixed the commutation rate arbitrarily or unfairly to either plaintiff or defendant in this case and we dismiss both the second appeal and the memorandum of objections with costs.

Appeal dismissed.

ROMESH CHANDRA BANERJEE *v.* EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 341, 344, 346, 352 AND 353 OF 1913.*

July 11, 1913.

Present:—Mr. Justice Woodroffe and Mr. Justice Beachcroft.

ROMESH CHANDRA BANERJEE AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 399, 402—Acquittal under section 399, if involves acquittal under section 402, Indian Penal Code—Nature of defence which accused can set up—Duty of Court—Prosecution evidence, deficiency in, defence not bound to fill up—Right of defence to comment on such deficiency—Case of fraud set up by defence—Prosecution, opportunity of explanation to—Verdict of assessors, in answer to questions by Judge, impropriety of—Repugnancy in judgment, conviction if can be set aside on such ground—Tendency of modern legislation—Power of High Court to alter acquittal on one of two alternative charges into conviction—Distinction between sections 399 and 402, Indian Penal Code—Criminal Procedure Code (Act V of 1908), s. 47, meaning and scope of—Section 103, clause (2)—Search—Right of "occupant to be present at search"—Denial of this right, effect of—"Occupant of the place," meaning of—Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings—Finding of incriminating articles in a house, presumption of law arising from.

Woodroffe, J. (*Beachcroft, J.*, concurring).—An accused person is entitled to put forward any defence open to him, technical or otherwise, and to have the Court's judgment on it.

It is no affair of the defence to supplement or explain deficiencies or suspicious circumstances appearing on the face of the prosecution evidence. It is open to it to say that the prosecution has not proved its case and to refer to such deficiencies in proof of the submission or to other circumstances appearing on the face of the prosecution evidence which show that it is so open to suspicion that it would be unsafe to accept it. If, however, the defence puts forward a case of fraud or if the evidence for the prosecution is not ambiguous, the defence should give notice of the point they intend to take so that the prosecution may have an opportunity of explanation. If any charge of fraudulent practice was going to be based on a circumstance which standing by itself was not necessarily suspicious, the defence should have cross-examined witnesses on the point.

Where the Sessions Judge in taking the verdict of the assessors put a large number of questions to them and then recorded their opinion on those questions:

Held, that the Judge should have allowed the assessors in the first instance to have given their opinion in their own language and way, and then when they had completed what they had to say it would have been open to him to put to them such questions as were necessary to elucidate or supplement their opinion.

Where the charge against the accused was of two separate offences laid in an alternative form, *viz.*, one under section 399 and another under section 402, Indian Penal Code, but it appeared that the charges were treated not alternatively but as additional and the Sessions Judge acquitted them of the charge under section 399, Indian Penal Code, and convicted them of the charge under section 402, Indian Penal Code:

Held, that the acquittal under section 399, Indian Penal Code, did not involve an acquittal under section 402, Indian Penal Code, and the conviction under the latter section was not wrong and the judgment of the Sessions Judge was not vitiated by repugnancy;

(2) that even if there was any repugnancy it was open to the High Court to alter the finding of acquittal under section 399, Indian Penal Code, into one of conviction maintaining the sentence;

(3) that the offences of commission of dacoity, preparation for it and assemblage for the same purpose have this in common that they presume an intention or agreement to commit dacoity by five or more persons. A mere assembly without further preparation is not a preparation within the meaning of section 399, Indian Penal Code, for if it were, section 402, Indian Penal Code, would be redundant. Section 402, Indian Penal Code, applies to the case of mere assembling without proof of other preparation. A person can thus be not guilty of dacoity yet guilty of preparation and not guilty of preparation yet guilty of an assembly.

Beachcroft, J.—The tendency of modern legislation in general and of the Criminal Procedure Code in particular is to avoid technicalities and there is no provision in that Code which would justify interference with a conviction on the ground of repugnancy in the record.

Woodroffe, J. (*Beachcroft, J*, concurring).—Where the Police searched a hut on suspicion and incriminating evidence was found, and after the search was over the Additional District Magistrate came to the spot and saw what had been found and a search list was prepared which the Additional District Magistrate signed, and the accused were subsequently placed before another Magistrate who held an inquiry and committed the accused to the Court of Session for trial:

Held, (1) that the fact that the Additional District Magistrate did not take cognizance of the case at once did not render the subsequent proceedings before another Magistrate bad, nor could such subsequent proceedings be held to be prejudicial to the accused;

(2) that it was not the duty of the Additional District Magistrate to take cognizance of the case on the basis of what he found at the spot.

Where the accused persons who were inside the room searched by the Police were, after the discovery in their presence of a gun and after search of their persons, sent out of the room and the search was continued:

Held, that the Code of Criminal Procedure permits the occupants of the place searched to be present at the search and there was, therefore, a violation of this rule which is one not merely of technicality but of substance, in that it is enacted to guarantee the reality of the search and the discoveries made thereat.

That this was an irregularity which the accused

*Taken from C. W. N. with permission.—*Ed.*

ROMESH CHANDRA BANERJEE v. EMPEROR.

were entitled to ask the Court to consider and which made it incumbent on the Court to scrutinise the evidence carefully.

Beachcroft, J.—The spirit of section 103, sub-section 3, is that the occupant of the place searched shall be present and it means that he is to be given the option of being present and not that he is to be allowed to be present only if he demands it. But the right of presence given by section 103 applies only to the occupant of the place searched or some person in his behalf, and the words "occupant of the place" are not intended to cover every person who may happen to be in the place at the time but they refer back to the person mentioned in section 102, *i. e.*, a person residing in or being in charge of the place.

Woodroffe, J.—Where after searching a hut arms were found under a *machan* inside the hut and in the ceiling of the hut:

Held, that the knowledge of the existence of the arms would not without other evidence be imputable to any other than the lessee of the hut, nor would the presumption operate even against him if it were shown that the circumstances were such that arms might be in his place without his knowing it.

Beachcroft, J.—Where an article is found in a man's house the ordinary presumption is that he as owner of the house is aware of its contents. This is subject to the qualification that no other person has access to that particular place. It follows that if the house is in the occupation of more persons than one having access to the particular place, there is no presumption against them individually that they have put the article where it is found; though if it be proved that an article has been for a considerable period of time in a place to which all have frequent access, it might reasonably be presumed that all were aware of its existence.

Section 47, Criminal Procedure Code, is not intended to restrict the powers of the Police to enter the place to be searched: on the contrary it is a provision compelling householders to afford the Police facilities in carrying out their duties, and section 48 provides that if difficulties are placed in the way of a Police officer he may use force to obtain ingress.

Appeal against the judgment of the Sessions Judge of Tipperah, dated the 12th of March 1913.

Messrs. *A. Caspersz, Nisith Sen, J. K. Ghosal, H. K. Ghose, M. L Mitter* and *S. Dutt* and Babus *Monmatha Nath Mukherjee, Upendra Nath Roy, Satish Chandra Bhattacharjee, Profulla Chandra Bose* and *Probodh Kumar Dass*, for the Appellant in No. 341.

Mr. *A. Rasul* and Babu *Sasadhur Roy*, for the Appellant in No. 344.

Babus *Monmatha Nath Mukherjee, Amulya Charan Chatterjee* and *Promotho Lal Dutt*, for the Appellant in No. 346.

Messrs. *U. N. Sen Gupta, N. Sen, H. Ghose* and *S. Dutt* and Babu *Birendra Kumar De*, for the Appellant in No. 352.

Babus *Probodh Kumar Dass* and *Profulla Chandra Bose*, for the Appellant in No. 353.

Messrs. *S. P. Sinha, N. Gupta* and Babu *Atulya Charan Bose*, for the Crown in all cases.

JUDGMENT.

WOODROFFE, J.—In this case, the hearing of which on appeal has lasted over three weeks, there are twelve accused who have been represented by various learned Counsel and by Babu Monmatha Nath Mukherji.

The charge in the Magistrate's Court was of two separate offences laid in an alternative form. The first charge was that the accused on or about the 1st November 1912 at Comilla made preparation for committing dacoity in a particular manner, which was assigned to be as follows; namely, by assembling together with arms, masks and implements which might be used for the commission of dacoity. The offence there charged was one under section 399, Penal Code, all else in the charge than the allegation of preparation being merely particulars as to the preparation alleged. It then proceeded in the alternative to charge an offence under section 402 of the Indian Penal Code, in that on the said date, and at the same place, the accused assembled together for the purpose of committing dacoity. Judging from the record before us it would seem that before the Sessions Judge the charges were treated not alternatively but as additional. This appears both from the order-sheet, the judgment, the written statement of the accused and from what learned Counsel has told us. Under the circumstances, however, the matter is of no practical importance.

The learned Judge and the Assessors found that the accused were not guilty under section 399. The learned Judge's view, as appears in the judgment, was that though the facts alleged by the prosecution had been proved they did not constitute an offence under section 399, because he was of opinion that mere assembling would not constitute an offence under section 399, and because he thought it necessary that it should be proved

what part each particular member of the gang took in the preparation and bringing together arms and the like. As he was of opinion that this had not been shown he held that the accused had not been guilty of an offence under section 399. There may be a question whether he was right in this, for it may be argued that if the facts put in evidence by the prosecution are true, they evidence preparation, and that it was not necessary that the prosecution should point out with their finger the exact part taken by each member of the gang as regards such preparation provided that it were shown that the accused were members of a gang which had made in fact preparation for dacoity. Doubtless the word "whoever makes", in section 399, may have been the cause of the contrary view. But section 399, it is argued, assumed a previous agreement to commit dacoity and to refer not to individual but concerted action [see *Crown* v. *Shera* (1)]. It is, however, unnecessary in this case to discuss or decide the question having regard to my findings on the other points raised. The question before us is not whether the accused might not also have been convicted of the major offence but whether their conviction on the minor offence should stand. The Assessors were of opinion that the accused were not guilty under section 402. Here I may observe that objection has been, and I think rightly, taken to the form of the Assessors' verdict which was due to questions put by the learned Judge. The latter put a large number of questions to the Assessors and then recorded their opinion on those questions. He should, however, have allowed the Assessors in the first instance to have given their opinion in their own language and way and then when they had completed what they had to say, it would have been open to him to put to them such questions as were necessary to elucidate or supplement their opinion. To the method followed there is amongst others this objection that the questions which a Judge may call on an Assessor to answer may not be exhaustive in extent nor crucial in character. Speaking generally the opinion of the Assessors was that the accused Nos. 1, 5, 6 and 10 (I take the numbers of the accused here and later from the heading of the printed judgment) had offered a satisfactory explanation of their conduct, but that as regards the other eight they were assembled for a purpose which one Assessor describes as "immoral or illegal" and the other as "evil." It is not easy to reconcile such a finding with the facts of the case whatever, view be taken of them. The Assessors could only be justified in assuming the existence of some evil and illegal purpose on the evidence. If that evidence is not accepted there is no legal ground for such an imputation. If it is accepted, then the evidence itself discloses specifically what the purpose was, namely, preparation or assembly for the committing of dacoity. The learned Judge accepted the truth of that evidence and consistently with such acceptance found that all the accused were guilty of an offence under section 402.

Now, the first objection to this finding is one of law. It is said that the acquittal by the learned Judge of the accused under section 399 involved an acquittal under section 402, and, therefore, the conviction under the latter section cannot stand. There is, of course, no merit in this objection, for when we look at the judgment itself apart from the order of acquittal following on it, we know why it was that the Judge acquitted the accused under section 399. It was not because he found that there had been no assembly when arms had been found and so forth, but because though there had been such an assembly as would justify a conviction under section 402, there was in the Judge's opinion no sufficient evidence of preparation under section 399, Penal Code. The objection is a technical one and put forward as such. The accused are, however, entitled to put forward any defence open to them, technical or otherwise, and to have the Court's judgment on it. The objection, however, is ill-founded. I assume for the purpose of argument and without further discussion that we should, in determining this matter, not consider what the learned Judge has said in his judgment, but that we should determine the objection on a reading of his order of acquittal with reference to the terms of the charge which are incorporated in it. The objection then is this. It is argued that there may be preparation both before and after assembly, and that assembly itself is a form of preparation: that here the preparation alleged is the

(1) 18 P. R. 1868 Cr.

assembling with arms, etc., and that as the assembling in terms of the first charge was negatived as preparation, assembling under the second charge was also negatived. It is argued that as the accused were acquitted under section 399, they should (having regard to the terms of the charge under that section) have been acquitted under section 402, as the charges under the two sections contained, having regard to their form, the same essential elements. There is, therefore, it is said, a repugnancy in the judgment. If this were the case, I am not prepared to accede to the argument that we could not ourselves alter the finding of acquittal under section 399 into one of conviction maintaining the sentence. Mr. Nisith Sen has argued that the decision in *Queen-Empress* v. *Jabanulla* (2), which admittedly entitles us to do so, was wrongly decided. It is, however, now too late to question it even if it was open to us and we wished to do so. That decision was given some seventeen years ago and must have been followed in numbers of unreported cases. It has also been adopted in reported decisions. I think it may be said, as Mr. Sen has done, that the decision in *Satis Chandra Das Bose* v. *Queen Empress* (3) in which no question of acquittal was involved, in *Kunja Bhuiya* v. *Emperor* (4) in which the Court did not convict on a charge on which the accused had been acquitted and in *Emperor* v. *Sakharam Ganu* (5) in which the Court set aside the order, except so far as it involved an acquittal, are not authorities on the particular point before us. But the decision of *Nazimuddi* v. *Emperor* (6) clearly is such an authority. It is true that the Judges in that case say that the trial was vitiated because the Assessors' opinion was not properly taken, but by this word "vitiated" they did not mean that the trial was void, otherwise they could not have proceeded to have expressed the opinion which they did, namely, that it was open to them to convict the accused of an offence of which he had been acquitted. That they did not do that which they considered they had ordinarily jurisdiction to do was due to the fact that they could not enhance the sentence and, therefore, a re-trial was ordered. The Madras High Court have followed the decision of *Queen-Empress* v. *Jabanulla* (2), see *Appanna* v. *Pithani Mahalakshmi* (7), *Golla Hanumappa* v. *Emperor* (8), and the Allahbad High Court proceeds on the same principle, see *Sardara* v. *Emperor* (9), for though that appears to have been a case where a Judge declined to convict, the effect of such an order is tantamount to an acquittal. It is, however, not necessary to invoke such powers as these cases speak of, as there is, in my opinion, no such repugnancy in the Judge's order as would require us to have recourse to them. Dealing only with the principal aspects of the offence of dacoity there may be, as is apparent from the Code itself, the actual commission of dacoity, a preparation for it, and an assemblage for the same purpose. As appears from the punishments awarded, the first two are treated as the more grievous offences, preparation is the next grievous, and assembly is the least grievous. All the offences have this in common that they presume an intention or agreement to commit dacoity by five or more persons. In a popular sense an assembly to commit dacoity may be a preparation for it. But a mere assembly without further preparation is not a preparation within the meaning of section 399. For if it were, section 402 would be redundant. This section applies to the case of mere assembling without proof of other preparation, for which there is a maximum punishment of seven years, whilst the preparation which is the subject of section 399 is punishable with ten years' imprisonment. A person can thus be not guilty of dacoity yet guilty of preparation, and not guilty of preparation yet guilty of an assembly. This appears also to be admitted by the argument for the defence that a band of dacoits might be convicted under both sections. However this be, and such admission does not affect my conclusion in this case, the argument substantially is that the form of the charges is such that the preparation alleged under section 399 is such that if negatived it follows that an offence

(2) 23 C. 975.

(3) 27 C. 172; 4 C. W. N. 166.

(4) 15 Ind. Cas. 481; 39 C. 896; 13 Cr. L. J. 481; 16 C. W. N. 1053.

(5) 8 Bom. L. R. 120; 3 Cr. L. J. 240.

(6) 15 Ind. Cas. 641; 40 C. 163; 13 Cr. L. J. [illegible]

(7) 7 Ind. Cas. 861; 34 M. 545; 11 Cr. L. J. 534; (1910) M. W. N. 474; 8 M. L. T. 313.

(8) 10 Ind. Cas. 372; 35 M. 243; 21 M. L. J. 805; 12 Cr. L. J. 269; 10 M. L. T. 66; (1911) 2 M. W. N. 106.

(9) 12 Ind. Cas. 836; 34 A. 115; 8 A. L. J. 1239; 12 Cr. L. J. 572.

under section 402 is negatived. On the other hand, it is said that the gist of the offence of preparation is the assembly which is also the offence under section 402. The argument, though not without an air of speciousness, appears to me to be fallacious. What the first charge says when paraphrased is this: It says that the defendants assembled or came together with or bringing arms, masks and other implements. This is specifically alleged as the preparation. It is obvious that it is not merely the mere assembly as such which is charged as a preparation under section 399, for in law it would not amount to such, and the use of the words "with arms, masks and implements" would be unnecessary. It is true that in order to make out that the assembly under section 402 was for the purpose of committing dacoity, it may be necessary to show that there were arms, masks, and other implements found at the place of assembly indicating such purpose, but in that case such evidence is not relied upon as indicating preparation, but to show the purpose of the assembly. No question of bringing arms, masks and other implements necessarily arises under the second charge, though the fact in this particular case that arms and so forth were found on the premises has been taken as evidence indicative of the purpose of the meeting. What, therefore, the Judge has done is to hold that the accused did not commit the offence of preparation under section 399 by assembling together and doing something more, *viz.*, bringing with them arms, masks and implements; but that they did assemble together within the meaning of section 402 and that the presence of such arms, masks, and implements (by whomsoever brought and whether by the accused or by others) together with other circumstances of the case showed that such assembly was for the purpose of dacoity. There appears to me to be nothing repugnant in such a finding though, as I have already said, it might perhaps have been open to the learned Judge on the evidence to hold that there was not merely an assembly but that the circumstances of the case, if accepted, indicated that the presence of arms, masks and implements at the place of assembly was due to the action of those who took part in it. The learned Judge, however, took a course which I am not prepared without further discussion to say was wrong and which was more favourable to the accused in that he convicted them only of the minor offence. Having now disposed of this argument on the order and charge only, I may refer to the judgment which clearly expresses the grounds of the learned Judge's decision on this point. He says "with the possible exception of Kumud in whose pocket a mask was found, I do not think that there is sufficient evidence of preparation by bringing together arms and weapons. I do not think it can be assumed that any individual actually made preparation for dacoity by bringing together arms. Nor do I think it can be said that under the circumstances of the case constructive preparation has been proved by the application of section 149 of the Penal Code."

I hold then that there is no such repugnancy as is alleged, that if there were it would be open to us to correct it, and I now proceed to deal with the facts of the case.

It is said that, on the 27th October 1912, a letter, which is in peculiar terms, was sent to one Sukhendra Bhattacharji, the thirteen years old son of Sub-Inspector Sashi Kumar Bhattacharjee, here referred to as the witness Sashi. This was received by the witness Sashti Charan De, a servant of the Sub-Inspector, on the 28th October and shown by the witness Sashi to Inspector Hari Kumar and mentioned to the Superintendent of Police. The letter warned the recipient, who was directed to tell his father, that a dacoity would be committed on the 1st November. In consequence of this on the 1st November Sub-Inspector Sashi sent a requisition to the Superintendent of Police for extra constables and two head constables and 10 men were deputed for round duty. About 10·30 P. M. on a rainy evening of the 1st November two constables, the witnesses Majub Ali and Fazar Ali who were on the Kandipar Chomuni Road, saw two persons whom they regarded with suspicion and whom on refusing his challenge, Majub Ali chased. He caught one of them, but being struck on the arm with something hard either by the man he was holding or by his companion, the man who was caught was let go and he and his

companion ran eastward along the road, in the direction of the hut, where the accused were found. These two men were followed by seven or eight others, who ran past Majub Ali in the same direction, that is, towards the hut of one Probhat Karmakar. This man is said to be a goldsmith and has hired two huts, which are in the compound of the witness and Mukhtear Durga Charan Pal, from the latter. The hut in which the latter lives is only 23 cubits from the Karmakar's hut. He gave important evidence when he said that he heard a noise on the road about 11 o'clock, on which he came out of his hut and enquired of Probhat Karmakar what it was about. He then says that Probhat (who would ask us to believe that he was then asleep) told him that there were shouts of "thief, thief" on the road and that people were running, on which the Mukhtear returned to bed until, as hereinafter stated, he was called by the Police to be a witness to the search of the Karmakar's hut. Majub Ali says he then stayed on the spot and sent Fazar Ali for relief, the latter armed with 8 or 10 Police, one of whom was Yakub Ali Havildar. He on being told what had happened went to the place where Majub had attempted to effect an arrest and there found a blacksmith's cold chisel and iron holder. The fourth Sub-Inspector of the Katowali Thana, who lived near by and whose name is Jatindra Mohan Ray, was sent for through the Jamadars Jaffar Ali and Yusuf Ali. The latter seems to have arrived about 11-30 P. M. He was told what had happened and made an examination of the locality. He then went to the Inspector who, having heard what he had to say, told him to return and inquire and promised to follow later on. The Inspector's house is close by, 40 or 30 cubits south-west of the Kandipar Chomuni. On Sub-Inspector Jatin's return he asked Majub Ali to point out the way along which the suspicious characters had run and according to Jatin's evidence Majub Ali pointed out a route across the drain along a drain and 2 or 3 cubits east of the Karmakar's hut. He then crossed the drain and went and stood at the north-east corner of the Karmakar's north hut,—a light was burning within. The Sub-Inspector asked who was inside to which some one replied, "we Karmakars are here." The Sub-Inspector then said, "some men have run past this house a little time ago, do you know where they have gone or anything about it?" He also asked if any one had come into the house from outside to which some one replied, "we heard the footsteps of some people going away but we do not know where they have gone. There is no one else in the hut." On, however, the Sub-Inspector going to the south-east corner of the hut he saw with the light of his lantern a man spring from the south to the north hut of the Karmakar. The whole of this hut measures only 21 *by* 13 feet. It is divided into two rooms by a fencing, which are called the western and eastern rooms. The eastern or larger room is said to be 13 *by* 13 and the western 8 *by* 13 only. Further in the room there is a *machan* which takes up a good deal of the space. On this *machan* was a mosquito curtain which was down. Outside this *machan* were found, according to the Sub-Inspector, three or four persons whose upper bodies were bare and their *dhuties* were wet. On lifting up the curtain six or seven more persons were discovered lying down on the *machan* with something like a quilt over them. This was removed and the clothes of some of those who were beneath it were found to be wet. Two men were in the east room where there was a light. These were the accused Thakur and Prasanna. The Sub-Inspector Jatin says that he then asked what they were all doing there on a wet and cloudy night with wet clothes on, to which he said none of them answered. There is some conflict of evidence here, for the Constable Yakub Ali before the Committing Magistrate says that the Daroga felt the clothes of a man, who appears to be the accused Romesh Banerjee, who was standing between the *machan* and the door-way and who explained that his clothes were wet as he had come from the station, which is possibly the case. This from his deposition would appear to refer to a time before the arrival of the Sub-Inspector Sashi. In, however, his deposition before the Judge he made the incident take place after the arrival of the witness Sashi. So far as the Police witnesses are concerned, this and other discrepancies, to which we have here referred, must be considered in dealing

with the weight to be attached to their evidence, but so far as the defence of the accused is concerned it does not appear to be of much importance, for it is admitted that a little later on they all did give accounts (whether true or not is another matter) of themselves on that night to the Additional Superintendent of Police, Rai Sahib Nanda Kumar Bose, who has given evidence before us. This man Romesh Banerjee was known to Sub-Inspactor Jatin and made an observation which has been held to be not admissible. Thereupon the Sub-Inspector looked under the *machan* and found a basket which, when removed, disclosed a double barrelled gun in two pieces. A man was then sent to fetch the Sub-Inspector Sashi and the Mukhtear in whose *basha* the hut was—Durga Charan Pal. The latter came about midnight. On his arrival he was shown the gun and told what had happened, and it is noteworthy that none of the persons in the room made any disclaimer as to knowledge of the gun which was found in their presence and which according to the evidence was stolen from the district of Mymensingh some four or five years ago. Five or six minutes after the arrival of the Mukhtear Sub-Inspector Sashi came. He was informed of what had occurred and three or four minutes later Hari Kumar Gupta, the Sadar Inspector, arrived and with or shortly after him another Mukhtear named Lalit Chandra Chakraburty. Sashi Inspector on arrival told the men that he put them under arrest and four or five minutes later the accused were taken out of the rooms and kept out of it and tied up—a circumstance on which the defence naturally rely. It is said, however, that, though taken outside, they were kept near the south door facing the *machan*. In the presence then of the two Mukhtears, the Sadar Inspector and the two Sub-Inspectors a search was commenced of the hut. On the mosquito net being undone a lot of clothes were found heaped upon the *machan*. On examination of the ceiling a cloth bundle was found, which on being opened was seen to contain a number of bags of similar pattern and design which it is suggested were to be used for the purpose of carrying loot and so forth, as also two revolvers, one of which was an old fashioned pinfire. There were also found some cloth bundles containing cartridges. Two hammers, one of which is described as a sledge hammer, a bag of seeds and some *lathis* were found in various places. After this search was over the Superintendent of Police and subsequently the Additional Superintendent, Rai Sahib Ananda Kumar Bose, arrived. This was about 1-30. They were informed of what had happend and shown the articles which had been found. Still later and some time after 1-30 the Additional Magistrate, Mr. Chatterjee, came. A search list was then prepared. The clothes which had been found on the *machan* were then examined. These or some of them were wet. Some things were found in the pockets of the clothes. It is not necessary to deal with this in detail. It is sufficient to say that some of the clothes contained cloth marks. If these were truly discovered they could under the circumstances only have been there for the purpose of dacoity, and in a shirt was found a piece of paper marked XVC which is in the following terms: (1) Nishi and Paritosh, (2) note, (3) packing, (4) money takadi, (5) Cheni (Chisel) las etc., (6) automatic, *rumal* (handerkerchief), (7) Carry, (8) Nayan. In a piece of wet rag was found a paper marked XX*a* which runs as follows:—

1. Kumud	...	Hammer.
2. Jogess	...	Cheni (in Bengali character.)
3. Madan	...	R. 380.
4. Bepad	...	S. B. L.
1. Nishi	...	Hammer.
2. Bira	...	Cheni (in Bengali character).
3. Rebati	...	S. B. L.
4. Arun	...	R. 450.
1. Nayan	...	D. L.
2. Kalachand	...	R. Pin.
3. Dhiren	...	D.
1 Debendra	...	G.
2, Romesh	...	R. 450.
3. Doctor	...	L. D.
1. Jiten	...	R. 450.
2. Kali Prasanna		R. 380.
3. Baju	...	D.
1. Paritosh	...	Automatic.

There are 18 names in this list which, it is suggested, are those of the members of a gang of dacoits. If the names on the list are found to correspond with the names of the persons under trial then under the circumstances the inference is that the names on the

list are those of the persons on trial. And the more of such names there are on the list corresponding with the names of the persons on trial the stronger is the evidence of identity. In the present case if the document is a genuine one it is in the highest degree improbable that the eight names on the list which correspond with the names of eight persons in the hut should yet refer to some other people. Of these 18 names eight are said to be those of the accused found in the hut by the Police, *viz.*, accused Nos. 1, 2, 4, 5, 6, 8, 9, 11. Arun is one of the names of Ramesh Chandra Gupta, accused No. 4, and accused No. 8, Hara Chand Sil, was known by the name of "Doctor." Baju is the nickname of Brojendra, the fifth defendant. The names of accused No. 3, 7, 10, 12 are not included. The remaining ten names refer to others who are, it is suggested, members of the same gang. Of these names Nishi was a servant of the accused Sarbari or Baju. In a letter which purports to be written by the latter and which was found at the hut on the 7th November six days after the present search, the addressee is Nishi and reference is made to one Revati. It is also remarkable that a man of this name was actually arrested in the early hours of the morning of the 2nd and according to Mr. Watling between 4 and 5 A.M. after the discovery of Exhibit XXA and the completion of the search list. This man Revati was wearing a damp *dhuti*, had shoes and said nothing when the constable made his statement to Mr. Watling. It is suggested as regards the names other than those of the accused that they were those members of the same gang who were coming to Comilla to join forces with those members who were already there, but which they were unable to do as the steamer missed connection. The words opposite the names on the list are said to indicate the weapons which were to be assigned to each member of the gang. The words "hammer" and "chisel" speak for themselves. R. refers, it is said, to revolvers and a revolver of 380 bore was found which is said to be one of the R. 380 appearing in the list. R. Pin refers, it is said, to the Finfire revolver found. Other entries, it is suggested, refer to the guns and *lathis*, "automatic" referring to "automatic pistol." One mask was found outside by Jamadar Yusuf Ali near the kitchen.

When the list was completed the Rai Sahib questioned the accused and he has deposed to their answers. They gave various accounts of themselves to which I refer later when dealing with their individual cases. It is only necessary to note here that the accused Kumud does not admit having been found in the hut as the others were. He alleges that he was going from his *mama's basha* to the railway station with a view to returning home when he was arrested on the road by the Police and by them mixed up with the other accused.

All these matters took up to about 6 A.M. when formal first information was laid at the Thana. The party then left and the accused were taken to *hajat*. It will be convenient to notice here an argument of Mr. Caspersz who appeared on behalf of the first accused, Romesh Banerjee. He contends that when Mr. Ganga Charan Chatterjee arrived he should at once himself have taken cognizance of the case and as he did not, learned Counsel at first contended that all the subsequent proceedings were bad, and *secondly*, the accused were in any event prejudiced. I will assume for the sake of the argument that in law it would have been open to Mr. Chatterjee to have taken cognizance of the case then and there as also for the same purpose that it was his duty to do so. It would, of course, be impossible to hold that such a neglect of duty and refusal of jurisdiction by one Magistrate could possibly have the effect of preventing any other Magistrate doing his, with the result that subsequent trial and commitment before and by Mr. Rankin, the Magistrate, was bad. Ultimately learned Counsel conceded that this must be so and that even on the assumption which he asks us to make the commitment and trial were not bad. I may here observe that nothing appears to have been heard of this objection before this appeal. The matter then ultimately resolved itself into a question of alleged prejudice. According to learned Counsel the Magistrate, Mr. Chatterjee, should have taken cognizance on his own suspicion from what he saw that an offence had been committed and should then and there and in this hut and in the hours between 2 and 5 at night commenced proceedings, calling upon the prosecution to proceed with their case, asking the

accused what they had to say and if necessary postponing further hearing. I have myself no doubt that if the Magistrate had in this case done anything of the kind, his conduct would have been severely assailed by the accused. His cognizance on his own suspicion would have been censured as precipitate and his conduct in hastening on the proceedings and questioning the accused would have been challenged as oppressive. I think myself that under the circumstances of the present case had the Magistrate taken the course which Mr. Caspersz suggests, it would have been open to objection. It appears to me that what actually followed was right, namely, further investigation by the Police to see whether further light or evidence could be had on the affair and then the charge before Mr. Rankin. If Mr. Chatterjee should not have taken the course suggested then it cannot be argued that the accused were prejudiced by his not doing that which he ought not to have done, but I may add that this objection of prejudice appears to be a shadowy one. It was suggested that the accused had no opportunity of making a statement then and there before the Magistrate. As a matter of fact they did make a statement on that same night to the Rai Sahib, which has been recorded and of which they have had the benefit, and though a further statement might have been made before the Committing Magistrate the opportunity was not availed of. It is also made a grievance that instead of sending up the accused at once for trial the Police took time for further investigation with a view, it is suggested, of discovering whether there was evidence of a wider conspiracy of which the dacoity in question was an incident. I can myself see nothing improper in this. In fact it was their duty to investigate the matter in this manner and for the purpose of collecting all available facts before sending up the accused for trial. On the 2nd November the accused were remanded to *hajat* until the 10th. On the 8th one Nagarbashi Rudra Pal was produced before the Magistrate but discharged at the request of the Police for want of evidence. This has been relied on as a circumstance of suspicion and one tending to support the Police plot suggested in the case. There appears to have been no suggestion or cross-examination as to this before and, had there been, it might have been shown that the reason of his arrest was due to the appearance of his name in the Karmakar's books. On the 11th the Police asked for adjournment to complete inquiry. This was granted until the 16th, when a further remand was given till the 27th November on which day and following days evidence was taken, and accused committed to the Court of Session on the 14th December last. During the investigation on the 9th November some chisels and a crowbar were found at the point marked S on the map, while the *basha* of the witness Debendra Nath Ghose was being cleaned. This place is at a short distance to the south of the Karmakar's hut, on the other side of the drain running from north to south. This finding is corroborated by the evidence of Babu Satish Chandra Rai, Honorary Magistrate, who having received immediate information from the sweeper, Basanta Mali, who found them, went to the place pointed out by the latter and there saw the crowbar and five or six chisels. With that conflict of argument which has marked the defence in this case it has been suggested on the one hand that these chisels were really dropped there by some dacoits and that, therefore, these had gone past and never entered into Karmakar's house, and on the other hand that the story of suspicious men having been found on the road and of their running away is an invention of the Police who for their own purpose put the chisels at the points where they were subsequently found. On the third of November the house of the accused Kumud was searched and some papers found. In one of these letters the latter is asked to secure a self-secrificing member, "a young man," for it is said "things are achieved by the energy and perseverance of young men." The writer in the *post script* gives the name of a young student. "You should", it says, "watch him strictly and if found fit you should write to me, you should procure all informations regarding him and write to me and if you think it all right you yourself may proceed slowly." Another letter presses upon the addressee the propriety of the time and opportunity of work and in another letter the

writer says that by the will of the *mother* (that is the Devi) he hoped to meet Kumud shortly, adding, "It seems to me that mother would get some works done by you. The mother has an eye upon you." Mr. Rasul has suggested to us that these references may apply to assurance business or religious proselytising. It is, however, obvious to me that the letters are of a political character and refer to secret nationalist propaganda, most probably of a revolutionary kind They were, however, written some time before the occurrence, the subject of the charge, but have this bearing that if Kumud Nag was a member of this gang, this evidence serves to explain its motives and how it is that persons who did not appear to belong to the ordinary criminal classes engaged in the work of dacoity. On the early morning of the 2nd November the house of the accused Romesh Chandra Banerjee was examined. The importance of this evidence is with respect to the post card, Exhibit A, said to have been addressed by one Surendra to Romesh Banerjee and which is relied on by the latter in support of the account which he gave of himself to the Police. For though in examination of the search witness No. 36 the question of the prosecution as to whether that post card was found at such search was on the objection of the defence disallowed, it is yet obvious that the post card was not then found, as it was produced by the prisoner's Counsel much later and for the first time in the Sessions Court. The fact is of importance when we consider the question of the genuineness of the document. On the 7th November the Karmakar's hut was again searched and possession taken of some *khata* books and papers. An entry in the *khata* exhibit is relied upon in support of the defence of the accused Sarbari or Baju. It has been a matter of dispute whether there were two entries as the defence contends or one as Mr. Sinha for the Crown has submitted. It shows under the name of this accused an entry of gold weighing twelve annas and the receipt of 3 annas for repairing work. Of the other papers there found two have some importance, *viz.*, Exhibits XXVIII and XXIX, one of which is addressed to one Nishi who was a servant of this accused Sarbari and contains a statement of the sending of one Rebati. These names occur on Exhibits XVC and XXA and have importance on the question of the genuineness of the latter documents.

Before leaving the question of Police investigation before trial it is to be noted that the Police charge sheet of the 15th November, in giving the names of the witnesses and the points upon which they are to be called to give evidence, mentions two persons' names, Nagarbashi Rudra Pal and Ram Chandra De, who are expected to prove association of the accused and their conduct. The former is the man who had been put up and discharged on the 3th November. These persons are not called and the circumstance is pointed out as one of suspicion; in what way is not clear. All that is before us is that the Police expected two witnesses to depose for the prosecution and for some reason or other they did not. We cannot assume that this indicates something wrong on the part of the Police when it is quite possible that these two witnesses may have been willing to give evidence and for fear or other motive refused at the last moment to do so. Moreover, if any charge of crime in this matter was going to be made against the Police it should, as I have already pointed out, have been cross-examined to when, as Mr. Sinha has argued, an explanation might have been forthcoming. The charge sheet was signed by Sub-Inspector Sashi, who was not questioned as to this. Upon this point I may make an observation which has application to other points in the case. It is, of course, no affair of the defence to supplement or explain deficiencies or suspicious circumstances appearing on the face of the prosecution evidence. It is open to it to say that the prosecution has not proved its case and to refer to such deficiencies in proof of the submission or to other circumstances appearing on the face of the prosecution evidence which show that it is so open to suspicion that it would be unsafe to accept it. If, however, not content with relying on such deficiencies and suspicious matter, the defence put forward a case of fraud or if the evidence for the prosecution is not ambiguous, the defence should give notice

of the point they intend to take so that the prosecution may have an opportunity of explanation. The present is a case in point. If any charge of fraudulent practice was going to be based on a circumstance which standing by itself is not necessarily suspicious, the defence should have cross-examined witnesses. I may here add in connection with the witness Sashi that I think that there is ground in the defence objection that he should have been called at an early stage of the case and not at the very end as was the fact. He and the other Sub-Inspector are two of the more important, if not most important, witnesses in the case and such should always be examined as early as possible. To some extent the matter has been remedied in the present case by the fact that the other Inspector of Police was called at an early stage, being in fact the fourth witness.

It must be plain that if the facts are truly stated the case against the accused is fully established in the absence of any credible explanation forthcoming from them.

[His Lordship dealt with the facts and continued.]

I turn now to that which is undoubtedly the most substantial point in favour of the defence, namely, the question of the manner in which the search was conducted. It is argued that there were grave irregularities in the conduct of the search and that although the existence of such irregularities does not render evidence of what was discovered on such search inadmissible, it does affect the credit which we should give to such evidence.

In the first place, reference is made to the provisions of the Police rules that the party making the search should himself be searched. Sub-Inspector Jatin says that he told the search witnesses to examine his person, but they said it was unnecessary. The Mukhtear Durga Charan Pal, however, says that no one searched him and that he did not search any nor did any one offer to be searched by him. Whether the evidence of the one witness or the other is correct, it seems plain that the searching party were not for one reason or another themselves searched. I need not delay to consider the argument that the entry into the house was illegal which was sought to be justified on the ground that the Sub-Inspector Jatin may have had reasonable suspicion of an offence. The question is of no importance here, whatever might be its value in an action for trespass on which I express no opinion. The Sub-Inspector, however, admits that after entry no notes were made of the places at which things were found at the same moment that they were found. It is said that people were allowed to come in and go out during search. This, if it took place, would be an irregularity but is certainly no indication of the suggested dishonesty of the Police which might be exposed by allowing any stranger to pass in and out of the room. Dealing, however, with the case of alleged irregularity, Lalit, the Mukhtear, says that between the time of his arrival and the preparation of the search list Police Officers and others were coming and going through the door. This refers to a period extending from midnight till four in the morning. The point is who were these others. But this he was not asked. These may have included such persons as the Additional Magistrate, the Deputy Magistrate or Mr. Watling. And this may explain the apparent contradiction between this evidence and that of Sub-Inspector Jatin who says that people did not come and go in and out of the room before the Additional Magistrate came. He may be speaking of persons other than those concerned in the search. The Mukhtear Lalit may by the word "people" refer to persons who, though not Police Officers, may have had a right to be there. The other search witness, Durga Charan Pal, similarly says that from the time that Sashi Babu arrived till the search list was completed, people including Officers and Constables were coming in and going out of the room. When Durga Charan speaks of the children of his house coming he appears to be speaking of the time of his arrival and on cross-examination he says the children were outside or rather in the door way. Lalit's statement as to the presence of a Post Office employee living with Inspector Har Kumar Gupta refers to a period before the accused were removed. It cannot be said that the evidence is very clear or satisfactory on this point, but if it

be possible that others than those properly concerned did have access to the room, then, as I have said, though an irregularity, it would go against the theory that the Police amongst other things fabricated documents there or introduced those documents and other things from outside, for it is not likely that under such circumstances anybody and everybody would have been admitted access to the room. The Police rules further provide that what is found should be sent up as soon as possible to the Magistrate. The reason given for the non-observance of the rule in this case is that the Magistrate had (as is the fact) already signed the search list. As, however, the object of this rule is to satisfy the Court of the identity of the objects found, it cannot be said that in this case the matter was one of any importance seeing that Mr. Ganga Charan Chatterjee, the Additional Magistrate, was himself in the hut and saw the articles which were entered in the search list.

It is not clear that the alterations in the search list were made whilst the document was in Police custody, but in any case they are not of importance. The alteration of the numbering was due to the fact that the number 23 was written twice and though the word Nogen has been changed into Nayan—Nayan appears in the original document entered in the search list. This document was in a bad light read as Nogen and so entered at first in the search list, though in fact it is plainly Nayan. The most important matter in this connection is the fact that the accused were after the discovery of the gun (which was in their presence) and after search of their persons sent out of the room. The Code permits the occupants of the room to be present at the search and there was, therefore, a violation of this rule, which is one not merely of technicality but of substance in that it is enacted to guarantee the reality of the search and the discoveries made thereat. It is unnecessary to determine whether all the accused found in the hut can be said to be occupants within the meaning of the section, because the person or persons who were admittedly occupants were not present at the search. The reason for disregard of this rule is that the hut was, as is undoubtedly the case, a very small one. It is said also that the accused, though taken out of the room, were kept near the south door facing the *machan*. This, if a fact, would have been of little service to them. Moreover, it is contradicted by the search witness, Durga Charan Pal, who says they were taken to the west of the wall which appears to be away from the door. Whilst I am not satisfied that, as has been argued, notwithstanding the alleged want of space people of all sorts were allowed to come and go out of the room, I am unable to say on the other hand that it would not have been possible to continue the search in the presence of the accused as by placing them in the eastern room and removing the mat screen between it and the western room or otherwise. However this be, the fact remains that the accused were not present at the search, and this is an irregularity which they are entitled to ask us to consider. The evidence must undoubtedly be carefully scrutinised on that account. It is to be noted, however, that there were two search witnesses present. But after all if, upon a careful scrutiny of the evidence, we come to a conclusion that notwithstanding the absence of the accused, advantage was not, and could not have been, taken of it the irregularity, whilst serving to exact from the Court a careful scrutiny of the evidence relating to the search, has no further effect. It is not sufficient to suggest that articles might have been fraudulently introduced, we must see whether there are any reasons to suppose that this was done. The chief question, therefore, is, was it possible or probable that the arms, implements, masks and documents found on that night were either there or previously introduced or fabricated by the Police as alleged? It will be here convenient to deal with the legal presumptions arising from possession if proved. If we take the single circumstance that arms were found under the *machan* and in the ceiling of the hut, knowledge of that existence would not (without other evidence) be imputable to any other than the lessee of the hut, Probodh Karmakar—nor would the presumption operate even against him if it were shown that the circumstances were such that arms might be in his place without his knowing

it; for instance, if, as alleged to be the case here, they could have been introduced from outside. The evidence on this point is in some respects not as clear as it might be, but appears to me to establish that the arms could not have been introduced from outside.

[His Lordship after dealing with the other facts and circumstances considered the case of each individual accused and concluded as follows:]

I have now dealt with the defence of all twelve accused. In my opinion for the reasons given I think that notwithstanding the suspicion which attaches to them, we should acquit the accused Thakur Das Pal and Aditya Charan Dutta, the other circumstances of the case being insufficient to overcome the inferences which may be drawn from their position as subordinates of the Karmakar and the absence of their names from Exhibit XXA. As regards the rest of the accused they have, in my opinion, failed to meet the strong case which the prosecution makes against them and have not by their defence shown that their presence in the hut was, as they allege, of an accidental and innocent character. The two defendants, I have above named, Thakur and Aditya, are accordingly acquitted and I direct that they be set at liberty. The appeal of the other accused fails and is dismissed and their convictions and sentences are confirmed.

BEACHCROFT, J.—In this case I had written a separate judgment, but my learned brother has dealt so exhaustively with the facts and arguments advanced and my own views coincide so closely with his on almost every point, that a lengthy separate judgment would be a mere repetition of a great deal of his. I, therefore, propose to confine my remarks to a few only of the principal matters that have been argued before us.

I agree with my learned brother's views as to the scope of sections 399 and 402. The contention that the conviction cannot stand by reason of repugnancy in the record must fail, in my opinion, for two reasons: (1) that there is in fact no repugnancy, (2) that if the suggested repugnancy existed it would provide no good ground for setting aside the conviction. With the first reason, my learned brother has dealt. I shall, therefore, confine myself to the second. The argument as to the repugnancy is based on the case of *Rex* v. *Plummar*(10), a case in which a person was acquitted though he had pleaded guilty to a charge of conspiracy, because the Jury acquitted the other two persons with whom he was alleged to have conspired. It seems to me that the principle which underlies that case is really this, that you cannot have contradictory results or decisions from one set of facts, as only one decision can be the right one. The verdict of the Jury was "no conspiracy," that was conclusive and, therefore, the prisoner who pleaded guilty could not be convicted because his plea was inconsistent with established facts. It is true the learned Judges speak of the record being inconsistent and contradictory. But the record is merely the outward and visible sign of the facts found and I take it that the underlying principle is that which I have stated.

In that case Bruce, J., says, "the record of conviction can only be made up in the terms of the indictment", and on that expression it is argued that in considering this matter we must look only to the indictment and ignore the facts actually proved. The reason for the rule in the case of a Jury verdict is obvious, for the verdict is simply one of guilty or not guilty on the specific indictment and the facts found by the Jury are unknown except to this extent that the allegations in the indictment are proved or not proved. But I emphatically dissent from learned Counsel's contention that such a rule can be applied to the case of a decision by a Judge. In such a case we cannot ignore the facts found. The argument amounts to this. The Judge has found certain facts, he has made a mistake in law in saying that those facts do not amount to an offence under section 399, the facts do also amount to an offence under section 402, yet because he has, though mistakenly, acquitted the accused of the charge under section 399 and though he has rightly held the facts to be an offence under section 402, the accused must be acquitted of the offence under section 402. It seems to me

(10) (1902) 2 K. B. 339; 71 L. J. K. B. 805; 66 J. P. 647; 86 L. T. 836; 18 T. L. R. 659; 51 W. R. 137; 20 Cox, C. C. 243.

that the argument has only to be stated in this form to insure its instant rejection. The position is this. The Judge finds certain facts, we agree with him in his findings as to those facts, yet if he makes an error in law in the application of the facts as to section 399, we are not only to accept his error in regard to that section, but to add to it one of our own in regard to section 402.

The accused are entitled to the benefit of any technicality that they can invoke in their favour, but a technicality, which leads to such a farcical result as the above, must be clearly established, and it must be one which is to be found within the four corners of the Code of Criminal Procedure and not one borrowed from English Law and founded on ideas as to the sacred character of a verdict by a Jury, whose findings of fact are unknown, a character which by the express provisions of law does not attach to Jury verdicts in this country.

Now, the tendency of mordern legislation in general and of the Criminal Procedure Code in particular is to avoid technicalities, and I am aware of no provision in that Code which would justify interference with a conviction on the ground of repugnancy in the record. An instance will make it clear that repugnancy in the verdict of a Jury in India is not by itself sufficient to justify the quashing of a conviction and to anyone with much experience of *mofussil* Juries, it will be evident that such repugnancies do occur. Suppose six persons are charged under section 147 with rioting and under section 304 read with section 149 in respect of culpable homicide committed in the course of the riot. The Jury convicts all six under section 147, but convicts only three of the charge under sections 304 and 149 acquitting the others of this charge. They do this arbitrarily to distinguish the case of ring-leaders from those who take a less prominent part. The Judge considers that he can give a sufficient sentence in regard to the latter three, though he does not agree with the verdict. He cannot, therefore, refer the case under section 307, for it is not necessary for the ends of justice to do so. Nor on appeal could this Court interfere on the ground of repugnancy, for under section 423 (2) it could interfere only on the ground of misdirection by the Judge or misunderstanding by the Jury of the law and both of these elements are absent in the case supposed. It is no answer to say that such verdicts ought not to be given, for the fact remains that they are.

If mere repugnancy in the verdict of a Jury is not by itself sufficient to ensure quashing of a conviction, much less can that result be insured by a repugnancy which exists only in the formal decision of a Judge, whose actual findings of fact are known, in other words a repugnancy in form only and not in substance.

[His Lordship then considered the facts of the case and continued.]

The finding of the gun and revolvers is not disputed, but it is urged that the manner of their finding shows that the Police knew that these articles were there to be found, and one of the facts on which this theory has been based is that Jatin found the gun almost immediately after he entered the hut, an entry which it is urged was in itself unjustifiable. It is argued that under section 47 of the Code of Criminal Procedure Jatin had no authority to enter the hut until he had asked permission from the occupant of it. This argument, in my opinion, is based on a misconception of the scope of section 47. It is not intended to restrict the powers of the Police: on the contrary it is a provision compelling householders to afford the Police facilities in carrying out their duties, and section 48 provides that if difficulties are placed in the way of a Police Officer, he may use force to obtain ingress. Now, no suggestion was made in the course of cross-examination to Jatin that he had done anything improper in entering the hut. What were the facts? He had been told about the occurrence on the road and led to the spot where the men had disappeared. He had been told that there was no one in the hut but the Kramakars, yet he sees a man, as he says, "spring" from the south hut to the north hut. He followed the man through the open door and found a number of men in a room without any light. He was about to look under the *machan* to see if anyone

was hiding there, when one of the men there made a statement to him. He then removed the basket which was under the *machan* and found the gun. I do not see anything suspicious in this conduct of Jatin's: on the contrary it seems to me extremely natural. If his suspicions were not aroused before he enterd the hut, it is a reasonable supposition to make that he entered to ask the inmates if they could throw any light on the point as to where the fugitives had gone, and it would be absurd to call such an entry illegal. If his suspicions were aroused before he entered, it is impossible to say that in the circumstances his suspicions were not reasonable, and if he had reasonable suspicion of the commission of a cognizable offence section 54 would have been a sufficient authority for him to effect an arrest. In either case the contention that his entry was illegal is, in my opinion, an idle one.

There is, however, more substance in the contention that at the time of the search the provisions of section 103, Criminal Procedure Code, were ignored. The learned Judge states, no doubt correctly, that the accused were not "prevented from seeing what was going on after expressing a wish to do so." The language of the Code no doubt is, "shall be permitted to attend during the search," and on that language it might be argued that there is no breach of the Code in excluding the occupant of the place, if he does not demand to be present. But the occupant of a place searched is hardly likely to be aware of his rights and in practice the search is ordinarily made in his presence. In my opinion the spirit of the section is that he shall be present and I take it to mean that he is to be given the option of being present and not that he is to be allowed to be present only if he demands it.

It is to be noticed, however, that the right of presence given by section 103 applies only to the "occupant of the place searched or some person in his behalf." I take it that the words "occupant of the place" are not intended to cover any person who may happen to be in the place at the time but that they refer back to the person mentioned in section 102, "a person residing in, or being in charge of, the place." Strictly speaking, then, only persons entitled as of right to be present at a search are persons residing in or in charge of the place, and when that view is applied to the facts of the present case, it is evident that the majority of the accused were not entitled as of right to be present at the search. As a matter of practice it is doubtless desirable that any person against whom an inference may be drawn from the fact of certain articles being found in a particular place should have an opportunity of being present at the search, but if it is proposed to draw an inference against the *bona fides* of the Police in respect of a search on the ground that the provisions of the law have not been complied with, it must be shown that those provisions have been ignored, and such an inference will not be justified from a mere failure to exercise a wise discretion. In the present case, however, it is quite clear that some one or more of the accused were in fact occupants of the hut, so that if they were improperly excluded there has been an ignoring of the provisions of the law.

Jatin says that the accused were taken out of the room and kept near the south door, that is the door facing the *machan*. He evidently intends to suggest that they were in such a position as to be able to see what was happening. In cross-examination he gives the reason for the removal to be that the presence of respectable witnesses made it unnecessary to keep them in the room. Sashi, being the person who had then removed, is the proper person to give the explanation. The reason he gives is that there was not sufficient room in the hut and says they were standing in the passage between the hut in front of the door. Durga says they were taken to the west of the west wall. Lalit says they were taken out, but he did not see where they were taken to.

Taking these statements together it may, I think, be fairly inferred that they were taken to a place from which they were not in a position to see what occurred. It is possible that it was not Sashi, but the constables who were in charge of the accused, who removed them from the door-way to the west of the hut, but I think Sashi ought to have taken steps to see that they were not removed.

It is suggested that they might have been taken into the east room and so enabled to watch the proceedings from the opening between the two rooms. Neither of the Police Officers was asked why they

were not taken there and if they had been taken there, the suggestion would doubtless have been made that considering the position of that opening they were not able to see anything.

If the dimensions of the hut are considered it will be seen that Sashi's estimate that there was not sufficient space in the west room for them is reasonable. The west room measured 13 ft. by 8 ft. and the *machan* took up 8 ft. by 6 ft., leaving an ample space of only 8 ft. by 7 ft. In this space were three search witnesses and three Police officers, for the Inspector was also there, and it does not need much imagination to realize that there was very little space left.

Another consideration must also not be lost sight of, two of the search witnesses were Mukhtears, the third, Jadu Babu, is described as a Civil Court Commissioner. These witnesses doubtless knew their businesses and were not likely to be imposed upon.

To my mind the removal of the accused ought to be attributed to an error of judgment, and it must be remembered that it was an error of judgment shared in also by the Inspector as being the senior officer present, against whom not only has no suggestion been made, but it has been made a grievance that he was not examined as a witness, for it is suggested that he, having formerly been a Pleader and above suspicion, would have materially assisted the defence if called. However, the fact remains that the accused were not present at the search, and for that reason the evidence of finding of articles requires careful scrutiny. My learned brother has given reasons, in which I concur, for holding that the masks were not introduced by outside agency and that the two important documents, Exhibits XVC and XXA, were genuine documents.

The grievance of exclusion of the accused from the hut at the search is one which in regard to the earlier stages of the proceedings may fairly be termed unsubstantial, for it is not disputed that the bundle containing two revolvers and a shirt, in the pocket of which a mask was subsequently found, and a hammer were found above the ceiling, or that a gun was found under the *machan*. As regards these things the contention is that, whether put in the places where they were found by the Police or by somebody else, the accused knew nothing about them.

When an article is found in a man's house the ordinary presumption is that he, as owner of the house, is aware of its existence. This is subject to the qualification that no other person has access to that particular place. It follows that if the house is in the occupation of more persons than one having access to the particular place, there is no presumption against them individually that they have put the article where it is found; though if it be proved that an article has been for a considerable period of time in a place to which all have frequent access, it might reasonably be presumed that all were aware of its existence. These propositions depend on ordinary common sense and do not require any authority to support them. Applying them to the present case the position is this. If it is shown that these articles could not have been introduced above the ceiling or beneath the *machan* from outside, there will be a presumption that some one or other of the persons using the hut put them where they were found, but there will not be a presumption as against any particular individual if the hut is used by more than one person. It, therefore, becomes necessary to examine the possibility of the introduction of these things by outside agency.

[His Lordship considered the evidence on the record and agreed with Woodroffe, J., and thus concluded:]

The next stage in the proceedings, after the finding of the bundle and hammers and the clothes on the *machan*, was the examination of the contents of the pockets of the clothes after the arrival of the Additional Magistrate, who had been preceded by Mr. Watling—in fact it was Mr. Watling who sent for the Additional Magistrate and the Additional District Superintendent of Police, and much argument has been devoted by all the learned Counsel appearing for the appellants as to the interval of time that elapsed between the arrival of Sashi and the arrival of Mr. Watling. The arguments are based on the estimate of the times given by the different witnesses when the various steps were taken. It is urged that no explanation is given of what was done during 1½ hours,

The estimates of time given by the different witnesses naturally vary somewhat, and it is impossible to suppose that men who have been suddenly called from bed will have any very clear idea of what the time was. Mr. Sinha, for the Crown, has argued that the interval was not more than about ½ hour to ¾ hour, *i.e.*, from the time when the Inspector left to call Mr. Watling till the arrival of the latter. Considering the time that has been taken I do not think it makes very much difference whether it was ¾ hour, an hour, or 1½ hours.

The argument is this. Sashi, having found the revolvers, etc., and the clothes must have done something in the interval before Mr. Watling came; as it has not been stated what was done, an inference must be drawn against the prosecution that the Police were up to no good, or at any rate that the absence of an explanation as to what was done rouses such an amount of suspicion that no reliance can be placed on the subsequent finding of the papers, Exhibits XVC and XXA, and of the masks.

Mr. Sinha's suggestion is that what was uppermost in the minds of Sashi and Jatin was the nature and condition of the clothes, for the circumstances showed that the accused found on the *machan* with wet clothes were out for no good purpose, and that they had no idea of the possible contents of pockets at that time, but thought only of showing the clothes as they found them to the superior authorities.

It seems to me to be futile to speculate as to what were the motives of the two Police Officers when not a single question has been put to them, the only persons who could state them, touching the point. It is suggested that that was a point which it was the duty of the prosecution to clear up. Now, not only is the argument based on a false premise that the Police Officers must have been doing something, but it is obvious that if the argument is to have any force it must be clear that the circumstances were such as to throw on the prosecution the duty of giving an explanation.

In cross-examination no stress was laid on the lapse of time and it was not suggested by a single question that there was a period for which some account should be given. And if the cross-examination does not even lay the foundation of a suggestion that there is a period for which an account ought to have been but has not been given, an Appellate Court ought not, in my opinion, to pay any attention to suggestions made for the first time in appeal. If there is anything in the evidence which on the face of it requires explanation, the absence of an explanation may reasonably give rise to adverse comment, and an accused is entitled to the full benefit of the want of explanation of a circumstance which *prima facie* requires explanation. But the very argument that there has been no explanation implies the suggestion that something ought to have been done other than what was done or what appears on the evidence to have been done. That, it is suggested, was according to the evidence nothing. Of the various Counsel to whom I put the question what did they suggest ought to have been done, one alone had a suggestion to make; it was that the clothes ought to have been examined. Now, I have not the slightest doubt that if the two Police Officers had examined the clothes and found the masks and papers, the comment would have been that their haste was evidence of dishonesty and that in view of the fact that the Inspector had gone to call the District Superintendent of Police, they ought to have waited. In a case like this it is impossible for the Police to do anything which will not be attacked and it is impossible to say, in view of the fact that their actions are so frequently subjected to hypercritical comment, that it would have been wiser to pursue one course rather than the other.

* * * * * *

I agree that accused Aditya Charan Dutt and Thakur Das Pal should be acquitted and the convictions and sentences of the rest of the accused affirmed.

MANINDRA CHANDRA GHOSE *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1986 OF 1913.
January 16, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
MANINDRA CHANDRA GHOSE—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Jurisdiction of Magistrate—Issuing warrant—Acting on advice of Crown's Law Officers—Jury—Verdict—Repugnancy, if justifies quashing of conviction—Opinion of Judge, how to be weighed.

Two persons were tried for murder but acquitted. It was alleged that there were three co-conspirators, of whom the petitioner was one. A warrant was issued against the petitioner which was re-called. Subsequently the District Magistrate, on the advice of the law officers of the Crown that the case against the petitioner could go on on the evidence, again issued a warrant against the petitioner:

Held, that the District Magistrate had jurisdiction to issue the warrant.

The repugnancy in the verdict of a Jury in India is not in itself sufficient to justify the quashing of a conviction. The technicalities, which are borrowed from the English Law and founded on ideas as to the sacred character of a verdict by a Jury whose findings of fact are unknown, cannot be imported so as to give such a character which by the express provisions of law, does not attach to Jury verdicts in this country.

Romesh Chandra Bannerjee v. *Emperor*, 23 Ind. Cas 985; 18 C. W. N. 498; 41 C. 350, relied upon.

In this country, the opinion of the Judge is to be weighed by the High Court in exactly the same balance as the opinion of the Jury.

Rule praying that the proceedings taken against the petitioner now pending trial in the Court of the Deputy Magistrate of Hooghly may be quashed.

Mr. *Norton*, Counsel, Babus *Manmatha Nath Mukherjee* and *Jyotish Chandra Hazrah*, for the Petitioner.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This was a Rule calling on the District Magistrate of Hooghly to show cause why further proceedings for conspiracy to commit murder against the petitioner, Manindra Chandra Ghose *alias* Binoo, should not be stayed on the ground that the two alleged co-conspirators having been acquitted there is no possibility of a conviction being obtained against the alleged conspirator who now stands alone, and upon the other grounds mentioned in the petition.

As regards the specific ground which is first mentioned in this Rule it has not been argued before us and it is clear that there is no charge of conspiracy at present against the petitioner, and the fact that there was an acquittal of the other two would not conclude the matter, inasmuch as there are two persons named as conspirators who have not yet been tried and it is stated that others unknown also conspired, so that the ground that the petitioner is the only alleged conspirator remaining can no longer be sustained.

We, therefore, turn to the grounds which were actually taken by the learned Counsel in the petition. The first was that the warrant against the petitioner having been re-called and there being no fresh materials for inquiry in the matter the issue of warrant again against the petitioner was illegal, that is to say, that the proceedings are without jurisdiction. The answer to that is that the proceedings are not as the petitioner appears to have imagined from paragraph 14 of the petition re-instituted by the complainant, Monmohan Ghose, but they were re-instituted by the officer in charge of the Hooghly Police station under the direction of the District Superintendent of Police, who could not appear himself but who had been instructed by the District Magistrate on the advice of the law officers of the Crown that this case can go on on the evidence. We do not desire to express any opinion upon this evidence, whether it is sufficient or not, but it certainly gave jurisdiction to the District Magistrate to take cognizance of the case, if on taking legal advice he was of opinion that the evidence brought the accused within the purview of the law. Of the jurisdiction of the District Magistrate to take these proceedings there can be no doubt, and it is the District Magistrate and not the complainant who has re-instituted these proceedings.

Then as regards the second ground that the case for the prosecution in the previous trial was one of conspiracy between two youths, who have been acquitted, and the present accused, and that charge having failed the present proceeding ought not to be allowed to go on, this has been argued by the learned Counsel from the

point of view that the opinion of the Jury in this country necessarily covers the whole of the indictment and has the same sacrosanct character that such a verdict has in England. This doctrine has very recently been dealt with in the case of this Court by Woodroffe and Beachcroft, JJ., in *Romesh Chandra Banerjee* v. *Emperor* (1) and we may express our concurrence with the view expressed by Mr. Justice Beachcroft where he says:—"The repugnancy in the verdict of a Jury in India is not in itself sufficient to justify the quashing of a conviction and that the technicalities, which are borrowed from the English Law and founded on ideas as to the sacred character of a verdict by a Jury whose findings of fact are unknown, cannot be imported so as to give such a character which by the express provisions of law does not attach to Jury verdicts in this country." However that may be the Jury certainly did not and could not have formed any opinion, much less expressed it, as regards the case of the present petitioner who was not before them. But it is argued that the evidence is precisely the same against him as against the others. The learned Deputy Legal Remembrancer appearing for the Crown has shown us that this is not so. There is distinct evidence against the present petitioner, and the fact that the wounded man did not satisfactorily identify the two youths does not, in our opinion, in any way affect the identification which he made or may not have made of the present petitioner, because that was a matter which was not in any way before the Jury and has never been adjudicated upon. It may be, as the learned Deputy Legal Remembrancer has told us, that he had better knowledge of the present accused, or he had better opportunities of seeing him. We have not purposely gone into the evidence because we do not wish in any way to prejudge the case. But it is clear that the evidence as regards the identification of one person may be quite different to that as regards the identification of two others, even although it proceeds from the mouth of the same witness, and the learned Judge clearly stated that the identification of these two youths showing that the crime was committed by these two youths appeared to him to be weak, and on that ground he agreed with the Jury in acquitting the accused. In this country the opinion of the Judge is to be weighed by this Court in exactly the same balance as the opinion of the Jury. Where the Judge has expressed a clear opinion and the Jury has expressed none it would be, in our opinion, an unwarrantable thing for us to interfere with the ordinary course of justice in a case of this nature.

Then the further ground that is taken is that there being no suggestion at any stage of the two previous trials that any particular accused was responsible for the offence, the present proceeding ought not to be allowed to go on. This particular ground has not been urged before us by the learned Counsel, but it is necessary to glance at it, for this reason that at present the proceedings against the petitioner to which he has to answer come under section 307 read with section 34, Indian Penal Code, and section 34 does not involve abetment and, therefore, does not imply any conspiracy and does not require proof that any particular accused was responsible for the commission of the actual offence.

The fourth ground stated in the petition refers to the unanimous verdict of the Jury of not guilty on all charges against the two youths who were formally on their trial and the Judge having held that the evidence of identification was weak and there being no suggestion that any new or further evidence would be available, the proceedings are fit to be quashed. We have already dealt with this above and there is no need to say anything further.

The last ground is as to the nature of the evidence, which we decline now to go into, and also upon the opinion of the Civil Surgeon, which is referred to in the petition and which we may at once say relieves the petitioner of any necessity of showing that he had not certain marks of injury on his person which might have been caused by the explosion of a gun. That portion of the evidence, if it was ever seriously put forward, seems to have entirely broken down and, no doubt, will not again be revived;

(1) 23 Ind. Cas. 985; 18 C. W. N. 498; 41 C. 350.

but this is a very minor point and has nothing to do with the other considerations which we have already set out.

Having given this case our most careful consideration we are of opinion that it would not be in any way justifiable to interfere with the ordinary course of justice at the present stage of the proceeding. We, therefore, direct that this Rule be discharged and the proceedings do continue from the point they had already reached. The petitioner will remain on the same bail.

Rule discharged.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 314 OF 1913.

Present:—Mr. Lindsay, J. C.

SURAT SINGH—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 395—Dacoity—Circumstantial evidence—Pointing out place where stolen property found.

Where the sole evidence against a person charged with an offence under section 395, Indian Penal Code, consisted of the fact that the accused had pointed out the place where some remains of the stolen property were found:

Held, that the above circumstantial evidence was not sufficient to show that the accused had committed the offence, inasmuch as it did not exclude other theories compatible with his innocence.

Queen-Empress v. *Gobinda*, 17 A. 576, referred to.

Appeal against the order of the Sessions Judge, Hardoi, dated 8th September 1913.

Mr. *Bhattacharji*, for the Appellant.

The *Government Pleader*, for the Crown.

JUDGMENT.—Surat Singh, the appellant, has been convicted on a charge of dacoity in the Court of the Sessions Judge of Hardoi and has been sentenced to five years' rigorous imprisonment. The evidence for the prosecution shows that on the 6th of June last four persons Ram Dayal, Ram Charan, Mul Chand and Bachwa Chamar went to Sandila. Ram Dayal is the agent of one Puttu Lal and the object of his journey to Sandila was according to his story to receive a sum of money from one Salamat Ali, who was redeeming a mortgage which had been executed in favour of Puttu Lal. The money was not paid at Sandila, inasmuch as there was some dispute between Ram Dayal and Salamat Ali as to the registration of the receipt for the money. These people returned home, three of them in a cart, while the other Mul Chand was riding a pony. When they reached close to the village of Musalmanabad after nightfall they were attacked by a number of persons and were beaten and robbed. Ram Dayal is said to have lost some Rs. 10 and some papers and articles of clothing. The others lost various articles of small value. It is stated that the dacoits had been expecting these people, for it is said that they enquired where the money was which Ram Dayal was to receive from Salamat Ali at Sandila on that day. A report of the affair was made at the Police station that night by Laltu, the *Chaukidar* of Kebli, the village in which these people live. The dacoity was described in general terms, but no names of any persons said to have been concerned in it were mentioned. Laltu's story is to the effect that before he went off to the *Thana* to make the report he saw all the four persons who had been attacked, but none of them was able to give him any intelligent account of what had taken place. A Police Officer arrived on the scene the next day and proceeded to record certain statements. Ram Charan, one of the men who were attacked, having been rather severely wounded, was sent to hospital at Hardoi. On the 10th of June the accused appellent Surat Singh is said to have taken the Police and various other people to a spot some considerable distance from the scene of the dacoity, where he pointed out the remain of a fire and some pieces of burnt papers and clothing and it is said that these papers and pieces of clothing were identified as the remains of some of the property which was stolen on the night of the 6th of June. Surat Singh was arrested in connection with this charge and also another man, named Gaya Din Chamar, who has been convicted in this case but whose appeal is not before me at present. Some other arrests were also made and on the 23rd and 25th June certain identification proceedings were held in the Jail at Hardoi. On that occasion the witness, Ram Dayal, is said to have identified

both Surat Singh and Gaya Din. Mul Chand recognised Gaya Din only, while Bachwa recognised nobody. Ram Charan, who was unable to attend at the Jail on the 23rd of June, is said to have identified Surat Singh in Jail on the 25th. So far as direct evidence is concerned implicating the accused appellant we have only the statements of these four witnesses Ram Dayal, Ram Charan, Mul Chand and Bachwa. Bachwa's evidence does not incriminate the appellant, nor does that of Mul Chand. As for the statements of Ram Charan and Ram Dayal the Sessions Judge discarded them as being absolutely unreliable. He believed that both of these persons knew Surat Singh very well and could have identified him and named him immediately after the dacoity, had they seen him taking part in it. He was of opinion that no reliance could be placed upon the identification which these two witnesses made in the Hardoi Jail. In short he discarded their evidence as being entirely false. The only evidence, therefore, to connect Surat Singh with this crime is to be found in the circumstance that on the 10th of June he took the Police and certain people to a spot some miles away from the scene of the dacoity and pointed out some charred pieces of paper and clothing which were recognised as remains of the property stolen at the time of the dacoity. Three witnesses deposed to this incident, one of them being Surji Singh who is Surat Singh's own cousin. According to the note made by the learned Judge, Surji Singh was trying to save the accused by saying as little against him as possible. According to Surji's account Surat Singh had been under arrest since the day after the dacoity. Shaukat, another witness, can only depose that Surat Singh led the public to the spot in question and pointed out the things. The Sub-Inspector Muhammad Husain gives evidence to the same effect. He says that he searched Surat's house on the morning of the 8th of June but found nothing incriminating there. Surat Singh himself appeared on the scene a few hours after the search. It would seem that the reason for searching Surat Singh's house was not that Surat Singh himself had been named to the Police, but because one of the complainants had stated that among the dacoits he had recognised a man whom he had seen frequenting the house of Surat Singh. Surat Singh, it may be noted here, was placed before a Magistrate on the 12th of June for the purpose of having his confession recorded. He refused, however, to make any statement and represented to the Magistrate that the Police had been putting pressure upon him. The only other witness whose evidence incriminates Surat Singh is Nasir-ud-din who is a *Ziladar*. According to his story on the 8th of June Surat Singh approached him and asked him to procure some *alibi* evidence. His story is that Surat Singh represented that he was afraid that people would implicate him in this charge of dacoity. He wanted evidence to show that on the night of dacoity he was absent at Sandila. The witness goes on to say that he asked Surat Singh if he had taken any part in the dacoity. Surat Singh's answer was that he had not. The question is whether this evidence is sufficient to establish that Surat Singh took part in this dacoity. It has been argued on behalf of the appellant that the evidence falls short of establishing his guilt. One of the assessors was of opinion that the evidence was too vague to convict on. The other assessor, who is described by the learned Judge as an unintelligent person, agreed with his fellow-assessor. After carefully considering the evidence relating to the discovery of these pieces of burnt paper and clothing I have come to the conclusion that the appeal should be allowed. I do not think there was sufficient evidence to justify the conclusion that Surat Singh was necessarily concerned in this crime. The learned Counsel has referred to a judgment of the Allahabad High Court reported as *Queen-Empress* v. *Gobinda* (1), in which it was held that where the sole evidence against a person charged with an offence under section 411 of the Indian Penal Code consisted of the fact that the accused had pointed out the place where some of the stolen property was concealed in the field of another person, this was not in itself sufficient evidence to support a conviction under that section. Applying the same principle here it seems to me that it cannot be said that there is sufficient evidence to show that Surat Singh committed an offence under section 395 of the Indian Penal Code.

(1) 17 A. 576.

The circumstantial evidence such as it is does not exclude other theories which are compatible with the innocence of the appellant. In this view of the case I allow the appeal, set aside the conviction and sentence and direct that the accused appellant be acquitted and released.

Appeal allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION APPLICATION No. 671 OF 1913.

December 22, 1913.

Present:—Justice Sir George Knox, Kt., and Mr. Justice Tudball.

BASHIR HUSAIN—APPLICANT

versus

ALI HUSAIN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 192—Transfer—Sub-Divisional Magistrate, whether empowered to transfer case referred to him for trial.

A Sub-Divisional Magistrate, to whom a case has been referred for trial by the District Magistrate, has no power to transfer it to any other Magistrate who may happen to be subordinate to him.

Application in revision against an order of a Sub-Divisional Officer of Moradabad transfering a case to another Magistrate.

FACTS are sufficiently stated in the following order of

KNOX, J.—This case was called upon a perusal of the quarterly statement. The offences charged were offences under sections 426 and 323 of the Indian Penal Code and section 24 of Act I of 1871. The case was instituted upon a complaint in writing in the Court of Thakur Hanuman Singh, Magistrate of the First Class, who at the time was Sub-Divisional Magistrate of Amroha. He examined the complainant, and by virtue of the powers vested in him under section 192, clause (1) of the Criminal Procedure Code, he transferred the case for trial to Babu Bir Narain Singh, Magistrate of the second class, subordinate to him. Before Babu Bir Narain Singh could try the case he was transferred and under orders of the District Magistrate, dated the 30th of November 1912, all cases pending before him went back to the Court of the Sub-Divisional Magistrate of Amroha. There is nothing on the record to show under what powers this order of transfer was made. The officer in charge of the Sub-Division of Amroha was at this time Mr. Panna Lal, who transferred the case for trial to Chaudhri Dharam Singh, Special Magistrate of Kanth, a Magistrate subordinate to the officer in charge of the Sub-Division of Amroha. An important question arises here, whether Mr. Panna Lal had powers to make this order of transfer. It appears that he was not empowered by the District Magistrate to transfer the case to any other specified Magistrate in his Sub-Division. Orders of transfer have of late been frequent in the District of Moradabad. In a previous case, Criminal Revision No. 665 of this year, I had before me a case in which transfers were made no less than nine times from Court to Court before it was decided. The question is of some importance and I direct that the papers be laid before the Hon'ble the Chief Justice in order that the question may be considered and determined by a Bench of two Judges. It is a case in which the Public Prosecutor should appear on behalf of the Local Government.

Mr. *Wallach*, (Offg. Government Advocate), for the Crown.

JUDGMENT.—In this case the accused came first before the Court of Thakur Hanuman Singh, who at the time was the Sub Divisional Magistrate of Amroha. Thakur Hanuman Singh took cognizance of the case and then transferred it for trial to Babu Bir Narayan Singh, a Magistrate subordinate to him. Before Babu Bir Narayan Singh could try the case he was transferred. There is no formal order on the record, but we are told that on Babu Bir Narayan Singh's transfer the District Magistrate under an order, dated the 30th of November 1912, transferred all cases pending before the Court of Babu Bir Narayan Singh, which had ceased to exist, to the Court of Mr. Panna Lal who at the time was the Sub-Divisional Magistrate of Amroha. Among the cases so transferred was the present case. Mr. Panna Lal, in an explanation furnished by him, says that as the case was a petty one he transferred it for trial to Chaudhri Dharam Singh, Special Magistrate of Kanth and a Magistrate subordinate to the Sub-Divisional Magistrate of Amroha. When this case first came before this Court it seemed doubtful whether Mr. Panna Lal had power

to make this last order of transfer. We asked the Public Prosecutor to appear in the case, and after hearing him we are confirmed in the opinion that this last order of transfer was *ultra vires*. When a District Magistrate has referred a case for trial to a Sub-Divisional Magistrate, the latter has no power to transfer it to any other Magistrate who may happen to be subordinate to him. This case was specially called up because frequent cases of transfer from other districts and specially from this district have lately come before this Court, and in some cases transfers have been so frequent and have caused such extraordinary delay as to amount practically to a denial of justice. We might have set aside the proceedings before the Special Magistrate of Kanth as void, but we do not think it necessary to exercise our powers in this particular case and, therefore, we make no further orders. Let the record be returned.

Record returned.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 240 OF 1914.

April 24, 1914

Present:—Mr. Justice Chamier.

EMPEROR—APPLICANT

versus

GANGA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898) s. 438—Power of District Magistrate to make reference to High Court in cases tried by Sessions Judge.

It is very much doubtful whether a District Magistrate is entitled, as a matter of law, to make a reference to the High Court for enhancement of sentence in a case tried by a Sessions Judge. Even if he is so entitled, the procedure is extremely inconvenient.

Emperor v. *Krishnaji Shyam Rao*, 6 Bom. L. R. 1099; 1 Cr. L. J. 1115; *Queen-Empress* v. *Zor Singh*, 10 A. 146, A. W. N. (1888) 5; *Emperor* v. *Jamna Bai*, 28 A. 91; 2 A. L. J. 589; A. W. N. (1905) 198; 2 Cr. L. J. 515, referred to.

Reference made by the District Magistrate of Moradabad as per his letter No. 920, dated 27th March 1914.

JUDGMENT.—This is a reference by the District Magistrate of Moradabad in which he recommends that the sentence of five years' rigorous imprisonment with ninety days in solitary confinement passed on Ganga Ahir should be enhanced. The case was tried by the Assistant Sessions Judge to whom it was transferred by the Sessions Judge. The District Magistrate in the first instance, in accordance with the procedure followed in cases tried by Subordinate Magistrates, sent the record to the Sessions Judge with the request that the case might be forwarded to the High Court with a recommendation that the sentence should be enhanced. The Sessions Judge declined to send the case to the High Court. The District Magistrate has accordingly submitted the case direct to this Court. The question whether this can be done has arisen on several occasions. It arose in a case which was in my hands as Government Advocate several years ago. This Court, while declining to hold that the District Magistrate was not entitled, as a matter of law, to submit the case to the High Court observed that the procedure adopted was inconvenient and declined to interfere. In the two reported cases *Queen-Empress* v. *Zor Singh* (1) and *Emperor* v. *Jamna Bai* (2), this Court observed that as a general rule it would not entertain a reference from a District Magistrate which had for its object the enhancement of a sentence passed by a Sessions Judge as a Court of appeal. The remarks made by Banerji and Richards, JJ., in the judgment in the latter case apply equally well to the present case. They said: "We do not think that the Legislature by using the words 'or otherwise' in section 438 intended to confer upon a Magistrate the power to question the propriety of an order of a Sessions Court and make a reference to this Court upon that ground." The Bombay High Court seems to take the same view in the matter. See *Emperor* v *Krishnaji Shyam Rao* (3) in which the order passed by the Sessions Judge was an appellate order. I doubt very much whether the District Magistrate is entitled, as a matter of law, to make this reference; but assuming that he is so entitled, I think it is extremely inconvenient that the District Magistrate should be allowed to criticise an order of a Court superior to him in this way. In the present case it seems that the District Magistrate, having failed to induce the Sessions Judge to send the case to this Court, asked the Commissioner of the Division to send the case

(1) 10 A. 146; A. W. N. (1888) 5.

(2) 28 A. 91; 2 A. L. J. 589; A. W. N. (1905) 198; 2 Cr. L. J. 515.

(3) 6 Bom. L. R. 1099; 1 Cr. L. J, 1115.

up to the Local Government with a view to having the case brought to the notice of this Court by the Government Advocate, but the Commissioner declined to do so. It is quite clear that this Court ought not to interfere in a case of this kind except for special reasons. There appear to be no special reasons in the present case, all that can be said is that the sentence inflicted is somewhat lighter than is generally inflicted in a case of this kind. In the circumstances I decline to interfere. Let the papers be returned.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 741 AND 742 OF 1914.

April 17, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

DESIKACHARI AND ANOTHER—PETITIONERS

versus

EMPEROR—RESPONDENT.

Madras City Police Act (III of 1888), ss. 43, 46, 47—Gambling—Gaming materials found on premises—Presumption.

The presence of cards, counters and so-called *hundi* boxes on the premises, is a strong presumption that it is used as a common gaming house and the owner of it when he makes a profit out of it is presumed to keep a common gaming house and the persons present on the spot are guilty of gaming, in the absence of rebutting evidence.

Petitions, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the conviction and sentence passed by the Presidency Magistrate, Egmore, Madras.

Mr. *V. N. Kuppu Row*, for the Petitioner in Criminal Revision Case No. 741 of 1914.

Mr. *R. Sadagopa Chariar*, (with him Mr. *C. Narasimhachariar*), for Petitioner in Criminal Revision Case No. 742 of 1914.

ORDER.—The fact that cards and counters and so-called Hundi boxes were found on the premises raises a presumption under section 43 of the City Police Act that the premises were used as a common gaming house, and the evidence of habitual gaming going on there strongly supports this presumption. As regards the charge under section 45 against the first accused of keeping a common gaming house, there is evidence that the accused No. 1 derived a profit from the gaming that went on there. The accused says the collections were credited to the club, but there are no accounts to support this for a long time before the visit of the Police. As regards the other accused who are charged under section 46, a presumption of guilt arises from their presence under section 43, but we think this is sufficiently rebutted in the case of the third accused. In these circumstances we acquit the 3rd accused and decline to interfere in revision with the conviction of the other accused. We, howevers, reduce the fines of the accused other than 1 and 2 from Rs. 30 to Rs. 10 each. The balance, if recovered, will be refunded.

Fine reduced.

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Where a letter merely says that the writer after looking into the account will sign it:

(1) it is not an acknowledgment of liability on an account stated;

(2) assuming that it is an acknowledgment of liability to pay whatever may be found due when accounts have been properly taken between the parties, it is not an acknowledgment of liability to pay the amount stated to be due in the *hatchitta* of a particular year. BHAIRO PRASHAD *v.* GAJADHAR PRASHAD **587**

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—— 1860—XLV. *See* PENAL CODE.
—— 1865—X. *See* SUCCESSION ACT.

ACTS—GENERAL—concld.

Act 1865—XV. *See* PARSI MARRIAGE AND DIVORCE ACT.
—— 1867—XXV. *See* PRESS ACT.
—— 1869—IV. *See* DIVORCE ACT.
—— 1870—VII. *See* COURT FEES ACT.
—— 1872—I. *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1877—III. *See* REGISTRATION ACT.
—— 1877—XV. *See* LIMITATION ACT.
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—VI. *See* COMPANIES ACT.
—— 1882—XIV. *See* CIVIL PROCEDURE CODE.
—— 1882—XV. *See* PRESIDENCY SMALL CAUSE COURTS ACT.
—— 1886—II. *See* INCOME-TAX ACT.
—— 1887—VII. *See* SUITS VALUATION ACT.
—— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—IV. *See* MERCHANDISE MARKS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1890—... *See* FOREIGN JURISDICTION ACT.
—— 1894—I. *See* LAND ACQUISITION ACT.
—— 1895—I. *See* PRESIDENCY SMALL CAUSE COURTS ACT.
—— 1896—XII. *See* EXCISE ACT.
—— 1898—V. *See* CRIMINAL PROCEDURE CODE.
—— 1899—II. *See* STAMP ACT.
—— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—VI. *See* EXPLOSIVE SUBSTANCES ACT.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1910—I. *See* PRESS ACT.

ACTS—(LOCAL) BENGAL.

Act 1855—XXXVII. *See* SONTHAL PARGANAS ACT.
—— 1859—XI. *See* BENGAL LAND REVENUE SALES ACT.
—— 1867—II. *See* GAMBLING ACT.
—— 1876—VII. *See* BENGAL LAND REGISTRATION ACT.
—— 1880—VI. *See* DRAINAGE ACT.
—— 1883—IX. *See* CENTRAL PROVINCES TENANCY ACT.
—— 1885—III. *See* LOCAL SELF-GOVERNMENT ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.

ACTS—(LOCAL) BENGAL—concld.

Act 1887—XII. *See* BENGAL, N.-W. P. AND ASSAM CIVIL COURTS ACT.
—— 1895—I. *See* PUBLIC DEMANDS RECOVERY ACT.
—— 1898—I. *See* CENTRAL PROVINCES TENANCY ACT.
—— 1898—XI. *See* CENTRAL PROVINCES TENANCY ACT.
—— 1901—V. *See* CHOTA NAGPUR TENANCY ACT.
—— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.
—— 1909—V. *See* BENGAL EXCISE ACT.

ACTS—(LOCAL) BOMBAY.

—— 1862—V. *See* BHAGDARI AND NARWADARI ACT.
—— 1863—II. *See* SUMMARY SETTLEMENT ACT.
—— 1869—XIV. *See* BOMBAY CIVIL COURTS ACT.
—— 1888—III. *See* BOMBAY CITY MUNICIPAL ACT.
—— 1905—I. *See* BOMBAY COURT OF WARDS ACT.

ACTS—(LOCAL) BURMA.

—— 1898—IV. *See* LOWER BURMA TOWNS AND VILLAGE LANDS ACT.
—— 1907—... *See* BURMA VILLAGE ACT.

ACTS—(LOCAL) MADRAS.

—— 1884—IV. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
—— 1884—V. *See* MADRAS LOCAL BOARDS ACT.
—— 1888—III. *See* MADRAS CITY POLICE ACT.
—— 1901—I. *See* MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.

ACTS—(LOCAL) PUNJAB.

—— 1884—XVIII. *See* PUNJAB COURTS ACT.
—— 1891—XX. *See* PUNJAB MUNICIPAL ACT.
—— 1900—XIII. *See* PUNJAB ALIENATION OF LAND ACT.
—— 1905—II. *See* PUNJAB PRE-EMPTION ACT.
—— 1912—I. *See* PUNJAB COURTS ACT.

ACTS—(LOCAL) U. P.

—— 1876—XVIII. *See* OUDH LAWS ACT.
—— 1886—XXII. *See* OUDH RENT ACT.
—— 1891—I. *See* AGRA AND OUDH WATER WORKS ACT.
—— 1900—I. *See* UNITED PROVINCES MUNICIPALITIES ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.

ACTS—REGULATIONS.

Regulation 1806—XVII. *See* REGULATION.
—— .. —— 1819—VIII. *See* PATNI TALUKS REGULATION.
—— .. —— 1825—XI B. C. *See* REGULATION.
—— .. —— 1827—IV Bom. C. *See* REGULATION.
—— .. —— 1830—XIII Bom. C. *See* REGULATION.
—— .. —— 1881—.. *See* POONA CANTONMENT TAXATION REGULATION.

ACTS—REGULATION—concld.

Regulation 1886—I. *See* ASSAM LAND AND REVENUE REGULATION.
—— .. —— 1893—V. *See* SONTHAL PARGANAS JUSTICE REGULATION

ACTS—STATUTES.

11 & 12 VIC., C. 21. *See* INSOLVENCY ACT.
24 & 25 VIC., C. 104. *See* CHARTER ACT.
44 & 45 VIC., C 58. *See* ARMY ACT.

Adjournment of suit. *See* CIVIL PROCEDURE CODE, 1908, O. XVII, R. 3.

Administration *suit by annuitant legatee —Legacy paid into Court by executor—Power of Court to dismiss suit.*

A suit by an annuitant legatee against the executor for a general administration of the testator's estate may, at the discretion of the Court, be dismissed, if the executor pays into Court the amount of the legacy and a sum sufficient to secure the payment of the annuity. ATHALUR MALAKONDIAH *v.* THATHA LAKSHMINARASIMHULU, 26 M. L. J. 312; 1 L. W. 572 **134**

Admissibility of evidence—Custom of village, proof of—*Ikrar-i-malikan-a deh* dictated by landlords alone, how far proof of custom recorded therein—Instances, citation of, in proof of custom, if indispensable—Trees, transferability of **952**

—— —— **of statement.** *See* EVIDENCE.

Admission, gratuitous, withdrawal of **965**

Adoption, *See* CUSTOM; HINDU LAW.

Adverse possession—*Burden of proof—Presumption—Limitation.*

In a suit for the recovery of a house the plaintiff alleged that the defendant had unlawfully and without any right taken possession of it ten years before suit and after the death of the plaintiff's ancestor. The defendant pleaded more than twelve years' adverse possession. The Court found that the death of plaintiff's ancestor took place more than twelve years prior to the institution of the suit:

Held, under the circumstances, (1) that no presumption as to continuation of the plaintiff's possession could be made in his favour;

(2) that it was for the plaintiff to prove by *prima facie* evidence that he had been in possession of the house within twelve years. *Musammat* HULASO *v.* SALAMAT KHAN **521**

—— —— —— —— Invalid transfer by widow—Transferee's title by adverse possession **931**

—— —— —— Prescription—Hindu Law—Gifts to females, construction of—Gift by father-in-law in favour of his widowed daughter-in-law—Presumption as to life-estate—Possession by female without title **594**

Affidavit, meaning of **377**

Agency—*Powers of Agent—Chetty banking, usage of—Power-of-attorney—Construction—Surety—Guarantee—Agent's power to give guarantee or sign negotiable instruments—Burden of proof.*

Unless expressly so empowered an agent cannot make his principal a surety for another's loan, nor can he borrow money in his principal's name for another, nor can he thrust a partner upon his principal or sign a promissory-note for his principal jointly with another person.

It is not a necessary incident in a Chetty banking and moneylending business that the Chetty must necessarily guarantee another Chetty, that is, it is no part of the Chetty business to stand guarantee for others who are not Chetties.

Powers-of-attorney must be construed strictly and unless an express power is given to an agent to enter into contracts of guarantee on behalf of his principal or to execute negotiable instruments for his principal jointly with others, it rests on the person alleging such power in the agent to show that in fact the agent had authority to enter into such a transaction. RAMANATHAN CHETTY *v.* BANK OF BENGAL, 7 BUR. L. T. 126 **516**

Agent—*Power of-attorney—Outstandings, powers to collect, whether includes decretal debts—Execution—Informal application—Step in-aid of execution.*

A power-of attorney, authorizing an agent to collect "outstandings," includes also a power to collect debts which have ripened into decrees, obtained even before the date of the power-of-attorney. An informal application, though infructuous, to carry on the proceedings in execution, may still operate to keep the decree alive. SRINIVASA AYIANGAR *v.* TIRUMALA CHETTY, (1914) M. W. N. 372; 15 M. L. T. 337 **99**

Agra and Oudh Water Works Act (I of 1891), s. 46 (a)—*Water used in repairing house, whether used for domestic purposes—Construction of Statute—Person on whose behalf but without whose knowledge or sanction water used for other than domestic purposes, whether guilty.*

Municipal water used in repairing a house is not used for domestic purposes. A penal enactment should be construed strictly.

Section 46 of Act I of 1891 does not impose any penalty on a person on whose behalf but without whose knowledge or sanction water is used. SAT NARAIN PRASAD *v.* EMPEROR, 12 A. L. J. 288; 15 CR. L. J. 291 **499**

Agra Tenancy Act (II of 1901)—*Sir land—Perpetual lease—Purchase of sir in execution—Suit for possession by purchaser against lessee, whether maintainable.*

During the pendency of a mortgage suit, the mortgagor made a perpetual lease of his *sir* in favour of one *A*. The mortgagee obtained a decree for sale of the *sir* and in execution thereof purchased the same. The mortgagee brought a suit for ejectment against *A*:

Held, that as the mortgagee could not maintain a suit for possession against the motrgagor under the Tenancy Act, he could not obtain decree for possession against *A*, the lessee. *Musammat* GHURE *v. Musammat* SITAL KUAR, 12 A. L. J. 370; 36 A. 248. **102**

Agra Tenancy Act—contd.

——— ——— ———**s. 22**—*Succession—Daughter's son—Daughter succeeding to her father's holding while Rent Act of 1881 was in force.*

B, a tenant of a holding under a permanent lease, died while the Rent Act of 1881 was in force, and was succeeded by his daughter *S* who died after the Tenancy Act of 1901 came into operation, leaving a son *D*:

Held, that *D* was entitled to succeed to the holding. DEOKI RAI *v.* PARBATI **100**

——— ——— ——— ——— **ss. 58, 95, 167**—*Civil Procedure Code (Act V of 1908), s. 11—Specific Relief Act (I of 1877), s. 42—Suit for declaration by landholder that lease granted by his Agent was without authority—Jurisdiction of Civil or Revenue Court*—Res judicata.

The defendant was a non-occupancy tenant under the plaintiff. In 1908 the defendant executed a *kabuliat* and the plaintiff's *mukhtear-i-am* a lease for 10 years. The former was, while the latter was not, registered.

In 1909 the plaintiff sued, under section 58 of Act II of 1901, to eject the defendant. The defendant resisted the suit by setting up the said lease and *kabuliat*, the execution of both of which the plaintiff did not challenge, but said that those documents were executed without his knowledge and consent and that his *mukhtear-i am* had no authority to grant a lease or accept a *kabuliat* for ten years. The Assistant Collector rejected the lease as unregistered, but acting on the *kabuliat* dismissed the plaintiff's suit on the ground that the term of the lease had not expired. This decision was upheld by the Commissioner on appeal. In 1912 the plaintiff sued in the Civil Court for declaration that the said lease and *kabuliat* were null and void as having been granted by his *mukhtear-i-am* without the plaintiff's knowledge, consent or authority. In bar of the plaintiff's suit the defendant relied on sections 95, 167 of Act II of 1901, section 11 of the Civil Procedure Code and section 42 of the Specific Relief Act:

Held, per *Rafique, J.* (*Piggott, J.*, dissenting):—

(1) that as the relief now claimed by the plaintiff could not be sought in a Revenue Court under section 58 or 95 of the Tenancy Act, it could not be said that the plaintiff's present suit was of such a nature as to be exclusively within the jurisdiction of a Revenue Court;

(2) that the question of the authority of the *mukhtear-i-am* to grant a ten years' lease could not be decided and was not directly decided by the Revenue Court;

(3) that as the authority of the *mukhtear-i-am* was neither in issue in the Revenue Court nor was that Court competent to try that question, any incidental expression of opinion on the point would not operate as *res judicata* and that the suit was, therefore, maintainable. RAM SINGH *v.* RAO GIRRAJ SINGH **705**

——— ——— ———**ss. 95, 167** **705**

——— ——— ———**s. 180 (2) (b)**—*Second appeal to District Judge—Question of jurisdiction.*

A suit was instituted in the Court of an Assistant Collector of the second Class. The Collector held on appeal that the suit was

Agra Tenancy Act—concld.

triable by a Civil Court, but the District Judge on appeal, overruling the Collector's contention, remanded the case for trial on the merits. On remand the first Court dismissed the suit. The Collector upheld the decree. A second appeal was preferred to the District Judge, but he dismissed the appeal on the ground that no appeal lay as no question of proprietary title or of jurisdiction was raised within the meaning of section 180, clause 2, of the Agra Tenancy Act:

Held, that an appeal to the District Judge lay, as a question of jurisdiction had already been decided at a previous stage of that suit. KESHO DAS *v.* MORAT PANDEY, 12 A. L. J. 267 **320**

Agreement. *See* SPECIFIC PERFORMANCE.

——, Antecedent oral — Promissory-note invalid for want of stamp—Plaintiff, whether entitled to fall back on oral agreement **85**

—— *between widow and reversionary heirs settling reversion on latter, whether legal.*

A Hindu widow and the expectant reversionary heirs cannot legally enter into an agreement whereby the latter's expectant reversionary rights become converted into vested reversionary rights. PALLA KANAKAMMA *v.* CHALLA RAMASAMI, 1 L. W. 237 **98**

—— **to sell.** *See* SPECIFIC PERFORMANCE.

Alienation. *See* CUSTOM; HINDU LAW.

Alluvion and diluvion. *See* REGULATION XI OF 1825.

Amendment. *See* APPEAL.

—— —— Clerical error in relief claimed—Decree **344**

—— —— **of decree**—Inherent power of Court—Amendment of decree to bring into conformity with judgment—Necessary for ends of justice—High Court's power of interference—Revision **906**

—— —— **of plaint**—*Date of operation—Limitation—Original Court, disallowing amendment—Appellate Court, whether can order amendment after limitation.*

The general rule that in the absence of any special circumstance, a plaintiff will not be allowed to amend by claiming a fresh relief, which, since the institution of the suit, has become barred, does not apply when an amendment is ordered in the interest of and at the instance of a defendant.

An amendment relates back to the date of the institution of the suit.

Where an amendment asked for by the plaintiff himself within the period of limitation is disallowed by a Court of first instance, an Appellate Court can give effect to the same, even though the appellate order is passed after the period of limitation. NEMASA *v.* RAMKRISHNA 10 N. L. R. 32 **165**

Amendment of plaint—concld.

—— —— —— Suit brought in wrong name—Limitation. **764**

—— —— Sale certificate—Jurisdiction of Court to amend sale certificate—Suit as representative of auction-purchaser for recovery of possession—Plaintiff to prove possession of judgment-debtor at date of sale—Symbolical possession, effect of **811**

Ancestral property. *See* CUSTOM.

Appeal (Civil)—Appellate Court's power to vary decree in favour of party not appealing **886**

—— Application for rateable distribution—Order, whether appealable **422**

—— Award below Rs. 5,000—Reference to Assistant Judge—Appeal to District Judge **614**

—— Dismissal for want of prosecution—Decree capable of execution, that of lower Court—Interpretation of Statutes—Barred rights cannot be revived **649**

—— —— *Execution proceedings—Second appeal—Party not allowed in second appeal to contest order setting off decree—Practice.*

An appellant will not be allowed to raise for the first time in second appeal the contention that a decree obtained by one of his judgment-debtors against the appellant's father, on whose death the appellant was brought on the record as his legal representative, cannot be set off against a decree obtained by the appellant in his own right. RAGHUNATHASAMI IYENGAR *v.* JANAKI AMMAL, 1 L. W. 431 **923**

—— filed after time—Sufficient cause—Gross carelessness of Pleader **86**

—— filed beyond time—Sufficient cause—Application for copies—Time allowed **874**

—— —— Final order—Succession Certificate—Certificate for portion of debt, if may be granted—Order declining to grant application **556**

—— Guardians and Wards Act (VIII of 1890), s. 42, order under **776**

—— Interlocutory order—Appeal allowed—Revision—Partnership suit—Amendment **564**

—— Limitation—Failure to file copy of decree—Further time allowed for appeal Sufficient cause—Limitation Act (IX of 1908), s. 9 **319**

—— Order of Assistant Collector referring parties to Civil Court—Not decree—No appeal **656**

—— —— Order of dismissal—Decree—Appeal competent—No decree prepared—Revision—Mistake of fact **902**

—— —— Order of remand—Appealable only when appeal competent from such order, if it were itself a decree—No appeal from order of remand involving questions of fact only—Certificate appeals not covered Custom—Question as to applicability of agricultural custom to particular person—Question of existence of custom **817**

—— —— Powers of Appellate Court—Party not appealing—Power to reverse decree against him—Ground of reversal common **620**

Appeal contd.

—— — (**Civil**)—*Pre-emption suit relating to land —Value—Course of appeal.*

In land suits, where the value of a claim for purposes of jurisdiction is calculated according to the revenue payable on the land claimed, the course of appeal is determined by such value and not by the amount of money decree to be payable to the vendee by the pre-emptor. TEJA SINGH *v.* SUNDER SINGH, 10 P. L. R 1914; 21 P. W. R. 1914 **89**

—— — Preliminary decree - Accounts—Findings recorded—No preliminary decree drawn up—Party omitting to have preliminary decree drawn up—Waiver **605**

—— — on question of custom without certificate —Granting permission to appeal—Revision **352**

—— —Refusal by Court to remit award **862**

—— —by some of unsuccessful plaintiffs—Common ground—Power of Appellate Court to set aside whole decree **91**

——— Suit for possession—Inference therefrom—Also from the fact that the suit was for possession only and not declaration of title—Appeal lies **367**

—— —Vakalatnama—*Pleader's name not mentioned by oversight—Presentation of appeal, whether proper—Objection at any stage of the case.*

Where by oversight the name of a Pleader presenting an appeal was not mentioned in the body of the *vakalatnama*:

Held, that the Pleader was not duly appointed and the appeal was not properly presented.

The fact that the objection was not taken till a very late stage in the case, would not validate the presentation of the appeal. MOHAMMAD ALI KHAN *v.* JASRAM. 16 A. L. J. 1015; 36 A. 46 **464**

Appeal (**Criminal**)—Appeal from acquittal —Additional evidence **188**

——— —, right of—Order of acquittal—High Court, power to interfere in revision—Practice **512**

—— — Sentence under Workmen's Breach of Contract Act—Revision **740**

——— —Several persons convicted at one trial—Different sentences—Right of appeal **739**

Appeal to Privy Council, *See* PRIVY COUNCIL APPEAL.

——— ——— ——— ———Application of legal representative to have his name recorded—Rejected by High Court - Order interlocutory—No appeal lies to His Majesty in Council **373**

——— ——— ——— ——— *Leave to appeal—Interlocutory matters.*

Their Lordships would be very slow to give leave to appeal to bring up a case at an interlocutory stage. It is better that the case should be allowed to proceed and be determined on its merits so that it may come up for final judgment at the proper time. NAYANI VENKA RANGA RAU *v.* RAMAKRISHNIAH. (1914) M. W. N. 170 **396**

Appeal—concld.

——— **Second**—Decision of amount of rent annually payable—Rent suit below Rs. 100—Decree according to defendant's admission of rent—Presumption—Publication of Record of Rights—Admission of plaint in rent suit without statement of rental of tenancy according to Record of Rights—Duty of Court to require Collector to supply copy of statement **416**

——— ——— ——— Findings of fact—Erroneous view of law—Interference by High Court **796**

——— ——— ——— Further appeal — Small cause suit of value less than Rs. 2,500—Divisional Court confirming decree of first Court—No further appeal—Section 70 (1) (b) repealed before date of hearing—Court incompetent to exercise powers under it **451**

—— — ——— *Material irregularity—Second appeal on ground of lower Court refusing to take whole evidence - Party closing his case—Practice.*

Where the first Court has recorded that a party has closed his case, that party cannot successfully urge in appeal that the Court refused to receive whole of his evidence without proving conclusively that the record is wrong, especially when the objector was represented by Counsel in the lower Court.

An Appellate Court ought to dispose of specifically the grounds of appeal urged before it BHIWANI DAS *v.* JHANDA RAM, 3 P. W. R. 1914; 27 P. L. R. 1914 **352**

——— ——— Necessity—Previous mortgage **940**

Appellate Court, whether can order amendment after limitation **165**

Application for copy, by whom to be made **209**

——— ——— *to sue in* forma pauperis - *Rejection by Court.*

Leave to sue in *forma pauperis* under Order XXXIII, rule 5, ought not to be refused on insufficient grounds.

A plaint presented by two or more plaintiffs claiming different reliefs against the same defendant cannot be said to be framed improperly or bad for misjoinder of causes of action. KANAGAMMAL *v.* PANCHAPAKESA ODAYAR, 26 M. L. J. 343; (1914) M. W. N. 327 **82**

Arbitration—Agreement to refer to arbitration—Revocation—Supersession of reference—Apprehension of misconduct of arbitrator, whether good ground for supersession **758**

——— ——— ———Arbitrator—Non-submission of award within time fixed by Court—Neglect or refusal—Appointment of second arbitrator without discharging first—Validity of reference—Agreement by parties to be bound by opinion of majority—Omission of Court to record that fact, effect of—Invalidity of reference to arbitration **842**

——— ——— ——— Award—Corruption or misconduct —Good portion of award separable from bad portion, effect of—Irregularities in procedure—Desirable that arbitrator takes notes of proceedings —Arbitrator bound to give evidence—What ques-

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tions can be put to arbitrator—Inquiry into dishonesty or partiality—Examination of arbitrator to be confined to charge of corruption—Suspicion—Guilt **625**

——————Reference by only some of parties—Non-joinder, objection as to—Waiver—Refusal by Court to remit award—Appeal **862**

——————without intervention of Court—Award deciding matters not referred to arbitration, whether legal **422**

Army Act (44 and 45 Vict., Chap. 58), s. 136, 144, 190 **935**

Assam Land and Revenue Regulation (Act I of 1886), s. 70—*Sale—Adverse possession, whether incumbrance.*

Adverse possession is an incumbrance in connection with a sale under section 70 of the Assam Land and Revenue Regulation, 1886. APTAR ALI *v.* BROJENDRA KISHORE ROY **119**

Assault. *See* PENAL CODE, s. 98.

Assignment - Mortgage—Debt paid to assignee—Cancellation of assignment—Notice of cancellation—Assignment treated by mortgagee as void **607**

——————*Transfer of decree to one creditor—Consideration—Arrangement—Absence of* bona fides *—Validity—Practice.*

A, a decree-holder, who was indebted to various persons, assigned a decree for Rs. 14,000 to *B*, one of his creditors, and thus he paid off *B* and two other creditors and received himself Rs. 7,775 before the Sub-Registrar. This amount was admittedly returned to *B* and an arrangement was entered into by which *B* himself received Rs. 610 and Rs. 1,000 was given to one *C* and Rs 5,838 to *D* and the rest to others. *C* and *D* were not found to be his creditors:

Held, that both the said transactions were fraudulent and void and no valid proceedings could be based on either of those transactions.

A deed is void against a creditor when his debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. It is not sufficient to render a deed valid that it should be made upon good consideration, for "a good consideration does not suffice if it be not also *bona fide*."

Their Lordships pronounced no opinion on the question whether any of the parties could establish rights based, not on the transactions, but on other grounds, such as the actual payment of debts, as the point was neither before the Courts below nor before them. CHIDAMBARAM CHETTIAR *v.* SRINIVASA SASTRIAL, 26 M. L. J. 473; 18 C. W. N. 841; 36 M. 227 **714**

Attachment. *See* CIVIL PROCEDURE CODE, 1908, s. 60.

——————before judgment. *See* CIVIL PROCEDURE CODE, O. XXXVIII, R. 5.

——————of salary of Honorary Commissioned Officers employed in Indian Subordinate Medical Department, power of executing Court as to—Army Act (44 and 45 Vict, Chap. 58), ss 136, 140 and 190 **935**

Awans of Talagang Tahsil, Attock District—Alienation—Powers of fathers **934**

Award—Award below Rs. 5,000—Reference to Assistant Judge—Appeal to District Judge—Second appeal to High Court, whether maintainable **614**

——————Compromise amending award—Decree based thereon—Ten days' time for objection not necessary **591**

——————, revision of decree based on—Made without intervention of Court **950**

Benami—*Transfer to defraud creditors—Creditors not defrauded—Estoppel—Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Powers of Appellate Court—Party not appealing—Power to reverse decree against him—Ground of reversal common.*

Property transferred to another, *benami*, to defraud creditors is still the transferor's when no creditor is defrauded by the transfer, and the transferor is not estopped from proving that the transferee has no title and that that the property is the transferor's.

Where the ground of reversal is common, an Appellate Court can under Order XLI, rule 4, Civil Procedure Code, reverse the decree not only against the party appealing, but also against those who have not appealed. SOKKAPPA REDDI *v.* SINGANA REDDI, 1 L. W. 169 **620**

Benami transaction—Fraudulent transfer—Real owner suing for possession from *Benamidar* on the ground that the intended fraud was wholly inoperative—Burden of proof, real owner to prove that fraud was inoperative **370**

——————*Pardanashin* lady—Deed not explained to lady—Burden of proof **642**

Benamidar and real owner—*Transaction entered into by* Benamidar *alleged to be unauthorised by real owner—Estoppel—Fraud.*

Where property is held *Benami* and the ostensible owner assents to its being disposed of to the prejudice of the real owner the latter cannot be allowed to object, the fraud being a consequence of his own act. So if the property is purchased in the name of a *Benamidar*, and the indicæ of ownership are placed in his hands, the true owner can only get rid of the effects of an alienation by showing that it was made without his acquiescence and that the purchaser took with notice of that fact. MAUNG KYA *v.* V. P. L. V. N. FIRM, 7 Bur. L. T. 8 **363**

Bengal Land Registration Act (VII B. C. of 1876), s. 78 **844**

Bengal Land Revenue Sales Act (XI of 1859), ss. 36, 37, Excep. (4)—Benami *purchase—Real purchaser, if can sue for possession and annulment of incumbrance—"Purchaser," meaning of, in section 37—Burden of proof—Exemption—Benefit of 4th Excep. to s. 37.*

Section 36 of the Bengal Land Revenue Sales Act, 1859, does not bar a suit for possession of lands as appertaining to a *taluq* purchased at a revenue sale in the name of a *benamidar*.

Bengal Land Revenue Sales Act—concld.

The language of the section should be given a restricted interpretation and not extended to cases not manisfestly covered by it.

The word "purchaser" in section 37 of the Act does not mean only "a certified purchaser or his heirs or assignees." The real purchaser is a purchaser within the meaning of the section, and is entitled to avoid incumbrances.

In a suit to avoid incumbrances (*howlas*) under section 37 of the Bengal Land Revenue Sales Act, 1859, the defendants are bound to prove something more than the existence of the *howlas* and their long possession, and must establish that the lands in suit actually appertain to the *howlas* named or that the *howlas* still exist and that the defendants are owners of them or at least have been in possession of them for a sufficiently long period on assertion of their title under the *howlas*.

Where a defendant claims exemption from the provisions of the Revenue Sale Law which entitle a purchaser to annul incumbrances in respect of land in his possession, the benefit of the 4th exception to section 37 of the Act of 1859 must be limited only to such portions of land as are covered by buildings, tanks, etc. and cannot be extended to cover those lands included in the lease on which no permanent works have been constructed. MATHURANATH GHOSHAL *v.* RATMESWAR SEN **917**

——— ——— ——— ——— **s. 37, Excep. (4)** **917**

Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 19, sub-s. (1)—*Suits Valuation Act (VII of 1887), s. 8—Court Fees Act (VII of 1870), s. 7, cl. V, sub-cl* (e) *—Suit—Valuation—Interest claimed by plaintiff—Value of suit is value of interest claimed in suit—Jurisdiction.*

The value of a suit is the value of the subject-matter in controversy, that is, the value of the interest claimed by the plaintiff

Therefore, where a plaintiff seeks to establish his right as an occupancy *raiyat* in a garden and to recover possession thereof, the value of the suit must be determined with reference to the value of the interest claimed by the plaintiff, and not with reference to the entire interest in the land, that is, the interest claimed by the plaintiff as also the interest of the superior landlord: and if the value of the interest claimed by the plaintiff is less than Rs. 1,000 the suit is cognizable by a Munsif under sub-section (1) of section 19 of the Bengal, N.-W. P. and Assam Civil Courts Act, 1887. UPENDRA CHANDRA MITRA *v.* SATCOURI DHAR **564**

——— ——— ——— ——— **s. 37**—*Partition, suit for*—Ijmali *lands—Previous partition—Lands jungle or submerged in three* mouzas—*Separate suits for partition, maintainability of.*

Separate suits for partition of *ijmali* lands lying in different villages are maintainable against the same defendants on principles of justice, equity and good conscience and the plaintiff is not required to include in his suits those lands which have not emerged or become culturable and are incapable of partition. HEM CHANDRA CHOWDHRI *v.* HEMANTA KUMARI DEBI **442**

Bengal Tenancy Act (VIII of 1885), ss. 11, 18, 85, 170, cl. (3)—*"Transfer", whether includes lease—Sub-lessee under permanent tenure-holder or* raiyat *at fixed rate, whether may deposit money to prevent sale of holding in execution of rent decree.*

The term "transfer", as used in section 11 or section 88 of the Bengal Tenancy Act, includes a lease, as a lease is a transfer of an interest in immoveable property. Therefore, a permanent tenure-holder or a *raiyat* at a fixed rate of rent is competent to grant a sub-lease of his tenure or holding.

Consequently the sub-lessee may pay money into Court under section 170, clause (3), to prevent a sale of the tenure or holding.

The provisions of section 85 are subject to those of section 18, in other words, section 85 has no application to a case where section 18 applies. HARI MOHAN *v.* ATAL KRISHNA BOSE **925**

——— ——— ——— ——— **s. 18** **925**

——— ——— ——— ——— **s. 29** **579**

——— ——— ——— ——— **s. 50** — *Presumption — Assertion by tenant of certain rent more than twenty years before suit - Same rent claimed in present suit —Presumption that rent has not been altered for twenty years —Ancient document -- Proper custody -- Interference with discretion as to custody by Appellate Court -Evidence Act (I of 1872), ss. 13, 43, 90— Assertions of right — Admissibility in evidence.*

The presumption of section 50 of the Bengal Tenancy Act does not rest upon whether one uniform rate of rent has been paid or not, but upon whether the rent has or has not been changed.

Where a tenure-holder asserted in a rent suit, brought against him more than twenty years before the present suit for rent, that his rent was Rs. 71 *sicca*, and in the present suit rent was claimed at the same rate, and there was no evidence of a change of rent:

Held, (1) that the fact that in the present suit rent was claimed at the same rate was an admission that the rent of the tenure had remained unaltered for upwards of twenty years and was evidence that there had been no change in the rate of rent from the date of the previous suit;

(2) that the defendants were entitled to the presumption under section 50 of the Bengal Tenancy Act.

Documents containing assertions of the right of a tenure-holder to hold the tenure at a certain rental are admissible under section 13 of the Evidence Act.

Whether the custody of a document is a proper one under section 90 of the Evidence Act, is a question to be decided upon the circumstances of each case; and an Appellate Court will always be slow to interfere with the discretion of the Court below vested in it under section 90 in refusing or admitting the document. DINAMANI CHAUDHURANI *v.* JAGAT CHANDRA BHATTACHARJEE **773**

——— ——— ——— ——— **s. 52** — *Landlord and tenant—Suit for additional rent for increased area—Excess of land found in tenant's possession —Standards of measurement same on both occasions—Allowance for difference in systems of measurement, if to be granted.*

In a suit for additional rent for excess area, where it is found that the standards of measurement were the

Bengal Tenancy Act —contd.

same on both the occasions when the land was first let out and when the excess area was discovered, and that there has been an increased area in the possession of the tenant, the Court is not entitled to allow any deduction on the ground of difference in the systems of measurement. BAIDYA NATH DUTT *v.* JAWAHIR MANDAL **794**

——— ——— ——— **ss. 61, 66**—*Withdrawal of portion of claim in suit—Application for withdrawal in second appeal, whether may be granted—Deposit of rent—Interest.*

The plaintiff sued for rent for the years 1314 to 1316 and for the first half year of 1317. There was also a prayer for ejectment. Seeing that the plaintiff could not succeed in his prayer for ejectment, as he had sued for rent for the first half of 1317, he prayed in second appeal that he might be permitted to withdraw his claim in respect of 1317:

Held, that the application could not be granted at that stage.

A deposit of rent without the interest then due is not a sufficient deposit within section 61 of the Bengal Tenancy Act. SHYAM CHANDRA *v.* BHANGA DEI **777**

——— ——— ——— **s. 65** **632**

——— ——— ——— **s. 66** **777**

——— ——— ——— **ss. 67, 68** **108**

——— ——— ——— **s. 85** **925**

——— ——— ——— **ss. 103B, 105, 105A, 107**—*Rent suit—Entry in Record of Rights—Presumption—Entry not conclusive even on failure of tenant to take proceedings to rebut presumption.*

In proceedings taken on an application by the landlord under section 105, Bengal Tenancy Act, prior to the enactment of section 105A, it was not open to the tenant to question the correctness of the entries in the record, though it was open to him to do so by a suit under section 106 or by a declaratory suit in the Civil Court.

But under section 103B, the entries only give rise to a presumption and neither the defendant's failure to take proceedings for the purpose of annuling or rebutting that presumption nor a decision under section 105 prior to the enactment of section 105A can avail to make them conclusive. SHASHI BHUSHAN HAZRA *v.* DENAMOYEE DASI **615**

——— ——— ——— **ss. 103B, 148B (1), 153**—*Second Appeal—Decision of amount of rent annually payable—Rent suit below Rs. 100—Decree according to defendant's admission of rent—Presumption—Publication of Record of Rights—Admission of plaint in rent suit without statement of rental of tenancy according to Record of Rights—Duty of Court to require Collector to supply copy of statement.*

In a suit for rent valued at less than Rs 100, the question at issue between the parties was the amount of rent annually payable by the tenant. The lower Appellate Court decided that the plaintiff had not been able to prove his allegation as to the rate of rent, and the result was that the Court awarded the amount of rent annually payable which was admitted by the defendant:

Bengal Tenancy Act—contd.

Held, that there was a decision of a question of the amount of rent annually payable by the defendant within the meaning of section 153 of the Bengal Tenancy Act, and that a second appeal lay.

Under section 103B of the Bengal Tenancy Act the Record of Rights shall be presumed to have been finally published, unless such publication is expressly denied.

Under the proviso to section 148B (1) of the Act, in all cases in which a Court admits a plaint in a rent suit, which does not contain a statement of the rental of the tenancy according to the Records of Rights, the Court shall require the Collector to supply a certified copy of the Record of Rights relating to the tenancy. TARINI CHARAN MAJUMDAR *v.* UMAR MALITA **416**

——— ——— ——— **ss. 103B, cl. (5), 104J**—*Presumption—Rate and amount of rent—Relationship of landlord and tenant.*

The presumption which arises out of section 104J of the Bengal Tenancy Act merely refers to the rate and amount of rent. That rent may be payable by one person at one time and by another person at another time, but the mere fact that a certain rate of rent was found to be payable by the defendant's father to the plaintiff gives rise to no presumption that the sons are the plaintiff's tenants.

Where the defendants were recorded as under-*raiyats* of the plaintiff in the Settlement Record:

Held, that there was a presumption under section 103B, clause (5), that the relationship of landlord and tenant existed between the parties, but that the presumption could be rebutted. NADER ALI HOWALDAR *v.* ASIMADDI SARDAR **244**

——— ——— ——— **s. 104J** **244**

——— ——— ——— **ss. 105, 105A, 107** **615**

——— ——— ——— **s. 119** **524**

——— ——— ——— **ss. 143, sub-s. (2), 153**—*Civil Procedure Code (Act V of 1908), O. XLIII, r. 1, cl. (t)—"Suit," whether includes appeal—Appeal—Order of lower Appellate Court refusing to re-hear appeal heard ex parte in rent suit valued at less than Rs. 100, if appealable.*

An appeal against an order of the lower Appellate Court refusing to re-hear an appeal heard *ex parte* from a decree in a rent suit valued at less than Rs. 100, is not competent being barred by section 153 of the Bengal Tenancy Act.

The term "suit" includes the appellate stage.

An application to re-hear an appeal is an application in the suit. SAMED SHEIKH *v.* NABA NEPAL GHOSE, 19 C. L. J. 310 **12**

——— ——— ——— **ss. 148A, 158B**—*Civil Procedure Code (Act V of 1908), s. 115, O. XXXIV, r. 14—Usufructuary mortgagee, if can sue tenants for rent as landlord—Co-sharer landlords—Interest of each, whether should be of same degree—"Rent due," in s. 148A, meaning of—Effect of order of District Judge—Jurisdiction of first Court.*

Bengal Tenancy Act—contd.

A usufructuary mortgagee of a share of a *zemindari* is entitled to receive rent and is empowered under section 78 of the Land Registration Act to sue for rent in his character as landlord, and his suit is not barred under rule 14 of Order XXXIV of the Civil Procedure Code.

The co-sharer landlords are the entire body of persons who are entitled to collect rent. It is not essential that the interest of each should be of the same degree.

The expression "*rent due*", in section 148A of the Bengal Tenancy Act, means not the rent payable under the contract of tenancy, but the rent actually in arrears after deducting the amount, if any, which may have been actually paid to the landlord.

Therefore, a suit for the recovery of what to the information of plaintiff was the whole arrear due is in essence a suit for rent due to all the co-sharers within the meaning of section 148A and if a decree is made in such a suit, the holding will pass to the purchaser in execution of the decree, under section 158B.

The plaintiff in such a suit obtained a decree for rent and applied for execution in accordance with sub-section (1) of section 158B. The first Court granted the application, but on appeal the lower Appellate Court directed the first Court to hold the sale under the Civil Procedure Code and not under the Bengal Tenancy Act:

Held, that the result of the decision of the lower Appellate Court is that the first Court has to proceed to sell the holding under the Civil Procedure Code, which it has no jurisdiction to do, and to refuse to sell the holding under the Bengal Tenancy Act, which it has jurisdiction to do; and that, therefore, the High Court will interfere with the decision of the lower Appellate Court in revision. BROHMANDA NATH DEB *v.* HEM CHANDRA MITRA, 18 C. W. N. 1016 **981**

——————— **s. 148B (1) 416**

——————— **s. 148 cl. (h) 632**

——————— **s. 153 12, 416**

——————— **s. 153 proviso**—*Suit for rent—Registration—Burden of proof—District Judge exercising appellate jurisdiction—High Court's power of revision — Jurisdiction—Bengal Land Registration Act (VII B. C. of 1876), s. 78—Civil Procedure Code (Act V of 1908), s. 115.*

The burden of proving that the plaintiff cannot sue for arrears of rent without her name being registered under the Bengal Land Registration Act is upon the defendant.

The jurisdiction of a District Judge under section 153 of the Bengal Tenancy Act is of revisional and not of appellate character. Therefore, where a District Judge acting under that section fails to consider whether the primary Court had exercised a jurisdiction not vested in it or had acted in the exercise of its jurisdiction illegally or with material irregularity and treats the matter before him as in substance an appeal from the decree of the primary Court, he, in essence, acts illegally and with material irregularity in the exercise of his jurisdiction and the High Court will be justified to interfere with his orders. SURANGINI DASI *v.* NEKARADDI MULLICK **844**

——————— **s. 158B 931**

——————— **s. 160 (g)**—*Protected interest*—Se-patni—*General authority in* dar-patni patta *to create* se-patni, *whether sufficient.*

A general authority contained in a *dar-patni patta* expressly stating that the *dar-patnidar* may grant *se-patni* settlements is sufficient to protect from annulment a *se-patni* created by the *dar-patnidar* as a protected interest within the meaning of section 160 (*g*) of the Bengal Tenancy Act, and a special permission in each case is not required. BIDHUMUKHI CHOWDHURANI *v.* ASMATULLA **899**

——————— **ss. 163, 165 632**

——————— **s. 169, cl. (c)**—*Civil Procedure Code (Act V of 1908), s. 65—Title of auction-purchaser in execution of rent decree—Date of sale—Liability of purchaser for rent after sale—Whether judgment-debtor liable for same.*

A plaintiff caused a tenure to be sold in execution of a decree for rent due thereon. After the sale, he applied under section 169, clause (*c*), of the Bengal Tenancy Act to obtain from the surplus sale-proceeds the rent which accrued due from the date of institution of the suit to the date of confirmation of the sale. The amount of surplus was not sufficient to meet that amount, and the plaintiff, therefore, brought a suit to recover the same from the judgment-debtor:

Held, that, in view of section 65 of the Civil Procedure Code of 1908, which lays down that the title of the auction-purchaser dates from the date of the sale, the purchaser and not the judgment debtor was liable for the rent of the period from the date of the sale to its confirmation, and that the suit was rightly dismissed. BEJOY CHAND *v.* SHASHI BHUSHAN BOSE **101**

——————— **s. 170, cl. (3) 925**

——————— **s. 195 632**

Bhagdari and Narwadari Act (Bom. Act V of 1862)—*Valatdan Patta* of unrecognized portion of *Bhag* **602**

Bombay City Municipal Act (Bom. Act III of 1888), ss. 289, 293 765

Bombay Civil Courts Act (XIV of 1869), s. 16 614

Bombay Court of Wards Act (Bom. Act I of 1905), s. 32, *whether applicable to pending suits.*

Section 32 of the Bombay Court of Wards Act was not intended to apply to pending suits. HARI GOVIND KULKARNI *v.* NARSINGHRAO, 16 BOM. L. R. 30; 38 B. 194 **123**

Bond for appearance Non-appearance, forfeiture for—Court to order forfeiture, jurisdiction of **503**

——— ———Condition—25 per cent. more to be paid on default in payment on fixed day—Penalty **542**

———, suit for money due under—Compensation—Breach of contract—Acknowledgment **353**

Books of account—Regularly kept **893**

Buddhist Law—*Divorce—Cruelty—Caprice—Petty quarrels.*

A divorce cannot be granted on mere caprice, and petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce.

The parties had both been married before, the defendant being 53 and the plaintiff 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not as amicably as might be. On the 28th October 1911 the appellant missed rice, plantains and cocoanuts and accused his wife of taking them to give to her children and told her to go away from his house. She did so and went to her parents' house. She then attempted to get a divorce before the headman without success and on the 11th November 1911, the 14th day after the quarrel, she filed a suit. A decree as if by mutual consent was given for divorce and confirmed on appeal. Second appeal was lodged:

Held, that the facts stated above did not constitute such cruelty as entitled the plaintiff to a divorce, even as by mutual consent, and that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms. MAUNG KYAW YAN *v.* MA NYO U, 7 BUR. L. T. 16 **380**

——— ——*Divorce—Desertion—Convict, whether deemed to desert wife—Wife of convict taking another husband, effect of—Evidence—Arbitration proceedings—Clerk taking note of evidence—Note, whether admissible.*

Under Buddhist Law a man sentenced to imprisonment is not to be deemed to have deserted his wife; nor does desertion *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage tie.

Therefore, the wife of a convict in possession of sufficient joint property to maintain herself and children is not entitled to take another husband to herself but if she does so, her conduct amounts to desertion and adultery and the husband on return is entitled to treat the marriage tie as at an end and to demand all the property.

A note of evidence taken by a clerk in the course of abortive arbitration proceedings is not admissible in evidence. MA AUNG BYU *v.* MAUNG THET HNIN **940**

——— ——*Inheritance—Child taken away by divorced mother—Tie of relationship severed—To claim inheritance, tie to be strictly proved—Immaterial whether property ancestral or otherwise.*

When a child is taken away by her divorced mother, the relationship of the child with her father for purposes of inheritance is *prima facie* severed, and if she afterwards lays a claim to a share in the inheritance, whether of ancestral or non-ancestral property, it has to be shown by plain and unmistakeable outward signs that the tie of relationship with her father was maintained.

It is presumed in the absence of special circumstances that the affairs of people divorcing and re-marrying are settled definitely at the divorce or re-marriage, and the presumption becomes very strong where a long period has elapsed since the divorce and the wife has never taken any steps to claim a share in the property taken by her divorced husband to the second marriage. MI AH PU MA *v.* MI HNIN ZI U, 7 BUR. L. T. 83 **948**

Buddhist Law—concld.

——— ——*Inheritance—Exclusion of children—Filial neglect—Burden of proof where no divorce and separation—Act of father—No exclusion of children from inheritance.*

Where no divorce is proved or admitted, and the separation between father and children is entirely the act of the father, the separation cannot deprive the children of their right to inherit.

There must be some filial neglect to exclude children from inheritance, and the burden of proving exclusion lies on the person who asserts it. MA TIN LUN *v.* MA DWE, 7 BUR. L. T. 80 **915**

——— ——*Succession—Co-heirs—Living separately—Brothers and sisters exclude parents.*

According to Burmese Buddhist Law brothers and sisters are also co-heirs and, when living separate from their parents, the survivors succeed the deceased.

Therefore, where three sisters had settled separately from their father, the last surviving sister was held entitled to the estate of her two deceased sisters in preference to their father. MA NHIN EWIN *v.* U. SHWE GONE, 7 BUR. L. T. 105; 16 BOM. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121 **433**

Buddhist monk, suit by, relating to monastery **157**

Burden of proof. See FRAUDULENT TRANSFER

——— ——Adverse possession—Limitation **521**

——— ——*Benami* purchase—Real purchaser, if can sue for possession and annulment of incumbrance—Exemption **917**

——— ——*Benami* transaction—*Pardanashin* lady—Pleader and client—Extortionate bargain **642**

——— ——Buddhist Law—Inheritance—Exclusion of children—Filial neglect **915**

——— ——of character of disease—*Maraz-ul-Maut*—Evidence **253**

——— ——Duty of prosecution to establish charge—Failure of accused to examine witness, if implies guilt **723**

——— ——Father's debt—Necessity **248**

——— ——Hindu Law—Nucleus of family property—Self acquisition—Inheritance—Disqualifications—Congenital defect **528**

——— ——*Illegitimacy of plaintiff set up by defendant—Presumption—Khewat, extract from, produced in proof of legitimacy—Admissibility of evidence—Relevancy.*

It is for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs are illegitimate, for, the legal presumption being in favour of legitimacy and marriage, the burden of proving illegitimacy lies on the person interested in making out the illegitimacy.

Where an extract from the *khewat*, showing that the plaintiffs were reputed to be the sons of a

Burden of proof—concld.

certain person, was put in evidence to prove the plaintiffs' legitimacy:

Held, that although it was not shown that the defendants were parties to the mutation proceeding upon which the *khewat* entry was founded, yet the extract was relevant in proof of the legitimacy inasmuch as it showed that the plaintiffs had succeeded to their reputed father's estate and had been regarded as entitled to succeed. APARBAL SINGH *v.* NARPAT SINGH, 1 O. L. J. 89 **972**

——— ——— ———Jurisdiction to show that the grant was of land revenue only—Grant of waste land as *inam*—Both *warams* granted **553**

——— ——— ———*Limitation—Burden of proving age to bring suit within time—Plaintiff to prove his age under 21 at date of institution of suit—Proof to be affirmative and clear—Court reluctant to throw out case as barred by time if suit just or equitable.*

For the purposes of limitation it is for the plaintiff to establish affirmatively and clearly that he was under the age of 21 at the date of institution of his suit, and where he fails to do this and has been able merely to show that he was possibly under that age, at that time, it must be held that he has failed to discharge the burden of proving that his suit is within time.

The Chief Court will be naturally reluctant to throw out a claim as barred by limitation when it is satisfied that the claim is a just or equitable one. CHARANJIT SINGH *v.* BISHEN SINGH, 167 P. L. R. 1914 **462**

——— ———*Occupancy holding, attachment of, in execution of money-decree—Burden on decree holder to show transferability of holding.*

When a decree-holder for money wants to sell an occupancy holding belonging to his judgment-debtor in execution of the decree, the onus of proof is on him to establish that the holding is transferable by custom or local usage. NUR MIA *v.* CHANDRA MOHAN ROY **939**

——— ———*Pardanashin* lady—Mortgage executed of her house in favour of her husband's creditor—Undue influence of husband—Document, if fairly taken—Onus, on whom **401**

——— ———Party to agreement—Hindu Law—Right of son to contest liability under father's agreement **621**

——— ———Payment of interest—Limitation **863**

——— ———Special custom **276**

——— ———Suit for rent—Registration—District Judge exercising appellate jurisdiction—High Court's power of revision—Jurisdiction—Bengal Land Registration Act (VII B. C. of 1876), s. 78—Civil Procedure Code (Act V of 1908), s. 115 **844**

Burma Village Act, 1907, s. 19 (1)—*Evidence to be given.*

To justify a conviction under section 19 (1) of the Village Act, 1907, it is necessary to show that the accused had built his house without the permission of the Deputy Commissioner, and later than the year 1908, in which year the Act came into force. EMPEROR *v.* NGA NYO, U. B. R. (1913) I, 148; 15 CR. L. J. 250 **202**

Cancellation of sale-deed. *See* HINDU LAW—SALE.

Caste—Panchayat, *power of*—*Ex communication—Jurisdiction—Natural Justice—Defamation.*

To say that a man has been outcasted is *prima facie* to defame him. But where the Chaudhri of a community, duly recognised and acknowledged as such, convened a regular Panchayat according to the custom of the caste, and in fulfilment of his duties as Chaudhri, communicated a resolution, passed by the Panchayat, temporarily excluding the plaintiff from social intercourse with the members of the caste, and it was not shown that he was actuated by any ill-will or ulterior or improper motive:

Held, that the Chaudhri was not liable in damages for libel or defamation.

The Courts in India should refuse to interfere with the autonomy of caste, or in other words with the decisions of a Panchayat, provided that those decisions affect matters within the jurisdiction of the Panchayat and are not contrary to natural justice.

Some members of a caste refused to subscribe to a declaration of faith issued by the Panchayat and instead issued over their signatures a leaflet calculatad to bring the Panchayat into contempt. Upon this the Panchayat convened a meeting. Notice of this meeting was not served upon those members personally though other members of their families were served. The Panchayat decided to temporarily exclude from all social intercourse their families until those persons appeared before the Panchayat and cleared themselves It was contended that the order of the Panchayat was without jurisdiction in that no caste offence had been committed, and that the Panchayat had acted contrary to natural justice in not giving the persons concerned an opportunity of defending themselves before passing the order of temporary exclusion:

Held, (1) that the issue of the leaflet and the refusal to sign the declaration of faith were both social questions, closely concerning the community and well within the jurisdiction of the Panchayat;

(2) that personal service upon the persons complained against was unnecessary, inasmuch as other members of their family had been served with notice of the meeting, and that as Panchayats deal with families as units and not with individuals and as any member of a family can appear on its behalf and defend, the procedure of the Panchayat was not contrary to natural justice;

(3) that as the family had been suspended pending the appearance before the Panchayat of the offending members, there was no denial of justice BISHAMBAR DAS *v.* GOBIND DAS, 12 A. L. J. 552 **301**

Cause of action, accrual of **231**

——— ——— ——Partition proceedings—Party referred to civil suit—Cause of action arising by institution of partition proceedings—Effect of entry in Revenue papers—Several plaintiffs suing jointly **458**

——— ——— ———Sale—Vendee obtaining possession under voidable sale—Sale subsequently set aside—Suit to recover consideration money **570**

——— ———Vendee in consideration of sale undertaking by deed to deliver certain things at once and to pay balance by instalments—Default in respect of both promises—Single contract—One cause of action—Separate contract after deed in respect of delivery of things—Different causes of action—Plaintiff not bound to sue for specific things **845**

Caveat. *See* PROBATE.

Central Provinces Tenancy Act (IX of 1883), s. 38 (2)—*Interest, includes re-payments in cash and in grain—Usufructuary mortgages—Notice to landlord.*

The word 'interest' in section 38 (2) of the Tenancy Act, 1883, means a compensation for the use of money or grain, and, therefore, includes a re-payment in cash or in grain.

It cannot be laid down as a hard and fast rule, that all usufructuary mortgages of occupancy rights require notice to the landlords and give rise to a claim for pre-emption. RAGHUNATH *v.* GANPAT, 10 N. L. R. 74 **213**

Central Provinces Tenancy Act (I of 1898) ss. 44, 56 (2) **604**

Central Provinces Tenancy Act (XI of 1898), s. 46—*Sale decree of occupancy rights—Unregistered mortgage not allowed—Interpretation of Statutes.*

Under section 46 of the Tenancy Act, 1898, no sale decree in respect of occupancy rights can be passed on an unregistered mortgage, even if the deed was executed before the Act came into force.

Where the language of the Statute is clear and unambiguous, Courts have to give effect to it whether it has the effect of divesting a vested right or not. MIYA SAHEB *v.* CHAMPA LAL, 10 N. L. R. 42 **883**

Charge—Will creating charge by way of annuity—Charge upon immoveable property, whether enforceable against *bona fide* transferee for value without notice—Mortgage and charge, distinction between—Registration of charges not compulsory—Document, creation of charge by, not compulsory—Lien, legal and equitable, admission of **867**

Charge to Jury—Misdirection **465**

——— ——— ———Misdirection—Privy Council Practice—Royal prerogative **631**

Charter Act (24 and 25 Vic., c. 104), s. 13 **977**

——— ——— **s. 15** **883**

——— ——— **s. 15**—*Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 85—Jurisdiction—High Court's power of superintendence—Proceedings for settlement of fair rent before Revenue Officer.*

The High Court has no jurisdiction to exercise the power of superintendence it possesses under section 15 of the Indian High Courts Act, 1861, in relation to a proceeding for settlement of fair rents before a Revenue Officer under section 85 of the Chota Nagpur Tenancy Act of 1908. UMA CHARAN MANDAL *v.* MIDNAPORE ZEMINDARY CO., 20 C. L. J. 11 **896**

——— ——— ——— **s. 15**—*Civil Procedure Code (Act V of 1908), s. 115, O. XVI, r. 4—Commission refused—Discretion—Revision—Abuse of process.*

A High Court ought not to sit in appeal over every exercise of discretion by the Court below, even though under the law no appeal is given to the party against whom the discretion has been exercised.

Nothing short of the conclusion that there has been a wanton abuse of the process of the Court below, would induce a High Court to interfere in revision.

Therefore, where a subordinate Court has either issued a Commission to examine certain witnesses or has refused to issue one, it cannot be said under section 15 of the Charter Act or section 115 of the Civil Procedure Code that his refusal amounts to an abuse of the process of the Court or that he has acted with material irregularity in the exercise of jurisdiction. CHINNU *v.* SAMBANDA MOORTHI, 15 M. L. T. 339 **522**

Cheating—Attempt—Definition of "attempt"—Spurious trinkets—False representation—Untrue statement to support **473**

Cheque—Payment by cheque effected when cashed—Limitation runs from date cheque is cashed **779**

Chetty banking, usage of **516**

China and Corea Order in Council, 1904, Arts. III, V, VI, XIX, XXII, XXXV, L **678**

Chingleput District—*Mirasi tenure—Melvaram—Thunduvaram—Kudivaram—Kudivaram right, meaning of—Ullkudi Payakar—Swatantrums—Inamdar—Mirasidar also ancient Inamdar—Pre-emption—Ekabogam Mirasidar—Shrotriam Inam, granted to Mirasidar in 1802, whether "estate"—Madras Estates Land Act (I of 1908), s. 3, cl. 2 (d)—Suit to compel acceptance of patta—Revenue or Civil Court—Jurisdiction.*

In the case of Mirasi proprietors, the produce of the land is divided into three shares, (1) Melvaram, the royal share, (2) Thunduvaram, the landlord's and (3) Kudivaram, the occupant's share.

The word "Kudivaram" may be used in two senses, (1) the right of occupancy, (2) the share of the produce which the cultivator, whoever he may be, gets. In section 3, clause (2) (d) of the Madras Estates Land Act, it is used in the former sense.

A person cannot be held to own the Kudivaram right in its true and complete sense, unless he has got the power of alienation of his right of occupancy, and unless he does not acknowledge himself to be merely the tenant of a person really owning the Kudivaram right.

Chingleput District—concld.

A Payakar whom a Mirasidar introduces for cultivation purposes, if he permanently settles in the village and if he and his descendants enjoy the same lands as tenants for about 100 years, becomes, by custom and by Hindu Law, Ullkudi Payakar with permanent rights of occupancy, or in other words, acquires what may be called in one sense Kudivaram right in the lands in his holding.

Swatantrums include Thunduvaram and mean a certain portion of the gross produce raised by the Ullkudi tenants, which is due to the original Mirasidar

As regards Inamdars, the presumption is that at the time of the Inam grant, the Inamdar was not the owner of the Kudivaram right.

But as regards a Mirasidar, to whom an Inam was granted long ago, it cannot be said that there is a presumption against his having also owned the Kudivaram right at the time of the ancient grant, regard being had to the history of the Mirasi tenure in the Chingleput District.

A Mirasidar who is the owner of a Kudivaram right in the lands in the village is called Ekabogam Mirasidar.

Where a Shrotriam Inam was granted to a Mirasidar in 1802 and it was contended that the Shrotriam Inam came under the definition of 'estate' in the Madras Estates Land Act:

Held, overruling the contention, that the Shrotriamdar being also a Mirasidar in whom presumptively the Kudivaram right rested, the Shrotriam Inam was not an estate within the meaning of section 3, clause 2 (*d*), of the Madras Estates Land Act, and that, therefore, the suit to compel acceptance of *patta* could not be brought in an ordinary Civil Court. CHINNAN *v.* KONDAM NAIDU. 26 M. L. J. 169; 1 L. W. 41 **113**

Chota Nagpur Tenancy Act (V of 1908 B. C.), ss. 203, sub-s. (1), 211, sub-s. (1)—*Rent-decree—Sale of tenure—Successful claim to share of tenure—Sale of share of tenure, whether contemplated by s. 208 (1)—Execution of decree as one for money.*

Section 208, sub-section (1), of the Chota Nagpur Tenancy Act, 1908, contemplates the sale of an entire tenure, and not of any share thereof.

Where a decree-holder originally sought to bring to sale the entire tenure in accordance with sub-section (1) of section 208, but found that he could not do so as a quarter share of the tenure had been exempted from sale on the application of the registered holder thereof who had been left out of the sale:

Held, that the decree-holder could not execute the decree as a decree for rent under section 208 in respect of the three-fourths share of the tenure, but that it was open to him to treat the decree as a decree for money against the judgment-debtor and to execute it in the ordinary Civil Court. CHANDRA NATH TEWARI *v.* PROTAP UDAI NATH SAHE DEO, 18 C. W. N. 170 **105**

——————— **s. 211, sub-s. (1)** **105**

Chota Nagpur Tenancy Act (VI of 1908 B. C.), ss. 68, 139, cls. (2) and (4)—*Suit for ejectment by* raiyat *against under-*raiyat—*Whether jurisdiction of Civil Court barred.*

The word "decree" in section 68 of the Chota Nagpur Tenancy Act is not to be read with the words "passed under this Act."

In a suit brought under the provisions of the general law for the ejectment of an under-*raiyat* by a *raiyat*, the jurisdiction of the Civil Courts is not barred either by clause (4) or by clause (8) of section 139. BHOLA NATH MANDAL *v.* CHHOTA GUNARAM MIGHI **407**

——————— **s. 85** **896**

——————— **s. 139, cls. (2) and (4)** **407**

Circumstantial evidence — Dacoity—Pointing out place where stolen property found **1004**

——————— , *nature of—Theft of currency notes—Opportunity of entering room not accused's exclusively—Encashment of stolen notes in presence of accused's relation—Money in accused's possession after theft, not accounted for satisfactorily—Sufficiency of evidence.*

Circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person, or must point conclusively to the complicity of the accused.

Therefore, where in a case of theft of currency notes and cash from an office the evidence against the accused was that he was one of those who entered the office in the absence of the complainant, that a relation of his was present when two of the notes were cashed by that relation's relative and that the accused was after the theft in possession of money for which he could not satisfactorily account, it was *held* that this evidence did not fulfil the conditions of circumstantial evidence. CHIRAGUDDIN *v.* EMPEROR, 15 CR. L. J. 293; 18 C. W. N. 1144 **501**

Civil Procedure Code (Act XIV of 1882), s. 20—*Venue of suit—Plaintiff's option—Transfer, causes of—Preponderance of convenience.*

Though section 20 of the old Civil Procedure Code, which required that a Court must be satisfied that justice is more likely to be done by the suit being instituted in some other Court before it requires the plaintiff to do so, is dropped in the new Code and the Court's discretion is thus left unfettered, very strong reasons must be shown under the new, as required in the old Code, for depriving a plaintiff of the right to bring his suit in any Court in which the law allows. MUTHIA CHETTY *v.* ARUNACHELLAM CHETTY, 7 BUR. L. T. 1 **345**

——————— **s. 25** **425**

——————— **s. 295** **241**

——————— **s. 311**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Landlord and tenant—Non-transferable occupancy holding—Transfer of portion of holding—Sale of holding in execution of rent-decree—Application by transferee for reversal of sale, if maintainable—Transfer of entire holding and that of portion, distinction between.*

Civil Procedure Code—(1882)—concld.

A transferee of a portion of a non-transferable occupancy holding is entitled to apply, under rule 90 of Order XXI of the Civil Procedure Code, for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords.

If a tenant has transferred his entire holding, which is not transferable, and has surrendered possession to the transferee, he has in essence abandoned the holding. The tenancy has terminated and the landlord has become entitled to re-enter. On the other hand, if a portion only of the holding has been transferred, even though the holding be non-transferable, there is no forfeiture. The tenancy still subsists and the landlord is entitled to look to his tenant for payment of rent.

Distinction between section 311 of the old Code of Civil Procedure and rule 90 of Order XXI of the present Code pointed out. ABDUL AZIZ *v.* TAFAJADDIN **839**

——— ——— ——— **s. 373**—*Civil Procedure Code (Act V of 1908), s. 10, O. XXIII, r. 1—Withdrawal of suit—Permission of Court—Costs, no time fixed for payment of—Institution of fresh suit—Subsequent payment of costs.*

Where a plaintiff has obtained leave to withdraw a suit upon payment of the defendant's costs, it is his duty to pay the costs at once, for until they are paid, there is no withdrawal with the permission of the Court.

Where leave was granted to a plaintiff to withdraw upon payment of costs, but the order did not limit the time within which the payment should be made:

Held, that the plaintiff could institute a fresh suit and make the payment subsequently.

A Court, when giving permission to a plaintiff to withdraw, with liberty to bring a fresh suit on payment of the defendant's costs, should limit the time within which the payment should be made, and direct that on failure to pay within that time, the original suit shall stand dismissed with costs. SADHU CHARAN TEWARI *v.* BAIKUNTHA NATH MADAK 19 C. L. J. 529 **210**

——— ——— ——— **s. 622**—*Sub-Divisional Officer acting under s. 2 of Sonthal Parganas Act (XXXVII of 1855)—Revision—Commissioner or High Court—Jurisdiction.*

Where a Sub-Divisional Officer exercises jurisdiction as a Court created under section 2 of Act XXXVII of 1855, an application for revision of his order lies only to the Court of the Commissioner and not to the High Court under section 622, Civil Procedure Code of 1882. GOLAM NAJAF MIAH *v.* PANCHANAN GUPTA, 19 C. L. J. 292 **876**

Civil Procedure Code (Act V of 1908), s. 2, cl. 11—*Legal representative—Grove holder and tenant dying without heirs—House and grove escheating to zemindar—Zemindar's liability for decree against grove-holder and tenant—Execution of decree.*

The judgment-debtor was a grove-holder and tenant possessing a dwelling-house in the *abadi*. On his death without heirs the grove and the house escheated under the village custom to the *zemindar*. The decree-holder sought to execute the decree against the *zemindar* by joining him in the proceedings as the legal representative of the judgment-debtor:

Held, that the *zemindar* was not the legal representative of the judgment-debtor. CHIRANJI LAL *v.* BISWA NATH, 1 O. L. J. 86 **959**

——— ——— ——— ——— **s. 2, cl. 17** **935**

——— ——— ——— ——— **s. 2, O. XXVI, r. 11**—*Issue of Commission to examine accounts—Not preliminary decree—"Rights of parties," meaning of.*

In a suit for accounts and redemption under the Dekkhan Agriculturists' Relief Act, the Court before passing the decree for possession investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land, and then instead of making the final mortgage account itself referred the taking of the account to a Commissioner under Order XXVI, rule 11, of the Code of Civil Procedure:

Held, that the issue of a Commission, or the instructions which were recorded for the benefit of the Commissioner at the time of the issue of the Commission, did not constitute a preliminary decree within the meaning of section 2 of the Code of Civil Procedure.

"The rights of the parties in regard to matters in controversy," referred to in section 2 of the Civil Procedure Code, mean general rights such as rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit, and in relation to liability to accounts, which, if decided, must have a general effect upon the proceedings in the suit, and can be decided preliminary to the investigation of the matters in dispute between the parties upon the merits. NARAYAN BALKRISHNA KULKARNI *v.* GOPAL JIV GHADI, 16 BOM. L. R. 206 **889**

——— ——— ——— ——— **ss. 4, 100**—*Regulation IV of 1827, cl. 99—Regulation XIII of 1830, cl. 5—Vinchur Court's decision—Special appeal lies to High Court.*

A special appeal lies to the Bombay High Court against a decree of the Civil Judge at Vinchur, on the grounds mentioned in section 100 of the Civil Procedure Code. RAMCHANDRA ANANDRAO *v.* PANDU DAGDU TELI, 16 BOM. L. R. 75; 38 B. 340 **617**

——— ——— ——— **s. 9**—*Suit relating to monastery between Buddhist layman and monk—Monks may possess property—Monastery not poggalika property but sanghika—Withathagaha gift defined.*

A suit between a layman and a Buddhist monk in regard to land on which a monastery stands is cognizable by the Civil Courts.

Buddhist monks at the present day do and may possess property.

A monk can act as owner of a monastery whether dedicated to him personally by the Kyaungtaga or allotted to him by other monks for 12 years at most, but he cannot according to the *vinaya* give away to an individual, either a monk or a layman, a monastery dedicated to him personally. Such a monastery is *sanghika* property and cannot be *poggalika*.

Poggalika property is such as a monk can dispose of as he thinks fit.

Civil Procedure Code—(1908)—contd.

If a monk takes the property of another monk and appropriates it to his own use, the appropriation is valid and is called a *withathagaha* gift, provided (according to the *vinaya*) five conditions are fulfilled, *viz.*, (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property: (4) the owner must be alive when the property is taken and (5) the taker must know that the owner would be pleased at the taking. NGA PO THIN *v.* U THI HLA, U B. R. (1913) I, 183; 7 BUR. L. T. 27 **157**

——— ——— ——— **s. 10** **210**

——— ——— ——— **s. 11** **705**

——— ——— ——— **s. 11**—*Evidence Act (I of 1872), s. 41—Probate and Administration Act (V of 1881), s. 83—Contentious probate proceedings—Suit*—Res judicata—*Conclusive judgment.*

As contentious probate proceedings must take the form of a suit in accordance with the provisions of section 83 of the Probate and Administration Act, such proceedings constitute a suit within the meaning of section 11 of the Civil Procedure Code and, therefore, the finding of fact of a Probate Court in such proceedings, that the testator was not of sound disposing mind when the alleged Will was made, would operate as *res judicata* between the parties to the proceedings although the judgment in such proceedings would not be a judgment such as is contemplated in section 41 of the Evidence Act inasmuch as such judgment does not confer upon or take away from any person any legal character. KALYANCHAND LALCHAND *v.* SITABAI DHANASA, 16 BOM. L. R. 5; 38 B. 309 **325**

——— ——— ——— **s. 11** — *Execution of decree—Application by alleged transferee of real decree—Judgment-debtor served with notice* — Ex parte *order*—Res judicata.

B obtained a decree against *J* on the 29th of August 1905 and applied for execution of the decree on the 12th March 1908. The proceedings resulting from this application were infructuous. Later on, on the 26th of January 1910, one *D* applied for execution of the same decree claiming to be the transferee of the decree. Notices were issued. *J* did not respond to the notice. The Court then on the 12th February 1910 ordered the issue of notice calling upon *J* to show cause why an order for his arrest should not be made. *J* again made no appearance but as *D* failed to pay the process fee for his arrest, his application was dismissed. *D* again applied for execution on the 13th of January 1912 and this time a representative of *J* appeared and objected that as *D* was neither the decree-holder nor a transferee of the decree he had no right to take out execution:

Held, that the order of the 12th of February 1910 granting the application of *D* operated as *res judicata* as to his right to execute the decree and that *J* could not go behind that order OMAN PRASAD *v.* JANI DURLAB SHANKAR, 12 A. L. J. 206 **286**

——— ——— ——— **s. 24** — *Civil Procedure Code (Act XIV of 1882), s. 25—District Court—Powers of transfer — Subordinate Judge's Court—Inherent power—Jurisdiction.*

If a District Judge, to whom an appeal has been remanded by a High Court, transfers the same to a Sub-Judge and the latter disposes of it without any objection being taken as to his jurisdiction, the irregularity would not affect his decision on merits.

Under section 24 of the new Civil Procedure Code the District Court's powers of transfer are much wider than they were under the old law. SINGAMUSETTI VENKATIAH *v.* BOPPELLA CHIRRANA, (1914) M. W. N. 317; 15 M. L. T. 304 **425**

——— ——— ——— **s. 34, O. XXXIV, rr. 2, 4**—*Mortgage decree—Interest—Contractual rate—Discretion of Court in awarding less than the contracted rate.*

The date referred to in Order XXXIV, rule 2, is the date fixed by the Court for the payment of the money by the defendant to the plaintiff. The clear meaning of the rule is that the Court must ascertain the amount due on the mortgage up to the date mentioned. The amount must be according to the contract between the parties unless the Court for some legal reason sees fit to interfere with the contract as to the rate of interest.

The only section of the Civil Procedure Code which gives any discretion in the mater of interest to the Court is section 34. This section applies to decrees for the payment of money, and does not, in any way, permit the Court to reduce the interest below the contracted rate when taking the accounts and making the decree as provided for by Order XXXIV. RAJWANTA KAUR *v.* SHAM NARAIN SINGH, 12 A. L. J. 283; 36 A. 220 **88**

——— ——— ——— **ss. 37, 38, 42, 50, cl. (1), O. XXI, r. 16, O. XLV, r. 15**—*Transmission of decree for execution to District Court—Application by transferee of decree for recognition of transfer—Jurisdiction of District Court to recognize transfer—Power-of-attorney, construction of.*

Where the Privy Council transmits its decree to the High Court, the High Court in receiving and filing it does purely a ministerial act. The District Court whose decision was appealed against does thereby cease to be a Court "*which passed the decree*", for the purpose of recognizing the transferee-decree-holder and ordering execution at his instance.

Where a power-of-attorney executed in favour of an agent contains the following terms, "to conduct and manage all other, the estate property, moneys, affairs and concerns of the *zemindari* .....and in all respects as fully and absolutely as the principal himself is empowered to do, and (subject to aforesaid), to do, perform and carry out all such acts and deeds whatever as may be considered requisite for the above purposes as amply and effectually as the principal could do in his own proper person if these presents had not been executed", the words are wide enough to give the agent power to assign a decree to another person *even for less than the decree amount.* LINGAM KRISHNA BHOOPATHI DEO GARU *v.* RAJAH OF VIZAYANAGARAM, 15 M. L. T. 143; 26 M. L. J. 185 **235**

——— ——— ——— **ss. 38, 42** **235**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 47**—*Fraudulent execution of decree—Suit for damages, whether barred—Damages, measure of.*

A suit for damages for fraudulent execution is not barred by section 47 of the Civil Procedure Code.

The measure of damages is the amount recovered in such fraudulent execution. RAGHAVA IYENGAR *v.* AIHANAMBALAM, (1914) M. W. N. 174 **405**

——— ——— ——— **s. 47**—*Limitation Act (IX of 1908), ss. 5, 18—Suit to set aside revenue sale—Compromise that defendant should execute* kobala *within three months—After more than three years suit for declaration of title, whether maintainable.*

Certain land belonging to the plaintiff was sold for arrears of Government revenue and purchased by the defendant's father. The plaintiffs sued to have the revenue sale set aside on the ground of fraud, and during the pendency of that suit, which was decreed, a *solehnamah* was entered into between the parties by which the defendant agreed to execute a *kobala* on receipt of Rs. 60 within three months, in default the plaintiffs were to get the *kobala* executed in their favour by the Court. More than three years after this, the plaintiffs brought a suit for declaration of their title to the land which was the subject-matter of the previous suit, and for possession thereof, and also for getting a *kobala* executed by the defendant:

Held, that the suit was not maintainable; that the plaintiffs either must sue again to have the sale set aside on the ground of fraud, a suit which is clearly barred, or they must execute the original decree on the *solehnamah* which is also barred.

Neither section 5 nor section 18 of the Limitation Act has any application to cases under section 47 of the Code of Civil Procedure. SHEKAMBARI *v.* RAM KUMAR DAS **240**

——— ——— ——— **s. 47, O. XXI, r. 32**—*Injunction—Perpetual injunction to keep door closed—Door closed but re-opened—Remedy of decree-holder—Suit or execution.*

A decree directed the judgment-debtor to close a certain door and to keep it permanently closed. Having formally complied with the decree by closing the door, the judgment-debtor shortly afterwards re-opened it:

Held, that the decree-holder had a remedy under his decree *i e*, in execution, and was not bound to bring a fresh suit HABIBULLAH *v.* ABDULLA, 12 A. L. J. 347 **247**

——— ——— ——— **s. 47, O. XXI, r. 36**—*Usufructuary mortgagee pre-empting equity of redemption—Possession neither claimed in suit nor obtained in execution, effect of.*

A usufructuary mortgagee in possession sued for pre-empting a sale of the equity of redemption of the mortgaged property without asking for possession and on obtaining a decree deposited in Court the sale price which was removed by the vendee:

Held, that the mortgagee pre-emptor became the full owner of the property by operation of law and that being himself in possession it was quite unnecessary for him to seek anything further in execution of the pre-emption decree. SITA RAM PANDE *v.* MADHO PANDE, 12 A. L. J. 521 **876**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 50, cl. 1** **235**

——— ——— ——— **s. 60**—*Attachment—Salary—Officer in Indian Army—Salary realized and distributed cannot be refunded.*

Under section 60 of the Civil Procedure Code the salary of an officer in the Indian Army is exempt from attachment in execution of a decree.

Where the salary of such an officer has been attached, realized and distributed among his creditors without any objection having been preferred he is not entitled to a refund of the same. KING, KING & CO. *v.* DAVIDSON, 16 BOM. L. R. 233 **575**

——— ——— ——— **s. 60 (1), cl. (i), s. 60 (2), cl. (b), s. 2, cl. 17**—*Public officer—"While serving under the Government", meaning of "Affect," interpretation of—Attachment of salary of Honorary Commissioned Officers employed in Indian Subordinate Medical Department, power of executing Court as to—Army Act (44 and 45 Vict., Chap. 58), ss. 136, 144 and 190—Construction of enactment, principle of.*

The salary of Honorary Commissioned Officers employed in the Indian Subordinate Medical Department is attachable under the provisions of section 60, sub section (1), clause (i), Civil Procedure Code, since they are "public officers" as defined in section 2, clause 17, Civil Procedure Code, and are also "officers" as defined in section 190 of the Army Act, so that they are not protected by section 144 of the latter.

Section 60, sub-section (2), clause (*b*), Civil Procedure Code, does not amount to a declaration that the provisions of section 60, sub section (1), Civil Procedure Code, do not constitute a law passed by the Governor-General of India in Council authorising deductions to be made from the pay of an officer of His Majesty's Regular Forces PRINS, E. G. A. *v.* MURRAY & CO., LTD., 1 O. L. J. 127; 17 O. C. 99 **935**

——— ——— ——— **ss. 63, 73**—*Decree-holders of different Courts attaching in execution entitled to rateable distribution in Court of highest grade without transfer of decree.*

Under sections 63 and 73 of the Code of Civil Procedure all the holders of money-decrees, who have attached the property of their judgment-debtor in execution in several Courts before the actual receipts of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it. NARASIMHACHARIAR *v.* KRISHNAMACHARIAR, 26 M. L. J. 406; 1 L. W. 403 **903**

——— ——— ——— **s. 65** **101**

——— ——— ——— **s. 73** **909**

——— ——— ——— **ss. 73, 104**—*Application for rateable distribution—Order, whether appealable—Appeal.*

No appeal lies from an order passed under section 73 of the Civil Procedure Code, 1908. PUNGALUR CHENNAMMA *v.* RAJA OF KARVETINAGAR, 1 L. W. 234 **422**

Civil Procedure Code—(1908)—contd.

——————— **s. 92 (1) (b)**—*Suit under section 92 compromised and trustee discharged from liability to account—Compromise decree attacked as fraudulent and collusive—Declaration sought that discharge of trustee from liability to account is void—Advocate-General's consent, whether necessary for such declaratory suit*—Ejusdem generis, *principle of—"Further or other relief," meaning of.*

A suit, under the provisions of section 92, Civil Procedure Code, praying for the removal of trustees, appointment of new trustees, accounts and inquiries, etc., was compromised, the old trustees were discharged from their trusteeship, and new trustees were appointed in their stead. The beneficiaries under the trust being dissatisfied with the compromise decree attacked it in a regular suit on the ground of fraud and collusion and asked that so much of the decree as related to the discharge of the old trustees from their liability to render accounts of the trust money was void and of no effect:

Held, that, although the direct object of the suit of beneficiaries is to declare a portion of the challenged compromise decree void and of no effect, yet, as the grounds on which such a declaration is asked allege a breach of trust and involve the taking of accounts and inquiries before a decision can be given on the prayer for relief, the relief asked for should be held to come within clause (*b*), sub-section (1) of section 92, Civil Procedure Code, and, therefore, the suit is not maintainable without obtaining the consent of the Advocate-General. MAHOMED SALAY NAIKWARA *v.* MULLA GOOLAM MAHOMED, 7 BUR L. T. 160 **111**

——————— **s. 96 (1)** **614**

——————— **s. 97**—*Preliminary decree—Accounts—Findings recorded—No preliminary decree drawn up—Party omitting to have preliminary decree drawn up—Waiver—Appeal.*

The right to appeal under section 97 of the Civil Procedure Code arises only when a preliminary decree is passed by a Court, and there is no right of appeal when in a suit for accounts a preliminary finding directing the accounts to be taken is recorded but no preliminary decree is drawn up.

There is no statutory provision requiring a party to ask a Court to draw up a decree in pursuance of a judgment and it is the duty of a Court to draw up a decree and the Pleaders of the parties are to see that the decree is in accordance with the judgment. Therefore no inference adverse to a party as to his right to appeal can be drawn from an omission on his part to ask the Court to draw up a decree. KALURAM *v.* GANGARAM, 16 BOM. L. R. 67; 38 B. 331 **605**

——————— **s. 100**—*Second appeal—Findings of fact—Erroneous view of law—Interference by High Court.*

Findings of fact of a lower Appellate Court are conclusive in second appeal. But if those findings have been arrived at on an erroneous view of the law, the High Court will interfere.

Civil Procedure Code—(1908)—contd.

One *A*, who was carrying or about to carry on a business, made over the whole of his properties, including even his homestead, to his wife, the plaintiff, by a *hibbanamah*, and it was asserted in answer to the claim of the wife that this was done either with the intention of defrauding or with the effect of defrauding *A*'s creditors. The lower Appellate Court said that, in the absence of a single word by the witnesses of *A* that the gift by him was not a *bona fide* transfer, it could not hold that it was a fraudulent transfer:

Held, that the facts to which the witnesses could depose were facts from which an inference might, or might not, be drawn upon the issue raised in the case; and the fact that they did not state in so many words that the document was fraudulent made no difference.

Held, further, that it was sufficient to show that the *hibbanamah* was executed with the intention or with the effect of defrauding creditors generally, that is, creditors whose debts were not in existence at the time of the execution of the *hibbanamah* but might subsequently accrue, and it could not be said that the *hibbanamah* was not fraudulent because it was not devised with the intention of defrauding creditors whose debts were not in existence at the date of its execution. RAM KANAI SHAHA BHUNIA *v.* CHANDRA BALI DASI **796**

——————— **s. 104** **422**

——————— **s. 104, Sch. I, O. I, r. 13; Sch. II, para. 14**—*Arbitration—Reference by only some of parties—Non joinder, objection as to—Waiver—Refusal by Court to remit award—Appeal.*

Where the plaintiff and some of the defendants joined in a petition for reference to arbitration without making the other defendants parties, and at no stage before the Court any objection was taken upon the ground of non joinder:

Held, that the reference to arbitration was not bad by reason of non joinder, for, applying the principle set forth in rule 13 of Order I of the Civil Procedure Code, the right to object upon that ground was waived.

Under paragraph 14 of Schedule II of the Civil Procedure Code, a Court may remit an award to an arbitrator upon the ground that the award has left undetermined one of the matters referred; but if the Court after considering the objection made upon this ground refuses to remit the award to re-consideration, no appeal lies from such refusal. ANNADA PROSAD *v.* JOGESH CHANDRA SEN **862**

——————— **s. 105**—*Interpretation.*

Section 105 of the Civil Procedure Code is only one of the many rules that come under the heading of *res judicata*. If an order is passed against which an appeal is allowed but no appeal is lodged in time, that order is binding and also all the findings and decisions which form an essential part of the basis of that order, but not those which are only incidental thereto. Section 105 (1) sets out a group of exceptions to this rule and section 105 (2) states one exception to that group of exceptions, bringing that particular case back under the primary rule.

Civil Procedure Code—(1908) - contd.

It is an ordinary canon of interpretation that a word keeps the same meaning at least throughout any one Act. KEKRA v. SADHU, 10 N. L. R. 28 **238**

——— ——— ——— **s. 109** **373**

——— ——— ——— **s. 109, cl. (c)**—*Certificate for leave to appeal to Privy Council, when granted.*

Under section 109, clause (c), of the Civil Procedure Code a certificate for leave to appeal to His Majesty in Council should be granted only in cases in which the decision is of general importance or affects any large body of persons or threatens the religious or civil rights of any class of the community, and not where it is to serve as a precedent for similar subsequent cases. TAHILRAM MANIRAM v. J. A. BLACKWELL, 7 S. L. R. 120 **793**

——— ——— ——— **s. 110** **373**

——— ——— ——— **s. 110**—*Privy Council Appeal—High Court dismissing appeal on appellant's failure to furnish security for costs—Substantial question of law.*

Where an appellant on being ordered by the High Court to furnish security failed to do so and on his appeal being dismissed on that ground applied for permission to appeal to the Privy Council:

Held, that, as the appeal did not involve a substantial question of law, the permission applied for could not be granted. GAFUR KHAN v. SECRETARY OF STATE, 12 A. L. J. 451; 36 A. 325 **532**

——— ——— ——— **s. 115** **82, 522, 844, 931**

——— ——— ——— **s. 115**—*High Court's power of revision—Landlord and tenant—Lease for fixed term—Six months' notice given before expiry of term—Jurisdiction—Presidency Small Cause Court, when can pass order under section 41—Presidency Small Cause Courts Act (XV of 1882), s. 41—Presidency Small Couse Courts Act (I of 1895).*

A High Court has power under section 115 of the Code of Civil Procedure to revise the proceedings under section 41 of the Presidency Court of Small Causes Act.

Where a lease is for a fixed term and then the tenancy is determinable on notice, the notice cannot be given until after the expiration of the fixed term.

Where in such a case one notice was given before and another after the expiry of the fixed period:

Held, that the first notice was premature and the second insufficient inasmuch as it did not give six months' time as provided in the agreement.

Where discretion is to be exercised by Subordinate Courts, a High Court will ordinarily refuse to interfere if petitioner has other remedies, but where want of jurisdiction of the Subordinate Court has been established, no question of the exercise of discretion arises and a High Court cannot condone this.

Under section 41 of the Presidency Small Cause Courts Act the Court has jurisdiction to deliver possession only when the tenancy has determined and, therefore, where the Court has delivered possession before the determination of the tenancy, its order is wrong and open to revision.

Civil Procedure Code—(1908)—contd.

The provision as to new trials contained in Chapter VI of the Presidency Small Cause Courts Act does not apply to proceedings under section 41 of the Act. RAMASAMI NAIDU v. VENKATARAMANJULU NAIDU 26 M. L. J. 467; (1914) M. W. N. 368 **572**

——— ——— ——— **s. 115**—*Interlocutory order—Appeal allowed—Revision—Partnership suit—Amendment*

Where the legality of an interlocutory order can be questioned by way of appeal, it is not a fit case for interference by the High Court under section 115 of the Code of Civil Procedure unless there has been an improper exercise of jurisdiction by the lower Court or an improper refusal to exercise the jurisdiction vested in it.

In a partnership suit a Court should take into account all the transactions between the partners to avoid multiplication of proceedings and all such amendments should be allowed as may be necessary to determine the real questions in controversy. SAMBASIVA AIYAR v. GANAPATHY AIYAR **564**

——— ——— ——— **s. 115**—*Revision—Order of Single Judge—Judgment—Appeal—"Jurisdiction", meaning of—Letters Patent of 1865, cls. 15, 16, 39—High Courts Act (24 and 25, Vic. c. 104), s. 13—Presidency Small Cause Courts Act (XV of 1882), ss. 6, 41.*

Where a single Judge of a High Court interferes with a judgment of the Presidency Small Cause Court under section 115 of the Civil Procedure Code, his order is a judgment within the meaning of clause 15 of the Letters Patent and is appealable.

Where a Presidency Small Cause Court Judge refuses an application under section 41 of the Presidency Small Cause Courts Act for the recovery of possession of immoveable property on the ground that no relationship of landlord and tenant exists, his decision is on a question of law and there is no error of procedure to justify an interference by a High Court under section 115, Civil Procedure Code.

Per *Woodroffe, J.*—The word "jurisdiction" in section 115 of the Civil Procedure Code means a jurisdiction local, pecuniary, personal or with reference to the subject matter of the suit. SHEW PROSAD BUNGSHIDHAR v. RAM CHUNDER HARIBUX, 41 C. 323 **977**

——— ——— ——— **ss. 115, 151**—*Revision—High Court's power to interfere—Shahnas delivering attached property without permission—Remedy.*

A High Court cannot interfere either under section 115 or section 151 of the Civil Procedure Code with an order of a Munsif making a *Shahna*, who was put in charge of attached property but had given it away without permission to the judgment-debtor or decree-holder, pay a certain amount to the judgment-debtor.

The order though irregular cannot be said to be without jurisdiction.

The *Shahna*, if a servant of the Court, has a right, by way of appeal, to the District Judge. TURSI RAM v. PARMA **907**

——— ——— ——— **ss. 115, 151, 152**—*Inherent power of Court—Amendment of decree to bring into conformity with judgment—Necessary for*

Civil Procedure Code -(1908)—contd.

ends of justice—High Court's power of interference—Revision.

The Courts in this country have an inherent power to amend or vary decrees so as to bring them into conformity with the judgments after they are signed by the Judges under section 151 of the Civil Procedure Code, even if they do not fall under section 152.

An order under section 151, however, can only be made where it is necessary for the ends of justice.

Where the Court acts under section 151 in a case where it should not have done, it is competent to the High Court to interfere and set matters right. BIBHUTI MOHUN PAL *v.* LALIT MOHUN PAL **906**

——— ——— ——— **s. 148, O. IX, r. 13** *—Order setting aside ex parte decree conditioned on payment of costs—Condition not fulfilled—Extension of time—Appeal.*

An *ex parte* decree was set aside on condition that a sum of money was paid before a certain date. The money was paid one day too late and the plaintiff refused to accept it. The Court refused to extend the time, holding that it had no jurisdicion to do so and formally dismissed the application to set aside the *ex parte* decree:

Held, that the final order dismissing an application to set aside the *ex parte* decree is appealable.

Held, further, that the Court had power under section 148 of the Civil Procedure Code to extend the time fixed for the payment of the prescribed amount if good cause were shown, or to pass a fresh conditional order in place of the former which had become ineffectual owing to the applicant's failure to comply strictly with the prescribed condition. JAGARNATH SAHI *v.* KAMTA PRASHAD, 12 A. L. J. 38; 36 A. 77 **138**

——— ——— ——— **s. 151 903, 907**

——— ——— ——— **ss. 151, 152, O. XXII, r. 6** *—Abandonment of decree—Power of Court—Decree not representing true intention of Court—No necessity for filing review.*

Where a decree, as drawn up, does not correctly represent the judgment according to the intention of the Court, it is open to the Court *suo motu* to rectify it, either under section 151 or 152 of the Civil Procedure Code of 1908, even though the decree has been appealed against, and it is not necessary to review the judgment.

A suit was instituted against 14 defendants including the petitioners, who filed written statements protesting against their inclusion in the category of defendants. The suit was contested by defendant No. 1 alone. The plaintiff obtained a partial decree. On appeal the contest was again solely between the plaintiff and defendant No. 1. "The appeal was allowed and the suit decreed with costs". The decree gave costs against all the defendants, and the present petitioners made this application to have the decree amended so as to relieve them of that liability:

Held, that the intention of the Court was to decree costs against defendant No. 1 alone, and that the decree should be amended under sections 151, 152 and Order XX, rule 6 of the Civil Procedure Code, 1908, without the necessity of an application for review. BARHAMDEO SINGH *v.* HARMANOGE NARAIN SINGH, 20 C. L. J. 18 **419**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 152 419, 903**

——— ——— ——— **s. 152** *—Clerical error in relief claimed—Decree—Amendment.*

A person sued for possession of a two-anna share. He described the property in the plaint as a two-anna share and paid the Court-fee on that share. In the prayer for relief, however, at the end of the plaint, the word "pie" was written in place of "anna", but the parties knew all along that the dispute was with regard to the two-anna share. The decree was prepared in accordance with the relief claimed:

Held, that the error in the plaint was a clerical one due to an accidental slip and that the Court had power under section 152 of the Civil Procedure Code to amend the mistake throughout the record beginning with the plaint down to the decree. SHEO BALAK PATHAK *v.* SUKHDEI, 12 A. L. J. 185 **344**

——— ——— ——— **O. I, r. 13 862**

——— ——— ——— **O. 2, r. 2, O. 34, r. 14** *—Mortgage—Decree for recovery of money due under mortgage, not satisfied—Subsequent suit for sale of property, whether maintainable—Limitation Act (IX of 1908), s. 19—Acknowledgment of debt by Manager of Hindu joint family, whether other members bound.*

A mortgagee brought a suit on the basis of his mortgage for a simple money-decree only. The suit was decreed but the decree, not having been satisfied, he brought a second suit on the basis of the same mortgage for the sale of the mortgaged property:

Held, that the second suit was maintainable under Order XXXIV, rule 14, in spite of the provisions of Order II, rule 2, of the Civil Procedure Code.

An acknowledgment of a debt made within limitation by the manager of a joint Hindu family is binding on other members of the family. INDAR PAL SINGH *v.* MEWAH LAL, 12 A. L. J. 374; 36 A. 264 **429**

——— ——— ——— **O. 2, r. 2 (1)** *—Cause of action—Vendee in consideration of sale undertaking by deed to deliver certain things at once and to pay balance by instalments—Default in respect of both promises—Single contract—One cause of action—Separate contract after deed in respect of delivery of things—Different causes of action—Plaintiff not bound to sue for specific things.*

Defendant bought a certain thing from plaintiff for a sum named, and undertook by a written deed to liquidate that sum in a specified way, that is to say, (*i*) by making over at once certain things as worth one half of the price fixed and (*ii*) by paying the other half on a specified day. Apparently *at the time of the writing of the deed*, such a thing as breach in respect of (*i*), was not contemplated, while a penalty was provided for breach in respect of (*ii*):

Held, that this was a single contract, and in the absence of a new contract thereafter entered into with respect to (*i*), default having taken place both as to (*i*) and (*ii*) before the institution of a suit on the basis of the deed, there was only one cause of action within the meaning of Order II, rule 2 (1), Civil Procedure Code; but if subsequent to the deed there was a new separate contract as to (*i*), namely that it was to be an obligation to which a new

Civil Procedure Code—(1908)—contd.

liability was attached, that is, liability to pay interest, causes of action as to (*i*) and (*ii*) would be different.

Held, further, that the plaintiff was not barred in case of default as to (*i*) from suing for the specific things. The original arrangement was, no doubt, made for the defendant's convenience, but it would be unreasonable to hold that plaintiff after waiting for years should be debarred from recovering their price in cash. NARAIN DAS *v.* MANGHA RAM, 183 P. L. R. 1914 **845**

——— ——— ——— **O. 5, r. 12**—*Service, personal and substituted, when to be effected.*

If a defendant is going about from place to place, it is not the duty of the plaintiff to go about seeking him in all the places through which he is travelling, unless the defendant has any other place of residence or business, in which case the plaintiff is bound to take out summons to that other place to which he has been directed. MADURATHACHI *v.* CHOKALINGA PILLAI, (1914) M. W. N. 314 **324**

——— ——— ——— **O. 9, r. 3, O. 17, r. 3**—*Time granted to produce evidence—Adjournment of suit—Failure to appear on adjourned date—Proper order is to proceed with suit and not to dismiss it.*

Where the parties to a suit agreed that the decision in that suit should follow the decision of the Appellate Court in another suit, and after producing a copy of that decision, both parties absented themselves on the adjourned date:

Held, that the proper course for the Court was to proceed to decide the suit under Order XVII, rule 3, and not to dismiss it under Order IX, rule 3, of the Code of Civil Procedure. PENAMUCHA ANANDARAJU *v.* NADIMPALLI VENKATARAJU, 1 L. W. 428 **519**

——— ——— ——— **O. 9, r. 8, O. 17, r. 3**—*Plaintiff and his witnesses absent—Pleader instructed to apply for adjournment only—Dismissal of suit—Restoration.*

Where the plaintiff in a case and his witnesses are absent and his Pleader has instruction only to apply for an adjournment, the Court can dismiss the suit only under Order IX, rule 8, and not under Order XVII, rule 3.

A Court has power to restore a suit if dismissed under Order IX rule 8, only. MITTADAR VENKOBA *v.* MITTADAR KHADIRIAPPA, (1914) M. W. N. 334 **614**

——— ——— ——— **O. 9, rr. 8, 9**—*Some of defendants present—Dismissal of suit in default—Suit barred against defendants actually present and not against others—No res judicata—Dismissal in default not covered by rule of Common Law as to bar of action against several joint contractors—Case of judgment against one.*

Where there are more defendants than one and one or more of them appear, and the others do not appear; on the dismissal of the suit in default, the disability imposed by Order IX, rule 9, of the Code of Civil Procedure on the plaintiff means a disability only as against the defendant or defendants who were actually present.

The dismissal of a suit in terms of Order IX, rule 8, is not intended to operate in favour of the defendant as *res judicata*.

Civil Procedure Code—(1908)—contd.

A dismissal in default does not come within the rule of Common Law that a judgment recovered against one of several joint contractors, though unsatisfied, is a bar to any action against the others BUKHARAM *v.* RAMJI, 10 N. L. R. 39 **878**

——— ——— ——— **O. 9, r. 9** **878**

——— ——— ——— **O. 9, r. 13** **769**

——— ——— ——— **O. 9, r. 13**—*Ex parte decree—Declaration of service good under what circumstances—Indefinite absence of the defendant—Evidence apart from the return can be received by the Judge.*

In order that substituted service of a summons by affixing it to the door of the defendant's house in his absence may be effectual it is not necessary that the return of the process-server should show that there is a likelihood of defendant being absent for a long period, so as to entitle the process-server to affix it to the door of the house. The Court may from other circumstances of the case and upon other evidence taken by it come to a conclusion upon that question.

A High Court will not interfere in a case of this kind under section 115 of the Code of Civil Procedure. GONTLA VENKATA PITCHAYYA *v.* MAHOMMAD ABDUL KAREEM BEG, 15 M. L. T. 217; 26 M. L. J. 368; (1914) M. W. N. 253 **14**

——— ——— ——— **O. 9, r. 13**—Order setting aside *ex parte* decree conditioned on payment of costs—Condition not fulfilled—Extension of time—Appeal **133**

——— ——— ——— **O. 16, r. 4** **522**

——— ——— ——— **O. 17, r. 2** **769**

——— ——— ——— **O. 17, r. 3** **519, 614, 769**

——— ——— ——— **O. 18, r. 1** **242**

——— ——— ——— **O. 18, r. 18**—*Inspection by District Munsif—District Judge's sanction not necessary.*

Order XVIII, rule 18, of the Civil Procedure Code, Act V of 1908, gives absolute discretion to every Court to inspect any property or thing without the sanction of its superior Court. NALLABOLTU BODI NAIDU *v.* CHENGAMA NAIDU, (1914) M. W. N. 79; 26 M. L. J. 9 **297**

——— ——— ——— **O. 19, r. 3**—*Affidavit, meaning of.*

A statement which merely recites facts to the "best of the information and belief" of the deponent, but does not state the source of his information, is not an "affidavit" within the meaning of Order XIX, rule 3, of the Code of Civil Procedure, and cannot be used as evidence in any judicial proceeding. DURAISWAMI CHETTY *v.* GOVINDU CHETTY, 1 L. W. 394; 15 M. L. T. 377 **377**

——— ——— ——— **O. 20, r. 6** **419**

——— ——— ——— **O. 21, rr. 2, 3**—*Payment out of Court—Certificate of payment—Fact of payment inserted in application for execution, whether valid—Certificate of payment.*

Order XXI, rule 2, of the Civil Procedure Code points to a definite proceeding with a petition

Civil Procedure Code—(1908)—contd.

on the part of a decree-holder and a formal act by the Court. It signifies that a decree-holder should come forward and in some special well-defined speech or writing certify to the Court that money payable under his decree has been paid out of Court, and that on the decree-holder so certifying the Court shall record the same accordingly.

In an application for execution the fact of payment out of Court by the judgment-debtor was omitted from the column in which it ought to have found a place, but it was mentioned in the body of the application with the remark that the judgment-debtor had endorsed the payment on the copy of the decree in his own handwriting and affixed his signature:

Held, that the Court was not bound to recognize such clandestine mention of payment. GOKUL CHAND *v.* BHIKA 12 A. L. J. 387 **753**

——— ——— — — — **O. 21, r. 2, cls. (1) and (3)** —*Decree for delivery of immoveable property and payment of money—Payment out of Court not certified cannot be recognized.*

Order XXI, rule (2), clause (1), of the Civil Procedure Code, applies to decrees of all kinds under which money is payable; where, therefore, the payment of money in satisfaction of such a decree is not certified to Court, it cannot be recognized.

The distinction which existed under the repealed Code between decrees for mere payment of money and other decrees, has been done away with by the present Code. ABDUL LATIFF SAHIB *v.* BATHULA BIBI AMMAL, (1914) M. W. N. 246; 15 M. L. T. 338 **530**

——— ——— ———**O. 21, r. 3** **753**

——— ——— ———**O. 21, r. 7**—*Execution—Whether executing Court can question jurisdiction of Court passing decree—Bombay Court of Wards Act (Bom. Act I of 1905), s. 32, whether applicable to pending suits.*

Under Order XXI, rule 7, of the Code of Civil Procedure, a Court executing a decree has no power to question the jurisdiction of the Court which passed the decree.

Section 32 of the Bombay Court of Wards Act was not intended to apply to pending suits. HARI GOVIND KULKARNI *v.* NARSINGHRAO, 16 BOM. L. R. 30; 38 B. 194 **123**

——— ——— ———**O. 21, r. 11 (i)**—*Sureties for appearance of judgment-debtor on the day the time for appeal expires - Surety's bond not in accordance with Court's order—Construction—Court's intention in asking for sureties - Responsibility of sureties—Its extent*

D. M. Biswas was summarily arrested under Order XXI, rule 11 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs, the Judge ordered his release on his sureties furnishing security for his appearance on the 1st August 1909, the date when the period for appeal against the decree expired, failing which the sureties would be held liable for the decretal amount and the judgment-debtor would be re-arrested and committed to Jail. An appeal was duly preferred on the 27th July 1909 and dismissed on the 14th October 1909.

Civil Procedure Code—(1908)—contd.

The bond which the sureties actually signed was for the due performance of such decree as might ultimately be binding on the judgment-debtor and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing or about producing him before the Court on the 1st August 1909:

Held, that it was clearly not in accordance with the order of the Court.

Held, that what the Court ordered and the appellant agreed to was that the judgment-debtor's appearance on the 1st August 1909 should discharge the sureties and that it was then the Court's duty to re-arrest the judgment-debtor and commit him to prison.

The next question was whether the surety had fulfilled his obligation.

The proceedings showed that the judgment-debtor appeared before the Court between the 10th August 1909 and the 5th April 1911 (both inclusive):

Held, that not only did the judgment-debtor duly appeal but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of 2½ years and that, therefore, the purpose for which the appellant had been ordered to furnish security had been fulfilled and that the appellant had been discharged from liability. CHANDI CHARAN SEN *v.* RAM COOMAR CHAKRAVERTI, 7 BUR. L. T. 5 **349**

——— ——— ——— ———**O. 21, r. 16** **235**

——— ——— ———**O. 21, rr. 16, 17**—*Absence of defendant—Affixture to door of house, when good service—Due and reasonable diligence.*

The amount of "due and reasonable diligence" which a serving officer must exercise, before affixing a notice to the door of the house in which the person to be served resides, is a question to be decided on the facts of each case.

If the person to be served with has gone to another village, it is not the duty of the serving officer to wait till he returns or to pursue him to that village. In such cases, service by affixture would be "good service." VALLURI BASAVAYYA *v.* PERURI KISTNA BRAHAMAM, 1 L. W. 251 **219**

——— ——— ———.——**O. 21, r. 17** **219**

——— ——— ———**O. 21, rr. 31, 33 (1)**—*Suit for restitution of conjugal rights—Proof of marriage—Presumption — Minor wife — Execution against parents.*

In a suit for restitution of conjugal rights very strict proof of marriage is essential; but in the absence of proof to the contrary only the general evidence of marriage is sufficient to justify the presumption that all the necessary marriage ceremonies were performed.

The new Civil Procedure Code has abolished imprisonment as one of the modes of executing a decree for restitution of conjugal rights, but still a Court can pass an effective decree; and where the wife is a minor her parents can be directed to hand her over to her husband and in case of their default or

Civil Procedure Code—(1908)—contd.

failure to show sufficient cause therefor, execution can proceed against their persons as well as property. SIVARAMA PILLAI v. VEERAPPA PILLAI **828**

—— —— —— —— **O. 21, r. 32** **247**

—— —— —— —— **O. 21, r. 33 (1)** **828**

—— —— —— —— **O. 21, r. 36** **876**

—— —— —— **O. 21, r. 40** – *Poverty and other sufficient cause—Burden of proof—"Some part thereof," meaning of.*

When a judgment-debtor is arrested and brought before a Court the burden is on him to prove that from poverty or other sufficient cause he is unable to pay the amount of the decree or if that amount is payable by instalments, the amount of the instalment due.

A Court should refuse to direct a release of a judgment-debtor under Order XXI, rule 40, of the Civil Procedure Code, if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, as the case may be, and has refused or neglected to do so.

The words "some part thereof" in rule 40 2) (*d*) of Order XXI refer to decrees for payment of money generally and not only to instalment decrees. CHAS. R. COWIE & CO. v. W. H A SKIDMORE **833**

—— —— —— —— **O. 21, r. 63**—*Suit by decree-holder against judgment debtor—Defence that decree was collusively obtained, whether available to defendant—Insolvency—Adjudication—Creditor of insolvent, if can enforce claim, without leave of Court—Pleadings.*

In a suit under Order XXI, rule 63, of the Civil Procedure Code, a Court is not restricted to determine only the question as to whether the property ought to be attached or not. But when the decree holder has been guilty of fraud in obtaining a decree and has owing to that fraud purchased the property himself, if he brings a suit under the rule on the rejection of his claim, the defendant in the suit, against whom he had fraudulently obtained the decree and purchased the property, is entitled to set up the case that the suit from the beginning to the end was a fraud.

After an adjudication order, no creditor of a person, who has been adjudicated an insolvent, is at liberty to enforce any claim against the insolvent or against his property without the leave of the Court as provided by both the Presidency Towns Insolvency Act and the Provincial Insolvency Act. BAMA CHARAN BHATTACHARYYA v. BOGALA CHARAN KUNDU **755**

—— —— —— —— **O. 21, r. 90** **839**

—— —— —— —— **O. 21, r. 90**—*Execution—Judgment-debtor's death—Representatives not brought on record—Decree-holder, also purchaser with notice of judgment-debtor's death—Sale, whether irregular—Limitation Act (IX of 1908), Sch. I, Art. 166—Application to set aside sale.*

Where a decree-holder, who had notice of the death of the judgment-debtor, purchased his property sold in execution of the decree, without bringing the representatives of the judgment-debtor on the record:

Civil Procedure Code—(1908)—contd.

Held, that the omission to bring the representatives of the deceased judgment-debtor on record was not a mere irregularity and that consequently the sale was a nullity as against them.

Held, also, that as the sale was a nullity, Article 166 of the Limitation Act did not apply. SAMANDAN KARKAT EDATHIL RAYARAPPAN NAMBIAR v. MALIKANDI AKETH MAYAN, 26 M. L. J. 267 **251**

—— —— —— **O. 21, r. 91**—*Setting aside auction-sale on ground that judgment-debtor had no saleable interest in part of property—Fraud of decree-holder—Purchaser not misled thereby.*

Where an auction-purchaser of a certain land with two houses on it found that the judgment-debtor had interest only in the houses and not in the land and then sought to set aside the sale:

Held, that rule 91 of Order XXI did not apply where the judgment debtor had no saleable interest in a portion only of the property sold at the auction:

Held, further that the contention that the decree-holder knew that the judgment-debtor had no interest in the land and fraudulently concealed that knowledge was not supported by the fact found in the case, and that even if fraud was resorted to the plaintiff was not misled by it. MAUNG THA DUN v. CHOKALINGAM CHETTY, 7 BUR L T. 18 **383**

—— —— —— **O 22, r. 8**—*Suit instituted by insolvent after adjudication of insolvency—Receiver, whether can continue such suit.*

After a person has been adjudicated an insolvent he has no right to institute a suit for recovery of debts which had become legally vested in the Receiver; nor can the Receiver continue such a suit under Order XXII, rule 8. RAMASAMI AIYANGAR v. PAVADAI CHETTY **813**

—— —— —— **O. 23, r. 1** **210**

—— —— —— **O. 23, r. 1**—*Suit for partnership and accounts—Amount due to one defendant ascertained and Court-fee paid thereon—Withdrawal of suit by plaintiff—Defendant's right to claim trial.*

Where a plaintiff in a suit for a dissolution of partnership and accounts withdraws the suit after the share of the profits due to one of the defendants has been ascertained, and the Court fee due on it paid by that defendant, he is entitled to pray that his claim must be tried. TOMMENIDI ADEYYA v. CHILUKURI VENKATARAYUDU, (1914) M. W. N. 155; 15 M. L. T. 245 **392**

—— —— —— —— **O. 23, r. 3** **72**

—— —— —— **O. 23, r. 3**—*Compromise of suit—Some terms of compromise beyond suit, whether to be made part of decree—Consideration for compromise—Decree, effect of—Execution, objection to such decree, whether can be taken in—Contract Act (IX of 1872), ss. 38, 51, 54—Reciprocal promises—Offer—Tender—Compensation.*

Where a certain term, which cannot lawfully be made part of a compromise decree, because it goes beyond the subject-matter, has once been made part of the decree, a party to the decree cannot, in execution, object to that term as not binding on him. An objec-

Civil Procedure Code—(1908)—contd.

tion to such a decree ought to be taken by way of appeal and cannot be urged when execution of the decree is sought.

The question whether any particular term of a petition of compromise incorporated in a decree relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by a lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being covered by its own facts.

The terms and conditions, which are the consideration for a compromise of *the subject-matter of a suit*, must be incorporated in the compromise decree and have a binding effect, *although they themselves go beyond* the subject-matter of the suit.

A mere offer by registered posted letter to deliver something or rather the expression by a letter of a willingness or readiness to deliver is not a proper offer.

A sufficient tender of money is not made if the money is locked up in a box, nor of goods if they are enclosed in a cask which the other party is not allowed to open. Similarly, a mere offer by posted letter that the offeror is ready to execute a release without having a document of release ready to be delivered is not a proper offer.

The plea of tender is incomplete as an answer to an action (and, by analogy, as an answer to a defence,) unless accompanied by a tender in Court

If *A* and *B*, the parties to a contract, consisting of reciprocal promises, fail to perform their respective promises, the one (*A*) wilfully and the other (*B*) because he was not bound to fulfil his part unless *A* had fulfilled his preliminary part, the contract comes to an end by the acts of both parties, *A* and *B*, *except for the purpose of enabling the innocent party (B) to claim compensation from A*. *B*, however, cannot claim the performance of the specific obligation undertaken by *A* under the contract after *B* had himself (though lawfully) put an end to it. If *B* wants to hold *A* to the specific performance of *A*'s contract, *B* must fulfil his own promise or make an unconditional continuing offer to fulfil his promise. SABAPATHI PILLAY *v.* VANMAHALINGA PILLAI, 15 M. L. T. 206; 26 M. L. J. 331; (1914) M. W. N. 256 **581**

——— ——— ——— **O. 23. Sch. II, r. 17**—*Award—Compromise amending award—Decree based thereon—Ten days' time for objection not necessary.*

Proceedings under rule 17, Schedule II, of the Code of Civil Procedure, 1908, can be compromised and a decree passed upon the compromise.

It is not necessary to allow ten days for objections where the parties have accepted an award. SOHAMARI BAI *v.* CHATTA RAM, 27 P. W. R. 1914; 69 P. L. R. 1914 **591**

——— ——— ——— ——— **O. 26, r. 11** **839**

——— ——— ——— **O. 33, r. 1, expl., and r. 6**—*Pauper suit—Defendant entitled to adduce evidence in disproof of plaintiffs' pauperism—Opportunity to be given to defendant to prove allegations—Plea that part of property in suit is in possession of plaintiff—Defendant to be allowed to prove his plea.*

A defendant is entitled at the hearing to adduce evidence in disproof of the alleged pauperism of the plaintiff. Therefore, a Court should not allow a plaintiff to sue *in forma pauperis*, without opportunity being afforded to the defendant to prove that the plaintiff is not a pauper.

If a defendant seeks to prove that part of the property sought to be recovered from him is really in the possession of the plaintiffs and that consequently the plaintiffs are possessed of sufficient means to enable them to pay the prescribed Court-fee, the defendant is entitled to establish the truth of his allegation by evidence. ZILLAR RAHMAN *v.* GUZUNFFUR HOSSAIN **974**

——— ——— ——— **O. 33, rr. 3, 5, s. 115**—*Application to sue in* forma pauperis—*Rejection by Court.*

Leave to sue in *forma pauperis* under Order 33, rule 5, ought not to be refused on insufficient grounds.

A plaint presented by two or more plaintiffs claiming different reliefs against the same defendant cannot be said to be framed improperly or bad for misjoinder of causes of action.

Where claims, some of which are sustainable in law and others unsustainable in law, are joined together in one suit, it is open to the Court to direct the applicant to amend his plaint, so as to separate the sustainable from the unsustainable reliefs; and although a pauper application does not become a "plaint" within the meaning of Order VI, rule 1, until admitted under Order XXXIII, rule 8, the Court has, under section 141 of the Code of Civil Procedure, a general power to direct an amendment of this kind. KANAGAMMAL *v.* PANCHAPAKESA ODAYAR, 26 M. L. J. 343; (1914) M. W. N. 327 **82**

——— ——— ——— **O. 33, r. 5** **82**

——— ——— ——— ——— **O. 33, r. 6** **974**

——— ——— ——— ——— **O. 34, r. 2** **88**

——— ——— ——— ——— **O. 34, r. 4** **88**

——— ——— ——— ——— **O. 34, r. 5**—*Mortgage-decree—Preliminary decree executed—No objection by judgment-debtor—Not open to parties to plead subsequently that there was no executable decree—Res judicata.*

Although a relief may not have been granted by a decree, yet if in execution proceedings a Court holds that the decree-holder is entitled to that relief under the decree, the order of the Court, if not set aside in due course, operates as *res judicata* and it is not open to the parties afterwards to go behind it on the ground that no such relief was awarded by the decree.

Therefore, where a preliminary mortgage-decree, which is not capable of execution, is executed with the knowledge but without any objection on the part of the judgment-debtor, it cannot be afterwards pleaded that there was no decree under which the property could be sold. EPOOR RAMASAMY REDDY v. KANDADAI RANGAMANNAR IYENGAR, 26 M. L. J. 255; 15 M L. T. 246. **390**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **O. 34, rr. 5, 6**—*Mortgage decree against two defendants—Private sale by one defendant to decree-holder for part of decretal money, whether adjustment of decree—Application for personal decree against both, whether competent.*

Where in a mortgage decree against two defendants one of the defendants makes a part adjustment by private sale, a decree under Order XXXIV, rule 6, can be passed against him, but no such decree can be passed against the defendant who is not a party to the sale, for no procedure under Order XXXIV, rule 5, is followed against him. SRINIVASA AIYANGAR v. KUNDASAWMY NAICKER, 15 M. L. T. 235; 1 L. W. 294; 26 M. L. J. 375; (1914) M. W. N. 316 **544**

——— ——— ——— ——— **O. 34, r. 6** **389, 515, 544**

——— ——— ——— ——— ——— ——— **O. 34, r. 14** **429, 981**

——— ——— ——— **O. 38, rr. 5, 6**—*Attachment before judgment—Conditions to be fulfilled—Conditional attachment before judgment, when determines.*

An order of attachment before judgment can only be made after a defendant fails to show cause to the contrary or to furnish the security required. The conditional attachment permissible under Order XXXVIII, rule 5, has effect only until the defendant, to whom notice has been issued, either furnishes the required security or appears to show cause. NATHU MAL v. KISHORI LAL **107**

——— ——— ——— ——— **O. 38, r. 6** **107**

——— ——— ——— **O. 39, r. (2)**—*Guardians and Wards Act (VIII of 1890), s. 43 (4)—Power of Court to demand security from guardian of person of female ward.*

A District Court can demand security from the guardian of the person of a female infant ward to prevent his giving the infant in marriage to any person without the consent of the proper male relations of the girl. Such an order does not abate by the death of the person upon whose application it is made. GANDA MAL v. RAMJI DAS, 20 P. L. R. 1914; 12 P. W. R. 1914. **351**

——— ——— ——— ——— ——— ——— **O. 41, r. 4** **620**

——— ——— ——— ——— **O. 41, r. 4**—*Appeal by some of unsuccessful plaintiffs—Common ground—Power of Appellate Court to set aside whole decree.*

A suit brought by several persons was dismissed. Some of the plaintiffs appealed and prayed for reversal of the whole decree which proceeded on a ground common to all the plaintiffs. It was objected that as against the non-appealing plaintiffs, the decree had become final:

Held, that the Appellate Court was competent to set aside the whole decree in view of Order XLI, rule 4, of the Civil Procedure Code. SUNDAR SINGH v. KRISHNA MILLS CO., LTD., 11 P. L. R. 1914, 22 P. W. R. 1914; 63 P. R. 1914 **91**

——— ——— ——— ——— **O. 41, r. 11 (1)**—*Order of dismissal—Decree—Appeal competent—No decree prepared—Revision—Mistake of fact.*

An order passed under Order XLI, rule 11 (1), Civil Procedure Code, is a 'decree' from which an appeal lies in the ordinary course. Where, however, in such a case no decree has been drawn up the so-called appeal must be treated merely as an application for revision.

Where the order of dismissal under Order XLI, rule 11 (1), was passed under a mistake of fact, the Chief Court interfered in revision. BISHEN SINGH v. BISHEN KAUR, 19 P. L. R. 1914 **902**

——— ——— ——— ——— **O. 41, r. 23, O. 43, r. 1 (u)**—*Punjab Courts Act (XVIII of 1884), s. 40—Order of remand—Appealable only when appeal competent from such order, if it were itself a decree—No appeal from order of remand involving questions of fact only—Certificate appeals not covered—Custom—Question as to applicability of agricultural custom to particular person—Question of existence of custom.*

An appeal would lie under clause (*u*), rule 1, of Order XLIII, from an order remanding a case where the party aggrieved by the order would have the right of appeal, if the Appellate Court, instead of making the order of remand, passed a decree in that very proceeding reversing the decision of the first Court. In other words, the test in any given case is whether an appeal would lie from the decree of the Appellate Court if the order of remand made by it were itself treated as a decree and not a mere order within the meaning of section 2 of the Civil Procedure Code.

Under the combined operation of the provisions of Order XLIII, rule 1 (*u*), Civil Procedure Code, and section 40 of the Punjab Courts Act there can be no appeal to the Chief Court from a Divisional Judge's order of remand under Order XLI, rule 23, Civil Procedure Code, if that order is based upon a finding of fact only.

The certificate appeals under section 40 of the Punjab Courts Act stand on a peculiar footing, and such appeals do not fall within the purview of the second part of clause (*u*) of rule 1 of Order XLIII, Civil Procedure Code.

The question as to the applicability of agricultural custom to a particular person is a question regarding the existence of a custom. SAWAN SINGH v. MOTHU, 152 P. L. R. 1914 **817**

——— ——— ——— **O. 41, r. 33**—*Appellate Court's power to vary decree in favour of party not appealing.*

In a mortgage suit, the plaintiff got a decree subject to his paying a certain amount due to a prior mortgagee. The plaintiff accepted the decision and did not appeal, but on defendant's appeal the Appellate Court found that a smaller sum was due to the prior mortgagee:

Held, that, as the plaintiff had not appealed against the decree, the Appellate Court could not reduce the amount due under the prior mortgage. PITAM v. GAYA PRASHAD **886**

——— ——— ——— **O. 41, r. 33**—*Plaintiff not appealing against one of several defendants, whether Court can give decree against that defendant—Limitation Act (IX of 1908), Sch. I, Arts. 61, 120—Limitation, when right to sue accrues.*

R supplied wood to *P* in 1909 and was paid the price thereof upon certain conditions by *K*. In 1908, *K* brought a suit against *R* and got back his moneys.

Civil Procedure Code—(1908)—contd.

Upon this *R* sued both *P* and *K* in 1909, for recovery of the price of wood. The suit was dismissed against *P* but decreed against *K*. *K* appealed and *R* in cross-objections asked that *P* should also be made liable for the decree.

The lower Appellate Court dismissed the suit, holding that as regards *K* it was *res judicata*, that as regards *P*, *R* could not in cross objections ask that *P* should be made jointly liable for the decree, and that in any case the suit against *P* was barred by time:

Held, that the lower Appellate Court had the power under Order XLI, rule 33, of the Civil Procedure Code, to decree the claim against *P* even though there was no appeal by *R*;

(2) that the suit was not barred by time, as there was a fresh cause of action in 1908, when *R* had been forced to pay back the money to *K* and that Article 120 of the Limitation Act, Schedule I, was applicable. RANGILA MAL *v.* PHERU, 93 P. L. R. 1914; 37 P. W. R. 1914 **410**

—— —— —— —— —— **O. 43, r. 1, cl. (t) 12**

—— —— —— —— **O. 43, r. 1 (u) 817**

—— —— —— —— —— — **O. 45, r. 15 235**

—— —— —— —— **O. 47, r. 1** — *Jurisdiction of Court to hear review application not taken away by presentation of appeal.*

Per *Shah, J.* (*Heaton, J. dubitante*) :—

Where an application for review has been presented by a party to a suit and an appeal is preferred, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application. NARAYAN PURSHOTTAM GARGOTE *v.* LAXMIBAI DATTO BHAGWAN, 16 BOM. L. R. 189 **513**

—— —— —— —— —— —— **O. 47, r. 1** — *Review, ground for.*

A decree can be reviewed on such grounds only as, if tenable, would justify an alteration or cancellation of the decree. Therefore, where a review is sought on a ground which, even if it were tenable, would not result in a modification of the decree, the application for review should be rejected. MAHABIR PRASAD *v.* COLLECTOR OF ALLAHABAD, 12 A. L. J. 382; 35 A. 277 **514**

—— —— —— —— **O. 47, r. 2** — *Review—Jurisdiction—Application for review entertained by Judge who passed decree but disposed of by his successor—Grounds for review.*

An application for review was made before a Small Cause Court Judge who had passed the decree complained of. Subsequently the Judge was transferred:

Held, that his successor had jurisdiction to dispose of the application according to law.

It is not the intention of the Legislature that the provisions of the Code of Civil Procedure dealing with applications for review should be made use of by a litigant who has mismanaged his case, in order to secure a re-hearing of the case on the same materials. GITA RAM *v.* EAST INDIAN RAILWAY **394**

Civil Procedure Code—(1908)—contd.

—— —— —— **Sch. II, para. 4, sub-cl. (i); para. 5 cl. (b), sub-cl. (ii)** — *Arbitration — Arbitrator — Non-submission of award within time fixed by Court—Neglect or refusal—Appointment of second arbitrator without discharging first—Validity of reference—Agreement by parties to be bound by opinion of majority—Omission of Court to record that fact, effect of—Invalidity of reference to arbitration.*

Where an arbitrator does not submit his award within the time fixed for filing it, his authority to submit the award lapses and it may be held that he has refused or neglected to act within the meaning of Schedule II, paragraph 5, clause (*b*), sub-clause (*ii*) of the Civil Procedure Code.

Therefore, if another arbitrator is appointed without formally discharging the first arbitrator, the validity of the award of the second arbitrator cannot be questioned on the ground that the arbitrator was appointed without jurisdiction.

Where the parties have agreed to be bound by the opinion of the majority of arbitrators, the omission of the Court to record the fact in the order of reference does not invalidate the reference to arbitration. NARENDRA NATH DEY *v.* BROJESWARI DASI **842**

—— —— —— —— —— —— **para. 5, cl. (6), sub-cl. (ii) 842**

—— —— —— —— —— **para. 14 862**

—— —— —— **paras. 14, 15, 20**— *Arbitration — Award — Corruption or misconduct—Good portion of award separable from bad portion, effect of—Irregularities in procedure—Desirable that arbitrator takes notes of proceedings—Arbitrator bound to give evidence—What questions can be put to arbitrator—Inquiry into dishonesty or partiality—Examination of arbitrator to be confined to charge of corruption—Suspicion—Guilt.*

When a separable portion of an award is bad, the remainder of the award, if good, will be maintained.

If irregularities in the procedure of an arbitrator can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate his award without any imputation on his honesty or impartiality; for example, if the parties are not properly summoned to appear before the arbitrator and one of the parties is not given an opportunity of meeting the case set up by the other party, it would be held that there has been no proper inquiry.

It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceeding before him; but in the absence of such notes there is no warrant for holding that an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied.

An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence and where a charge of partiality or dishonesty is made, any relevant evidence, which he can give

Civil Procedure Code—(1908)—contd.

is properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction on which his decision is final, for example, a Court should not utilize evidence relevant on a charge of corruption to criticise methods adopted by an arbitrator in determining the *quantum* of his valuations. The charge of corruption ought to be put to him fairly and squarely so as to enable him to give a direct answer or explanation. A critical cross examination into the details of figures used by him in making his award, should not be permitted.

An arbitrator who is called as a witness in a legal proceeding to enforce his award may be asked questions as to what passed before him and as to what matters were presented to him for consideration, but no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matter submitted to him.

However, where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established. To infer the grave charge of dishonesty and partiality against an arbitrator there should be strong evidence in support of each particular instance of dishonesty.

Although in each instance the evidence of dishonesty might amount to more than a case of suspicion, yet the aggregate effect would not be sufficient to support the charge of corruption. Suspicion, in short, will not become facts and facts guilt. AMIR BEGAM v. BADR-UD-DIN HUSAIN, 18 C. W. N. 755; 1 O. L. J. 249; 12 A. L. J. 537; 19 C. L. J. 494; 17 O. C. 120; 16 BOM. L. R. 413; (1914) M. W. N. 172; 16 M. L. T. 25 **625 P. C.**

—— —— —— —— —— **Sch. II, para. 15** **625**

—— —— —— —— **para. 15**—*Arbitration—Agreement to refer to arbitration—Revocation—Supersession of reference—Apprehension of misconduct of arbitrator, whether good ground for supersession.*

In the case of an agreement to refer to arbitration come to out of Court, neither party can revoke the agreement at his own will and pleasure; but either party may do so for good and sufficient cause. A reference to arbitration made under the orders of the Court cannot be terminated by a mere revocation on the part of either the plaintiff or the defendant, but can only be superseded by an order of the Court. The fact that one of the parties concerned has lost faith in the fairness or impartiality of the arbitrator is not a valid ground for superseding the arbitration. Corruption or misconduct on the part of the arbitrator is a good ground for setting aside the award after the same has been received, but a Court is not authorized to take cognizance, during the pendency of the arbitration proceedings, of an allegation that the arbitrator is corrupt or partial or is misconducting himself so as to suspend the proceedings in arbitration and, if satisfied of the truth of the allegation, to supersede the arbitration before any award has been received. CHATAR BUGH v. RAGHBEER DAYAL, 12 A. L. J. 529 **758**

Civil Procedure Code—(1908)—concld.

—— —— —— —— **Sch. II, para. 20** **625**

—— —— —— —— **paras. 20 and 21**—*Arbitration without intervention of Court—Award deciding matters not referred to arbitration, whether legal.*

A private award determining matters not referred to arbitration cannot be filed and no decree can be based thereon, even if those matters be separable from the rest of the award.

A plea based on the defendant's acquiescence in the award is one that might be raised in a regular suit between the parties, but cannot be considered in proceedings under paragraphs 20 and 21, Schedule II, of the Code of Civil Procedure. DHANPAT RAI v. KAHN DEVI, 11 P. W. R 1914; 31 P. L. R. 1914; 30 P. R 1914 **422**

—— —— —— —— **para. 21** **422**

—— —— —— —— **para. 21**—*Award, revision of decree based on—Made without intervention of Court—Punjab Courts Act (XVIII of 1884), as amended by Act (IV of 1912), s. 70.*

A decree based on a private award filed in Court is not open to revision by the Chief Court under section 70 of Act XVIII of 1884, as amended by Act IV of 1912.

A mere clerical error in an award can be put right by a Court under section 151, Civil Procedure Code of 1908. THAKAR DAS v. RAM DAS, 13 P. W. R 1914; 114 P. L. R. 1914 **950**

Cocaine—Illicit possession—Possession of cocaine exceeding five grains—Burden of proof of authority under which cocaine was obtained **470**

Commission—Local inquiry—Case of wrongful restraint by obstructing path—Jurisdiction of Magistrate to issue commission for local inquiry—No notice taken by Magistrate of Commissioner's report or evidence—Accused misled—Further opportunity to be given for adducing evidence **510**

—— —— **refused**—Discretion—Revision—Abuse of process **522**

Commitment Order—Reason for quashing **478**

—— ——, power to order—District Magistrate **500**

—— ——, whether illegal—Prosecution and defence witnesses examined and cross-examined—Accused committed to Sessions **734**

Communications by husband to wife—Disclosure by widow after husband's death, whether permissible **511**

Companies Act (VI of 1832), ss. 48, 50—*Officers of Company resigning their positions as such without resigning directorships—Liability under section 50 not affected—Plea of ignorance of law.*

Where a paid Managing Director and the Chief Secretary of a Company were prosecuted for an offence under section 48, and convicted under section 50 of the Indian Companies Act, VI of 1882;

Companies Act—concld.

Held, that the fact of their having resigned their positions as Managing Director and Chief Secretary before the prosecution was started, without resigning thereby their posts as Directors, would not free them from their liability under section 50 of the Act.

The plea of ignorance of law cannot be accepted. CHHABIL DAS *v.* EMPEROR, 164 P. L. R. 1914; 15 CR. L. J. 300 **503**

——— ———**s. 50** **508**

——— ——— ———**s. 74**—*Filing balance-sheet within year—Director resigning before expiry of year—Not liable for failure to file—Mere ceasing to hold necessary qualification shares, effect of—Vacation of office of Directorship.*

A Company is not by law obliged to file a balance-sheet till a year from its registration is complete, and a Director of the Company who resigns office before the expiry of the year cannot be fixed with liability under section 74 of the Indian Companies Act, VI of 1882, for failure to file a balance-sheet with the Registrar of Joint Stock Companies.

Act VI of 1882 is not precise on the point, but under English Law the mere ceasing to hold the necessary qualification shares involves vacation of his office by a Director, and this is made clear by section 85 (2) of the new Act VII of 1913. CHANDAR BHAN *v.* EMPEROR, 15 CR. L. J. 330 **748**

——— ——— ———**s. 74**—*Penalty of Rs. 1,000 is fixed and irreducible—Criminal Revision—Enhancement of sentence.*

Under section 74 of the Companies Act the fine of Rs. 1,000 is a *fixed* one and a Magistrate cannot impose a lesser fine where the offence is proved.

The Chief Court enhanced the fine from Rs. 300 to Rs. 1,000. EMPEROR *v.* HARKISHEN LAL, 37 P. L. R. 1914; 16 P. W. R. 1914 CR.; 15 CR. L. J. 260 **433**

Complainant, whether witness **700**

Compromise—Amending award—Decree based thereon—Ten days' time for objection not necessary **591**

——— ———petition of, filed in mutation proceedings **965**

——— ———**decree**—Suit under s. 92, Civil Procedure Code, 1908 **111**

Compromise of suit—Some terms of compromise beyond suit, whether to be made part of decree—Consideration for compromise—Decree, effect of—Execution, objection to such decree, whether can be taken in—Contract Act (IX of 1872), ss. 38, 51, 54—Reciprocal promises—Offer—Tender—Compensation **581**

Concurrent sentences, validity of **508**

Conditional gift. *See* MUHAMMADAN LAW.

Congenital defect. *See* HINDU LAW.

Consideration, *failure of.*

The plaintiff who was a share-holder in a Company sold his shares therein to the defendant for Rs. 500. The defendant instead of paying the price in cash executed a bond whereby he agreed to pay the amount to the plaintiff with interest. No undertaking was given by the plaintiff that he would obtain the recognition of the transfer by the Company. The Manager of the Company, who had no such authority, refused to recognise and register the transfer:

Held, on the plaintiff's suit on the bond, that as there was no failure of consideration the suit must succeed BAHADUR SINGH *v.* SYAM SUNDER TAG, 12 A. L. J. 629 **900**

——— ———Mortgage—Mortgage without consideration is inoperative **805**

——— ———Subscription gratuitously promised, whether recoverable—Treasurer of Subscription Committee—Agent—Negligence **600**

——— ———Third person's right to sue—Creditor and debtor—Debtor mortgaging property and directing mortgagee to pay creditor—Right of creditor to sue mortgagee upon basis of direction in mortgage-deed **951**

——— ———Transfer of decree to one creditor—Arrangement—Absence of *bona fides* **714**

Construction. *See* HINDU LAW.

——— ———**of enactment,** principle of **935**

——— ———**of statutes.** *See* STATUTES.

Contingnent gift. *See* MUHAMMADAN LAW.

Contract, breach of—Compensation **353**

——— ———not allowing days of grace, whether permissible **431**

——— ———**of marriage,** breach of—Damages **376**

——— ———by minor void—Fraud—Misrepresentation—Transfer by minor's creditor—Estoppel **799**

Contract Act (IX of 1872), s. 2—*Offer—Acceptance—Lowest price telegraphed at request, whether offer to sell at that price—Invitation for offer—Completed contract—Specific performance.*

In answer to a broker's telegram, "Have likely purchaser your three properties, telegraph lowest price for each," the defendant, the owner of the properties, telegraphed his lowest price for each property and added, "reply by to-morrow." Upon receipt of this telegram the broker accepted earnest money for one of the properties and wired back to the defendant informing him accordingly and also asking him to "forward title deeds" The defendant refused to sell only one of the three properties and at the same time repudiated the broker's acceptance of the earnest money as "without authority:"

Held, that,

(1) the mere statement of the lowest price at which the defendant was willing to sell contained no implied contract to sell at that price;

(2) the words "reply by to-morrow" meant that the defendant wished to be informed whether the broker's purchaser was willing to buy and that if the reply was in the affirmative then the defendant would decide whether he would sell or not;

(3) as the defendant's telegram was not an offer, the broker's reply thereto could not be treated as an acceptance;

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(4) even if the defendant's telegram were taken as an offer, it was an offer to sell the three properties collectively and not singly. HARDANDOSS v. RANI MOHOLI BIBI, 7 BUR. L. T. 156 **322**

——— **s. 2 (d)**—*Consideration — Subscription gratuitously promised, whether recoverable —Treasurer of Subscription Committee—Agent—Negligence.*

A suit cannot be maintained to recover a subscription gratuitously promised for the benefit of an institution.

An honorary treasurer of a Committee for subscriptions is not an agent of the Committee and is not liable for gross negligence in not cashing a cheque given to him by one of the donors. ABDUL AZIZ v. MASUM ALI, 12 A. L. J. 351; 16 A. 268 **600**

——— **s. 2 (d)**—*Consideration — Third person's right to sue—Creditor and debtor—Debtor mortgaging property and directing mortgagee to pay creditor—Right of creditor to sue mortgagee upon basis of direction in mortgage deed.*

S, a debtor of *B*, executed a hypothecation bond in favour of *C* for a consideration including the amount of the debt, which was kept with *C* to be paid to *B*.

B sued *C* to recover the amount:

Held, that the plaintiff, being no party to the hypothecation bond, could not enforce it. ISWARAM PILLAI v. TAREGAN, 26 M. L. J. 127 **951**

——— **s. 11**—*Contract by minor void—Fraud — Misrepresentation — Transfer by minor's creditor—Estoppel.*

Contracts by minors are void; the only ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is fraud.

Where a minor obtains money by misrepresenting his age, that amounts to fraud and he may be made to refund it. A minor who mortgaged his property representing himself to be a major is not estopped from subsequently pleading his minority.

The same rule has also been adopted in India.

Per *Sadasiva Aiyar, J.*

Quaere:—Whether a future creditor can get rid of a viodable but real transfer under section 53 of Act IV of 1882? VAIKUNTARAMA PILLAI v. ATHIMOOLAM CHETTIAR, 26 M. L. J. 612 **799**

——— **ss. 14, 15, 16, 17**—*Pardahnashin lady—Mortgage executed of her house in favour of husband's creditor—Undue influence of husband—Document if fairly taken—Onus on whom.*

A Court should always be careful to see that deeds taken from *pardahnashin* ladies have been fairly taken, that the party executing them has been a free agent, and duly informed of what she was about. The burden of establishing this rests on him who claims against the *pardahnashin* lady.

The undue influence which may affect a *pardahnashin* lady's understanding of a document may proceed from a third party.

A *pardahnashin* lady executed a deed of mortgage of her property in favour of a creditor of her husband for the benefit of the latter. The lady herself derived no direct benefit from the transaction. At the time when this document was executed, the lady was living with her husband and she evidently acted under the influence of her husband in consenting to mortgaging her house for her husband's debt, because when a similar transaction was proposed before, the lady, who was at that time living with her husband's father and brothers, repudiated under their advice that transaction. The creditor, who was a Mukhtear, was present on the only occasion when the contents of the document were read and explained to her by no other than her husband who was an intended party:

Held, that as it was not shown that any independent person, free from any taint of the relationship or of the consideration of interest which would affect the act, had clearly put before the lady what were the nature and consequences of the act and that as the advice, if advice was given, was that of the husband or the creditor not removed entirely or at all from the suspected atmosphere, the mortgage was not fairly taken and that the lady was not bound by the transaction as she was not a free agent. BADIATANNESSA BIBI v. AMBICA CHARAN GHOSE, 18 C. W. N. 1133 **401**

Contract Act—contd.

——— **s. 15** **401**

——— **s. 16** **72, 401**

——— **s. 17** **401**

——— **s. 23** **540**

——— **s. 38** **581**

——— **ss. 38, 45**—*Mortgage—Payment of debt by mortgagor to one of several co-mortgagees, whether valid discharge of debt.*

The payment of the mortgage-debt to one of several co-mortgagees, without the concurrence of the others, is not a valid discharge thereof. RAMJIT v. KHEMCHAND **8**

——— **s. 39**—*Responsibility of contracting parties—Delivery of goods—Cash payment on delivery of railway receipt—Credit allowed to purchaser—Acquiescence—Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Appeal by some of unsuccessful plaintiffs—Common ground—Power of Appellate Court to set aside whole decree.*

A suit brought by several persons was dismissed. Some of the plaintiffs appealed and prayed for reversal of the whole decree which proceeded on a ground common to all the plaintiffs. It was objected that as against the non-appealing plaintiffs, the decree had become final:

Held, that the Appellate Court was competent to set aside the whole decree in view of Order XLI, rule 4, of the Civil Procedure Code.

A contract for supply of goods contained a condition regarding cash payment on delivery of railway receipts but several deliveries were made without such payment and the amounts due from the plaintiffs in respect of the deliveries were entered in an account which was finally made up on 14th April 1909, when a balance of about Rs 2,000 was found due from the plaintiffs to the defendants.

After the 14th April 1909 and up to 2nd May 1909 there were further deliveries in respect of which cash payments were made on

Contract Act—contd.

delivery of the railway receipts and then arose a dispute about a consignment and further dealings between the parties stopped.

On the 14th April 1909, the plaintiffs made over to the defendants first halves of currency-notes to the value of Rs. 2,000 but withheld the second halves of those notes. The plaintiffs alleged that the defendants stopped further consignments for there was a rise in the prices, and the defendants complained that since the second halves of the notes were withheld, they were competent to stop further consignments as they were entitled to cash payments:

Held, (1) that under the provisions of section 39 of the Contract Act, the defendants were not justified in rescinding the contract on plaintiffs' refusal to deliver the second halves of these notes, as it was clear from the correspondence between the parties that plaintiffs were ready and willing to take delivery of the last consignment on payment of the price of that consignment, and the defendants cancelled the contract, not because plaintiffs would not pay the price of the consignment, but because the plaintiffs refused to deliver the second halves of the currency-notes due on the previous account;

(2) that the account in respect of which the sum of Rs. 2,000 was due was not confined to dealings under the contract, but even if it was, the plaintiffs' failure to pay for the goods which had at first been delivered on credit was not a renunciation of the contract or such a refusal as excused perfomance of the contract on the part of the defendant. SUNDAR SINGH *v.* KRISHNA MILLS CO. LTD., 11 P. L. R. 1914; 22 P. W. R. 1914; 63 P. R. 1914 **91**

——— ——— ——— **s. 45** **8**

——— ——— **ss. 51, 54** **581**

——— ——— **s. 65**—*Mortgage—Void—Personal covenant to compensate mortgagee, whether enforceable—Bhagdari and Narwadari Act (Bom. Act V of 1862)*—Valatdan Patta *of unrecognized portion of* Bhag.

A *valatdan patta* (mortgage) of unrecognized portion of a *bhag* was held to be void, but, as there was a personal covenant by the mortgagor to compensate the mortgagee in case his possession was obstructed, the former was not allowed to recover possession of the lands from the latter without payment of proper compensation. HARIBHAI HANSJI *v.* NATHUBHAI RATNAJI, 16 BOM. L. R. 62: 38 B. 249 **602**

——— ——— **s. 73, ill. (m)**—*Damages, for breach of warranty—Vendee's previous contract with third person—No notice of this to vendor of goods—Vendor's liability.*

Where *A* entered into a contract with *B* in respect of unascertained goods, and afterwards entered into another contract with *C*, *C* not having been informed of the previous contract with *B*:

Held, that in a suit brought by *A* against *C* for damages sustained by *A* on account of the breach of warranty of quality, the proper basis for their calculation is the difference between the value of the goods as supplied and the market-value of the goods of the guaranteed quality on the date of breach, and not the special damages which *A* might have incurred through the breach committed by him of his own

Contract Act—concld.

previous contract with *B* of which *C* had no knowledge;

(2) that illustration (*m*) of section 73 of the Contract Act (IX of 1872) did not apply, as in the illustration the sale was of ascertained goods and not of unascertained goods as in this case, and also the contract between *A* and *B* was made on the same occasion as that between *B* and *C*, and the basis of damages in both was to be the same. SIMSON, C. W. *v* KOKA JAGANNADHA ROW NAIDU, 1 L. W. 268 **949**

——— ——— **s. 74**—*Bond—Condition—25 per cent. more to be paid on default in payment on fixed day—Penalty.*

Where a bond provides that principal and interest shall be paid on a particular date, that on default in payment on that date 25 per cent. of the principal and interest shall be added to the total amount, and that interest at 12½ per cent. per annum shall be charged on the consolidated amount till its realization, the provision is penal and, therefore, unenforceable. CHELLAGALI CHINNIGADU *v* KAPPALA VENKATARAYUDU **542**

——— ——— **ss. 108, 178** **174**

——— ——— **s. 253**—*Partnership — Death — Dissolution—Obligations of legal representatives of deceased—Limitation Act (IX of 1908), Sch I, Art. 106—Pleadings.*

After the death of a partner the partnership is at an end and there is no obligation on his legal representatives to continue the partnership, but if it is continued it is altogether a new partnership.

Obiter:—A pleading of a hesitating and non-committal character is apt to create a suspicion in the mind of the Court that the party asking for relief on it does not know what his own case is or that he is preparing to shift and change his case according to circumstances at the hearing. RAMDAS *v.* PARTABRAI, 7 S. L. R. 85 **771**

Contributory negligence—Railway accident—Damage to plaintiff's carriage—Gate at level crossing left open—Damage by defendant's train—Negligence of defendant—Negligence of plaintiff **788**

Co-owner—*Possession—Presumption that co-owner's possession is on behalf of all owners—Possession by biggest adult share-holder, character of—Trustee for minor co-owners—Reason for rule.*

In a case in which the question arises as to whether the possession of one co-owner has been adverse to that of another, the fundamental rule is that the entry of possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but would presumably be held to be for the benefit of all.

The reason for this rule is that the possession of one co-owner is in itself rightful and does not imply hostility as would be the possession of a mere stranger. The law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful the commencement and continuance of which is not proved to be wrongful and this is upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears.

Co-owner—concld.

There is a presumption that the biggest adult share-holder of a property is the trustee for the others, if, as a fact, he holds entire possession of the property during their minority. JAJNESWAR SAHA v. SATISH CHANDRA SAHA **562**

Co-sharers—Mesne profits—Recovery of possession—Ouster **122**

Costs—Court-fee paid on withdrawn part of claim, whether allowable as costs **231**

——— no time fixed for payment of—Withdrawal of suit with permission—Institution of fresh suit—Subsequent payment of costs **210**

——— Will—Construction **645**

Counsel—*Instructions—Cross-examination—Making charge—Right of Court to ask Counsel—Counsel's responsibility—Disciplinary action of Court—Reliance by Court on materials to be made known to parties at trial—Opportunity of adducing evidence—Counsel—Knowledge of important facts—Propriety of accepting retainer—Counsel giving evidence in case in which he is retained—Whether unprofessional conduct—General practice—Undesirable that Counsel engaged in case should give evidence—Withholding evidence—Inference, adverse—Cause of action—Conspiracy—Torts.*

A Court is entitled to ask Counsel, who in cross-examination makes a charge, whether he make it on instructions, and if so, on whose. Instructions to Counsel are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. But if the Court calls for written instructions, it cannot use them as evidence in the cause which is tried. They could be called for then and there, and be used after the trial on the determination of the question whether disciplinary action should be taken against the Counsel. It is not sufficient even to plead instructions. Counsel have a responsibility in the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

Whatever a Court relies on should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point.

If Counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein. If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client. If Counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises, is likely to be impugned in the case, he ought not to accept a retainer. If he accepts a retainer, not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client.

There is nothing necessarily unprofessional in Counsel giving evidence in a case in which he appears as such; and Counsel engaged in a case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer.

But as a matter of general practice it is undesirable when the matter to which Counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting.

When evidence which could be but is not produced, the inference is that if produced it would be unfavourable to the person who withholds it. The same rule applies to the case of a Counsel who ought to have been called but is not called. D. WESTON v. PEARY MOHUN DAS, 40 C. 898; 18 C. W. N. 185 **25**

Court-fees—*Deficiency made good within time allowed by Court but after limitatian, effect of.*

Where a deficiency in Court-fee is made good within the time allowed by the Court but beyond the period of limitation prescribed for the suit, the suit is not barred by time. RAM LAL v. KHUNDAT-UN-NISSA, 12 A. L. J. 709 **408**

Court Fees Act (VII of 1870), s. 7, cl. v, sub-cls. (a), (b), (c) and (d)—*Court-fee—Suit for possession of five Ghatwali mehals—Property in suit included in aggregate of fifty-two mehals for which Government revenue was payable—No apportionment in respect of property in suit—Court-fee according to market-value.*

In a suit for possession of five *Ghatwali mehals*, it was found that they were included in an aggregate of fifty-two *Ghatwali mehals* for which a certain sum of money was payable annually as *sadar jama* but that no apportionment of this sum was made between the several *mehals*:

Held, that the land in suit formed part of an estate paying revenue to Government, but did not constitute a definite share of such estate, nor was it separately assessed with revenue; that consequently sub-clause (*d*) of clause V of section 7 of the Court Fees Act was applicable to the case, and that a Court-fee according to the market-value of the land should be paid. CHANDRA NARAYAN SINGH v. ASUTOSH DE, 19 C. L. J. 312; 18 C. W. N. 659 **89**

——— ———s. 7, cl. V, sub-cl. (e) **964**

Cowledar, whether tenant **531**

Creditor and debtor—Debtor mortgaging property and directing mortgagee to pay creditor—Right of creditor to sue mortgagee upon basis of direction in mortgage-deed **951**

Criminal breach of trust. See PENAL CODE, s. 406.

Criminal force. See PENAL CODE, s. 349.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 190, 191—*Complaint, who can file—Magistrate—Jurisdiction.*

Every member of the public has a right to set the law in motion by complaint, whether he is himself a

Criminal Procedure Code—contd.

witness of the facts which *prima facie* constitute an offence or not.

Where, therefore, a complaint is filed by a Public Prosecutor the Magistrate does not take cognizance on his own knowledge, or suspicion or information and the accused has no right to claim to be tried before another Court. EMPEROR *v.* SHEWAKRAM, 7 S. L. R. 77; 15 CR. L. J. 360 **737**

——— ——— ——— **s. 4 (r)**—*Pleader accepting engagement in Court not authorized to practise—Duty.*

It is the duty of a Pleader who appears in a Criminal Court of a District to which his *sanad* or certificate does not apply to inform the Magistrate that he cannot appear as of right and to apply for permission under section 4 *(r)* of the Criminal Procedure Code. The better course is not to accept a fee or an engagement until that permission has been accorded, but if the Pleader accepts the engagement before attending the Magistrate's Court he ought to explain to his client that his appearance will be contingent on the Magistrate's permission. *In re* MR C. H. CLEMENTS, 7 S. L. R. 93; 15 CR. L. J. 382 **750**

——— ——— ——— **s. 35**—*Concurrent sentences, validity of.*

The power of passing concurrent sentences is confined to cases where a person is convicted at one trial of two or more distinct offences. DEBI DAYAL *v.* EMPEROR, 16 O. C. 370; 15 CR. L. J. 300 **508**

——— ——— ——— ——— **s. 47,** meaning and scope of—Section 103, clause (2)—Search—Right of "occupant to be present at search"—Denial of this right, effect of—"Occupant of the place," meaning of—Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings—Finding of incriminating articles in a house, presumption of law arising from **985**

——— ——— ——— **s. 107,** notice under, whether public document—Proof of identity of persons concerned, if necessary **529**

——— ——— ——— **ss. 109 (a) and (b), 110**—*Taking precaution to conceal presence to commit crime—Failure to give satisfactory account of himself—Giving false name and secretly delivering letters containing incitement to commit crime.*

A person who gives a false name and delivers letters secretly, containing incitement to commit crime or demanding money for the means of committing crime, falls within section 109, clause *(a)*, of the Criminal Procedure Code.

A person who secretly delivers letters arranging for the commission of dacoities is a person, who in the interests of public peace should be called upon to give security of good behaviour.

The accused, when charged by *A* with endeavouring to secretly deliver letters to *A*'s brother, asking him to assist in some nocturnal enterprise in which revolvers and guns were to be used, was unable to give *A* any satisfactory account of himself:

Criminal Procedure Code—contd.

Held, that this was sufficient to bring him within the meaning of section 110. PREO NATH DATTA *v.* EMPEROR, 15 CR. L. J. 255 **207**

——— ——— ——— **ss. 110, 112, 113, 117**—*Good behaviour—Security—Warrant case—Opportunity to bring witnesses.*

In a proceeding under section 110 of the Criminal Procedure Code, the accused person must have time to bring his witnesses and have their evidence recorded. Where the accused had not had this opportunity, the order against him must be set aside. KERAMUDDIN SARKAR *v.* EMPEROR, 15 CR. L. J. 253 **721**

——— ——— ——— **s. 112** **721**

——— ——— ——— **s. 112**—*Good behaviour—Qualifications of sureties—Conditions, validity of.*

Sureties for good behaviour ought not be rejected merely on the ground that they are caste-fellows or relatives of the accused.

The condition that a surety for good behaviour must be capable of controlling the accused is on general grounds undesirable and open to a practical objection, but the condition that he should be of the landholding class is unobjectionable. JIVA NATHA *v.* EMPEROR, 16 BOM. L. R. 178; 15 CR. L. J. 268 **476**

——— ——— ——— **s. 112**—*Surety—Restriction to local men—Jurisdiction of Magistrate.*

A Magistrate has no jurisdiction to put such a restriction upon the nature of the sureties under section 112 of the Criminal Procedure Code, as to direct that they should be local, for such a restriction is not contemplated by the section. That is a matter which must be decided subsequently if objection is taken to the sureties on that ground by the Police authorities. ISLAM KHAN *v.* EMPEROR **206**

——— ——— ——— **ss. 112, 167**—*Remand to Police custody—Magistrate—Jurisdiction—Action under Chap. VIII, when justified.*

Section 167 of the Code of Criminal Procedure does not appear to have been framed for cases in which action is taken under section 112 of the Code.

A Magistrate acting under Chapter VIII of the Code has no power to act until after he has recorded an order in writing under section 112. No person is to be called upon to show cause why an order should not be made against him until there is before the Magistrate some information which such Magistrate has reason to believe.

The Code gives a Magistrate no power to issue summons, warrant or order of detention until he has first upon his table something recorded by him in writing showing the ground upon which he is taking action. RAMESHWAR *v.* EMPEROR, 12 A. L. J. 365; 36 A. 262; 15 CR. L. J. 288 **496**

——— ——— ——— **ss. 113, 117** **721**

——— ——— ——— **s. 122**—*Judicial inquiry—Surety not to be rejected without taking evidence.*

An inquiry under section 122, Criminal Procedure Code, being a judicial inquiry, a Magistrate cannot refuse to accept a surety on the ground of his knowledge as Magistrate that the surety's in-

Criminal Procedure Code—contd.

nocence of connection with thieves is far from established. PIRU ABDULLA v. EMPEROR, 7 S. L. R. 94; 15 CR. L. J. 378 **746**

——— ——— ——— ——— **s. 133**—*Inoculating children—Trade or occupation.*

Some persons, who inoculated and admitted inoculating their children upon an outbreak of small-pox, were ordered under section 133 of the Criminal Procedure Code to stop the practice:

Held, that the section did not apply, inasmuch as the persons could not be said to be carrying on a trade or to be engaged in an occupation EMPEROR v. NGA KYAUK LON, U. B R. (1913) I, 189; 15 CR. L. J. 253 **205**

——— ——— ——— ——— **s. 133** — *Nuisance—Obstruction to channel not used by public.*

The owner of a low levelled field, across which the surplus water of the neighbouring fields used to flow into a tank, raised the level of his field to such an extent that the flood water, instead of flowing into the tank, as it used to do, was held back and thus caused injury to the neighbouring fields:

Held, that the case was not one in which a Magistrate could proceed under section 133 of the Criminal Procedure Code. JAGAR NATH SAHU v. PARMESHWAR NARAIN, 12 A. L. J. 248; 15 Cr. L. J. 229; 36 A. 213 **181**

——— ——— ——— ——— **ss. 133, 135, 138**—*Time for setting up* bona fide *claim to property.*

Where a conditional order is passed under section 133, Criminal Procedure Code, and the person against whom the order is made raises a *bona fide* claim that the subject of contention is private property, the Magistrate is bound to investigate the claim and cannot leave it to a Jury appointed under section 138. But when a Jury has once been appointed it is not open to the person, against whom the order is made under section 133, to set up such a claim and to have it determined by the Magistrate before the Jury proceeds with the matter.

Obiter.—If the Jury decided that the order was reasonable and proper the appellant would not be estopped from bringing a civil suit to establish his right to exclusive enjoyment of the land. AH YWAY v. MA GYI, 7 BUR. L. T. 23; 15 CR. L J. 259 **467**

——— ——— ——— ——— **ss. 135, 138** **467**

——— ——— ——— ——— **s. 144 (2)**—*Dispute likely to be settled in Civil Court—No apprehension of breach of peace.*

An order of a Magistrate directing a party to open a channel in his own land is not an order of the kind contemplated by section 144 (2) of the Code of Criminal Procedure.

Where a dispute between the parties is likely to be settled by a Civil Court, before the cultivation season and there is no immediate apprehension of a breach of the peace, it is not a case for interference of the Magistrate under section 144 (2) of the Code of Criminal procedure. SUBRAMANIA AIYAR v. MUTHU AMBALAM, 15 CR L. J. 291 **499**

——— ——— ——— **s. 145** **727**

Criminal Procedure Code—contd.

——— ——— ——— ——— **s. 145**—*Omission to record preliminary order before summoning opposite party—Omission to affix copy on property in dispute, effect of—Revision, parties to.*

An omission to record a preliminary order before issue of summons to the opposite party or to affix a copy of it to a conspicuous place at or near the subject of dispute, as required by clauses (1) and (3) of section 145, Criminal Procedure Code, is not fatal to the jurisdiction of the Court to proceed with the case under section 145, Criminal Procedure Code, when an order directing the parties to put in written statements has been once recorded in the presence of the parties and they have understood the nature of the proceedings.

The Chief Court will not interfere on revision with the order of a Magistrate under section 145, Criminal Procedure Code, where it is inconvenient and unnecessary to do so, even though such order is based on irregular procedure, as it is not usually the practice of the Chief Court to interfere on revision in a civil or *quasi*-civil case when the party asking for revision has got a regular remedy at his command.

An omission to make a joint owner of the property a party to the revision is immaterial where no mention is made of such joint owner in the order of the Magistrate and only one man has been declared to be in possession. MUHAMMAD SHARIF v. DHANPAT RAI, 15 P. W. R. 1914 CR; 68 P. L. R 1914; 15 CR L. J. 279 **487**

——— ——— ——— ——— **Ch. XII, ss. 145, 435, 526, sub-s. (8)**—*Transfer of case—Case under section 145, Criminal Procedure Code—Whether section 526 applies to proceedings under Chapter XII of Criminal Procedure Code.*

The provisions of section 526 have no application to proceedings under Chapter XII of the Criminal Procedure Code. Therefore, a party at a proceeding under section 145 is not entitled to an adjournment of the case under sub-section 8 of section 526. LAKHAN CHANDRA ROY v. YAKUB MANDAL, 18 C. W. N. 39; 15 CR. L. J. 350 **727**

——— ——— ——— **s. 147**—*Fence—Obstruction to public pathway—Jurisdiction.*

A Magistrate has jurisdiction to pass an order under section 147 of the Code of Criminal Procedure if he considers that on the date of the order there is a likelihood of the breach of the peace.

Where what is constructed is a mere flimsy fence and not a strong one, a Magistrate has jurisdiction to deal with it under section 147 of the Code of Criminal Procedure, and not to treat it as a public nuisance under section 133 of the Code of Criminal Procedure.

An order under section 147 of the Code of Criminal Procedure can be made even when the right claimed is a right to a private path. KARUPPANA KOWNDEN v. KANDASAWMI KOWNDEN, 15 M. L. T. 230; 26 M. L. J. 233; (1914) M. W. N. 394; 15 Cr. L. J. 362. **730**

——— ——— ——— **s. 162**—*Right of accused to get copies of statements to Police—Refusal—Reason—Statements under section 162, Criminal Procedure Code.*

Criminal Procedure Code—contd.

An accused person is not entitled as of right to be furnished with copies of statements made under section 162, Criminal Procedure Code, to the Police and if a Magistrate refuses to furnish him with copies of such statements, it is not necessary for him to say in so many words that he does not think it expedient in the interests of justice to grant the copies to the accused. *In re* THIRUVENGADA MUDALI. 26 M. L. J. 182; 15 CR. L. J. 289; (1914) M. W. N. 484 **497**

——— ——— ——— ———**s. 167** **496**

——— ——— ———. ——— **s. 172**—*Diary not used to refresh memory, whether evidence Improproper admission of such diary, whether sufficient ground for interference.*

A Magistrate should not refer to an entry in a diary not used by a prosecution witness to refresh his memory as corroborative of his evidence, but an error of the kind is not sufficient ground for interference, when the Magistrate has found the accused guilty after considering the other evidence in the case. *In re* KUTTIALIKUTTI MARAKAR, 1 L. W 229; 15 CR L. J. 256 **203**

——— ——— ———— **s. 190** **737**

——— ——— ———'**ss. 190 (c), 191**—*Report by Cantonment Magistrate to Assistant Commissioner—Cognizance, whether under section 190 (c).*

Where a Magistrate on receiving information from another Magistrate about the commission of an offence by *A* thought *B* to be the real culprit and consequently proceeded to try *B* in his own Court:

Held, that the Magistrate took cognizance of the case under section 190 (*c*) of the Criminal Procedure Code, 1898, and that the accused was entitled to have the case transferred to another Magistrate. MAKHAN SINGH *v.* GUNNER JEPSON, 10 P. W. R. 1914: CR; 65 P. L. R. 1914, 15 CR L J. 261 **469**

——— ——— ——— **s. 191** **439, 737**

——— ———. ——— **s. 192**—*Transfer—Sub-Divisional Magistrate, whether empowered to transfer case referred to him for trial.*

A Sub-Divisional Magistrate, to whom a case has been referred for trial by the District Magistrate, has no power to transfer it to any other Magistrate who may happen to be subordinate to him. BASHIR HUSAIN *v.* ALI HUSAIN, 12 A. L. J. 225; 36 A. 166 **1006**

——— ——— ——— ——— **s. 192**—*Transfer of cases—Practice.*

A Magistrate can transfer only those cases under section 192 of the Criminal Procedure Code of which he has taken cognizance under section 190 of the Code, but not those which have been transferred to his Court.

Obiter:—The frequent orders of transfer are objectionable in view of the trouble which they give to witnesses and parties. DARA *v.* MUKAT, 12 A. L. J. 277; 15 CR. L. J. 357 **725**

——— ——— ——— ——— **ss. 192, 200, 503**—*Pardanashin lady, complaint by—Examination of complainant—Issue of process—If complainant is pardanashin lady, whether she may be examined by Commission—Complainant, whether witness.*

If a *pardanashin* lady makes a complaint to a Magistrate, he is entitled to take cognizance of it. But before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate, if really it is her own complaint.

The words "at once" in section 200 of the Criminal Procedure Code clearly indicate that ordinarily a complaint must be presented in person. A complaint should never be accepted which is not signed by the complainant and is not preferred by a person duly authorized to prefer that specific complaint.

Process cannot be issued against an accused person, either by the Magistrate first taking cognizance of an offence or by the Magistrate to whom the case is transferred under the proviso to section 200, Criminal Procedure Code, unless and until the Magistrate issuing process has first examined the complainant. And this is perhaps more necessary in the case of a *pardanashin* lady than in other cases, to enable the Magistrate to satisfy himself that the complaint is really her own action.

A *pardanashin* complainant may be examined by Commission under section 503, Criminal Procedure Code. The terms of that section are very wide. They refer not only to an enquiry and a trial, but to any other proceeding The section authorizes the examination of any witness, and a complainant is certainly a witness. ABHOYESWARI *v.* KISHORI MOHAN BANERJEE, 15 CR. L. J. 348, 18 C. W. N. 1020 **700**

——— ——— ——— ——— **s. 195**—*Penal Code (Act XLV of 1860), ss. 193 and 471, offences under—Committed in proceedings before arbitrator appointed by Court—Sanction necessary for prosecution.*

A complaint charging a person with offences under sections 193 and 471, Indian Penal Code, alleged to have been committed in proceedings before an arbitrator, under the order of reference made by a Court, cannot be entertained without the sanction of the Court according to section 195 of the Criminal Procedure Code. MULA MAL *v.* CHURANJI LAL, 3 P. R. 1914 CR; 136 P. L. R. 1914; 15 CR. L. J. 358 **726**

——— ——— ——— ——— **s. 195**—*Penal Code (Act XLV of 1860), ss. 467 to 471—Forgery committed by person not party to proceedings—Sanction, whether necessary.*

No sanction under section 195 of the Code of Criminal Procedure is required in respect of a forged document, when the person producing it as evidence is not a party to the proceedings. 26 M. L. J. 220; 15 CR. L. J. 242 **194**

——— ——— ——— ——— **s. 195**—*Sanction—Jurisdiction—Penal Code (Act XLV of 1860), ss. 182, 211—Application in Judge's Court—False information—Prosecution sanctioned by Judge.*

The appellant pending an insolvency proceeding against him in the District Judge's Court applied to the District Judge that the respondent had misappropriated certain things belonging to him. The District Judge forwarded the petition to the Magis-

Criminal Procedure Code—contd.

trate with the result that the respondent was arrested and his house searched. Eventually the District Magistrate discharged the respondent. The respondent then applied to the District Judge for sanction to prosecute the appellant under sections 182 and 211 of the Penal Code:

Held, that the Distret Judge was a public servant to whom the alleged false information was given and that he had before him materials sufficient to warrant his granting sanction for the institution of proceedings under section 182. With regard to section 211, the Court of the District Judge was not the Court in which the criminal proceedings were instituted and it could not be said that the offence of causing to be instituted criminal proceedings without just or lawful ground was committed in relation to a proceeding pending in the Court of the District Judge. MUHAMMAD FAKHRUDIN *v.* BHIKHI RAM, 12 A. L. J. 278; 35 A. 213; 15 CR. L. J. 259 **723**

——————— **ss. 195, 259**—*Sanction to prosecute once availed of—Fresh sanction necessary for fresh complaint—Case of non-compoundable offence "struck off" for complainant's absence—Discharge—Jurisdiction—Cognizance.*

Where a complaint of an offence under section 211, Indian Penal Code, was ordered to be "struck off" for the complainant's absence but the Magistrate took cognizance of the case on a fresh complaint by the same complainant:

Held, (1) that the Magistrate had no authority to pass an order striking off the case;

(2) that the order striking off the case was not tantamount to an order of discharge under section 259, Criminal Procedure Code, inasmuch as this section relates only to compoundable cases while an offence under section 211, Indian Penal Code, cannot be lawfully compounded;

(3) that once a sanction to prosecute is availed of and a complaint instituted on its strength, a fresh complaint on the basis of the same sanction is incompetent, inasmuch as one sanction covers only one complaint;

(4) that the Magistrate had no jurisdiction in the case after he had "struck off" the case RAMPHAL *v.* EMPEROR, 17 O. C. 18; 15 CR. L. J. 230 **182**

——————— **ss. 195, 476**—*Sanction—Preliminary inquiry—Notice—Materials, which authority granting sanction may consider—Revision—Grounds on which High Court should interfere.*

The words of section 476 of the Criminal Procedure Code, "After making any preliminary *inquiry that may be necessary*," show that a preliminary inquiry is not essential in all cases when a Court takes action under that section.

A fortiori, under section 195, in which there is no reference at all to preliminary inquiry, such an inquiry is unnecessary.

Want of notice to an accused does not invalidate a grant of sanction under section 195 of the Criminal Procedure Code.

When granting sanction, a Magistrate should not substitute the judgment of the Police for his own judgment and accord sanction merely upon a Police report.

Criminal Procedure Code—contd.

Section 195 of the Criminal Procedure Code does not state that the authority giving sanction should act only upon legal evidence, and there is no warrant in the Code for the proposition that if other improbabilities, based on evidence which would not be admissible at the trial of the person against whom sanction has been given, are also referred to by the authority giving sanction, the grant of sanction becomes illegal and ought to be revoked.

A High Court should not interfere with the discretion of a Subordinate Court in the matter of the grant of a sanction unless there is some *prima facie* strong ground for holding that there is no reasonable probability of having a conviction on the sanction or that it is otherwise inexpedient to award the sanction on the facts of the particular case or that the party against whom sanction is granted was probably innocent.

An accused person was prosecuted for stabbing and was convicted of the offence, his defence version having been found by the Magistrate to be false. He afterwards brought a complaint against his prosecutors on the same facts as were urged by him in his defence. The Magistrate sent for the records of the previous case, examined the complainant on oath and, having patent doubts as to the correctness of his story, referred his complaint to the Police. The Police reported his complaint to be false and the Magistrate while dismissing his complaint under section 203, Criminal Procedure Code, also sanctioned his prosecution:

Held, that the order granting sanction was legal. NARAYANA NADAN, *In re*, 1 L. W. 331; 26 M. L. J. 486; 15 CR. L. J. 271 **479**

——————— **s. 195, cl. (6)**—*Penal Code (Act XLV of 1860), s. 193—Sanction to prosecute given—Complaint not filed within time owing to proceedings in appeal—Application for extension of time—High Court's power to grant—Practice.*

A High Court has power, under section 195, clause (6), Code of Criminal Procedure, to extend the time for the institution of a complaint of perjury when more than six months have elapsed from the date of the order according sanction.

Where delay in instituting such a complaint is due to the act of the person against whom the complaint had to be made, it is not open to him to object to the extension of time, when applied for.

Obiter:—It is not advisable in such criminal matters to delay the disposal of the case simply to wait the return of one of the two Judges to duty who ordered notice to issue to respondent to show cause against extension. SECRETARY OF STATE *v.* SANKARA PANDIAM PILLAI, (1914) M. W. N. 847; 15 CR. L. J. 320 **727**

——————— **s. 198** **725**

——————— **s. 200** **700**

——————— **ss. 205, 526**—*Dispensing with personal attendance of accused—Pardahnashin lady—Permission to appear by Pleader—Transfer of criminal case.*

The accused, respectable *pardahnashin* ladies, were charged with offences under sections 307, 308, 325 and 326, Indian Penal Code The High Court allowed them to appear at the inquiry or trial by their Pleader or Pleaders, subject to their having to appear before the Court to hear the sentences passed, should the case be proved against them and the trial end in a conviction and also directed that should the case be committed to the Court of Session, the personal appearance of the ladies should be dispensed with till the Sessions Judge passes his order.

The case was transferred from the Magistrate who had refused to dispense with the personal appearance of the ladies. RAJ RAJESWARI DEBI *v.* EMPEROR, 17 C. W. N. 1248, 15 CR. L. J. 281 **489**

——————— **Ch. XVIII** **734**

——————— **ss. 208, 350, 528** —*Transfer of case from one Magistrate's Court to another—Commitment on evidence recorded by Magistrate from whose file case was transferred—Jurisdiction.*

After the prosecution evidence in a case under section 324, Indian Penal Code, was recorded by a second class Magistrate, the District Magistrate transferred the case to a 1st class Magistrate who, acting on the evidence which had already been recorded by the 2nd class Magistrate, committed the accused to the Court of Session:

Held, that the order of commitment was not illegal. EMPEROR v. NANHUA, 12 A. L. J. 467; 15 CR. L. J. 354, 36 A. 315 **722**

——————— **ss. 209, 436, 437** —*Case exclusively triable by Court of Session—Discharge by Magistrate—Commitment by District Magistrate—Revision—High Court, power of.*

It cannot be said that a Magistrate has no power whatever to pass an order of discharge in a case "exclusively triable by a Court of Session."

Where the entire prosecution evidence is quite unworthy of credit and bristles with improbabilities and where it is clear that the case is foredoomed to failure at the Sessions, it is the duty of the Subordinate Magistrate to discharge the accused.

Where an order of discharge passed by a Magistrate under section 209, Criminal Procedure Code, is revised by the District Magistrate and a commitment to the Sessions Court is directed, the High Court, acting under section 437 of the Code of Criminal Procedure, can interfere and can even go into questions of fact to see if the order of the District Magistrate was correct and proper. DAMAPPA PALAI, *In re*, 15 CR. L. J. 673 **741**

——————— **ss. 215, 494, 537** — *Commitment order—Reason for quashing.*

A commitment order can be quashed under section 215, Criminal Procedure Code, only on a point of Law. The want of territorial jurisdiction in the Magistrate who holds the inquiry is a point of law. But the commitment is valid in spite of the want of territorial jurisdiction unless a failure of justice has in fact been caused by such commitment. A commitment order cannot be quashed merely on the ground that the evidence was doubtful. The proper course would be for the District Magistrate in such a case to instruct the Public Prosecutor to withdraw under section 494, Criminal Procedure Code. EMPEROR *v.* NGA TAUNG THU, 7 BUR. L. T. 26; 15 CR. L. J. 270 **478**

——————— **ss. 247, 403, 438, 439, 417, 428** — *Summons case—Acquittal of accused obtained by improperly procuring complainant's absence—Revision—Appeal from acquittal—Additional evidence.*

A brought a complaint against *B* under section 426, Indian Penal Code. On the date fixed for the trial, *B* improperly procured *A*'s arrest on a false charge of committing nuisance, and the Magistrate acting under section 247, Criminal Procedure Code, acquitted *B* because *A*, the complainant, did not appear. Upon *A*'s application the District Magistrate referred the case to the High Court recommending that the order of acquittal may be set aside and a new trial directed but the High Court declined to interfere, inasmuch as

(1) the order of acquittal was strictly in accordance with law;

(2) it is a sound rule of practice not to interfere in revision when there is no error in law on the face of the record;

(3) there was an appeal from an acquittal.

There is nothing in the language of section 417, Criminal Procedure Code, to limit appeals against acquittals to cases in which Courts have, owing to some error of law or misappreciation of evidence, come to a wrong decision on the evidence before them.

There is no distinction under the Code between the right of appeal against an acquittal and the right of appeal against a conviction.

Section 428, Criminal Procedure Code, allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions.

Under section 403, Criminal Procedure Code, an acquittal under section 247, Criminal Procedure Code, operates as a bar to a trial for the same offence and a District Magistrate cannot order a re-trial of the acquitted person. SINNU GOUNDEN, *In re*, 26 M. L. J. 160; (1914) M. W. N. 273; 15 CR. L. J. 235 **188**

——————— **s. 248** **507**

——————— **ss. 250, 537** — *Order awarding compensation not contained in order of discharge—Jurisdiction—Irregularity, fatal.*

Where a Magistrate discharged an accused and ordered payment of compensation to him, under section 250 of the Criminal Procedure Code, at a later stage when another co-accused against whom a charge had been framed was acquitted:

Held, that the order awarding compensation was without jurisdiction as it was not contained in the order of discharge.

Held, also, that this was not a mere irregularity which could be covered by section 537 of the Criminal Procedure Code. NANHEYLAL v. *Musammat* RANIBAHU, 10 N. L. R. 8; 15 CR. L. J. 290 **493**

——————— **ss. 252, 526** — *Transfer—Weak Magistrate—Proceedings unduly prolonged*

Criminal Procedure Code—contd.

—*Witnesses—Magistrate's discretion in summoning—Expenses of witnesses to be realised before summons—Practice.*

Where on account of the weakness of a Magistrate it was apprehended that a case under section 110, Criminal Procedure Code, would take a very long time if it were allowed to remain in that Magistrate's Court, the High Court transferred the case to another Magistrate.

The Magistrate trying a case is bound by law to hear those witnesses whose list is sent up by the Police along with the case. As soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of persons likely to be acquainted with the facts of the case and shall summon to give evidence before himself only such of them as he thinks necessary. He is not bound by law to accept a list of witnesses which the Police or any one else may choose to produce from time to time.

Where the Magistrate is of opinion that the expenses for summoning witnesses should be charged from parties he should realize them before issuing the summons. GOVIND SAHAI *v.* EMPEROR, 12 A. L. J. 262; 15 CR. L. J. 363 **731**

——————— **s. 259** **182**

——————— **ss. 289, 292**—*Documents put into evidence for defence in cross examination of prosecution witnesses Right of reply—Practice.*

The defence does not lose its right to the last word, that is to say, the prosecutor does not get the right of reply, merely because in the course of the cross-examination of the prosecution witnesses, certain documents are put into evidence on behalf of the defence EMPEROR v. J. S. BIRCH, 7 L. B. R 84; 15 CR. L. J. 241 **193**

——————— **s. 292** **193**

——————— **s. 297** **661**

——————— **s. 297**—*Misdirection—Charge to Jury.*

Where the accused was tried for criminal breach of trust by a District Magistrate with the aid of a Jury and in summing up the District Magistrate did not expressly tell the Jury that the test they were to apply was whether the circumstances relied upon by the accused showed an intention of causing 'wrongful gain' or 'wrongful loss', nor were they told what those terms meant:

Held, that there had not been sufficient compliance with section 297 of the Criminal Procedure Code and that the verdict could not stand. BROWNE, C. J. *v.* EMPEROR, 7 BUR. L. T 20, 15 CR. L. J. 257 **465**

——————— **s. 342** **661**

——————— **s. 347, Chap. XVIII**—*Penal Code (Act XLV of 1860), ss 352, 376 and 511—Trial under section 354, Penal Code—Prosecution and defence witnesses examined and cross-examined—Accused committed to Sessions—Commitment, whether illegal.*

The special power to commit to a Sessions Court, conferred on a Magistrate by section 347 of the Code of Criminal Procedure, cannot be interpreted as depriving the accused of the benefit of the procedure prescribed in Chapter XVIII of that Code; but where the accused, when tried on a charge under section 354 of the Indian Penal Code, denies the charge *in toto* and enjoys the benefit of cross examining the prosecution witnesses and of examining the prosecution witnesses and of examining the witnesses for the defence, it cannot be said that he has been prejudiced, merely because the Magistrate at the time of delivering his judgment altered the charge into one under sections 376 and 511 of the Indian Penal Code, and committed him to the Sessions, because he was not himself competent to try the accused on the altered charge.

A committal order passed under such circumstances is not illegal, and should not be set aside. CHINNAVAN, *In re*, 15 CR. L. J. 363 **734**

——————— **s. 350** **722**

——————— **s. 403.**

Under section 403, Criminal Procedure Code, an acquittal under section 247, Criminal Procedure Code, operates as a bar to a trial for the same offence and a District Magistrate cannot order a re-trial of the acquitted person. SINNU GOUNDEN *In re*, 26 M. L. J. 160; (1914) M. W. N. 273; 15 CR. L. J. 236 **188**

——————— **ss. 403, 413** *Several persons convicted at one trial—Different sentences—Right of appeal.*

Section 412, Criminal Procedure Code, prohibits an appeal against a sentence of less than one month's imprisonment or a fine of less than Rs. 50 passed by a District Magistrate or a Court of Session, and the mere fact that such sentences were passed on some of the accused while heavier sentences were passed on the rest would not give to the former a right of appeal only because there is one consolidated appeal by all convicted persons. URUMA MUDALI, *In re*, 15 CR. L. J. 371; 16 M. L. T. 13 **739**

——————— **s. 413** **739**

——————— **s. 417.**

There is nothing in the language of section 417, Criminal Procedure Code, to limit appeals against acquittals to cases in which Courts have, owing to some error of law or misapreciation of evidence, come to a wrong decision on the evidence before them. SINNU GOUNDEN, *In re*, 26 M. L. J. 160; (1914) M. W. N. 273; 15 CR. L. J. 236 **188**

——————— **s. 428.**

Section 428, Criminal Procedure Code, allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions SINNU GOUNDEN, *In re*, 26 M. L. J. 160; (1914) M. W. N. 273; 15 CR. L. J. 236 **183**

——————— **s. 435** **727**

——————— **s. 436** **741**

——————— **s. 436**—*Commitment, power to order—District Magistrate.*

Criminal Procedure Code—contd.

Where a Magistrate of the first class, after holding an inquiry into offences under sections 408 and 477A of the Indian Penal Code, discharged the accused and the District Magistrate, acting under section 436, committed the accused to the Court of Sessions on the same charges and the accused applied to the High Court contending that the order of the District Magistrate was without jurisdiction, as primarily the case against him was under section 408 which was not triable exclusively by the Court of Session:

Held, (1) that the District Magistrate was competent to commit the accused as in this case the charge of falsification of accounts was one of the substantial things against the accused;

(2) that the District Magistrate could add a charge under section 408 if it was so intimately connected with the charge under section 477A as to form part of the same transaction. GENDLAL CHIMANBHAI *v* EMPEROR, 16 BOM. L. R. 80; 15 CR. L. J. 292 **500**

——— ——— ——— **s. 437** **741**

——— ——— ——— **s. 438** **188**

——— ——— ——— **s. 438**—*Power of District Magistrate to make reference to High Court in cases tried by Sessions Judge.*

It is very much doubtful whether a District Magistrate is entitled, as a matter of law, to make a reference to the High Court for enhancement of sentence in a case tried by a Sessions Judge. Even if he is so entitled, the procedure is extremely inconvenient. EMPEROR *v.* GANGA, 12 A. L. J. 519 **1007**

——— ——— ——— **ss. 438, 439 (5)**—*Order of acquittal—Right of appeal—High Court, power to interfere in revision—Practice.*

It is against the practice of the High Court to interfere in revision with orders of acquittal. The right of appeal in case of acquittal is vested in the Local Government and not in the District Magistrate, but it is always open to the latter to move the Local Government to file an appeal. EMPEROR *v* GUR DAYAL, 12 A. L. J. 255; 15 CR. L. J. 304 **512**

——— ——— ——— **s. 439** **188**

——— ——— ——— **s. 439**—*Misappreciation of evidence—Revision.*

Miller and *Ayling, JJ*—In revision, it is in the discretion of a High Court to exercise its power of going into the question of appreciation of evidence.

Sankaran Nair, J, (*dissenting*).—Where there has been misappreciation of evidence and a convicted person claims to be heard to show that the lower Courts have misappreciated that evidence, and that he has been unjustly convicted, it is not open to a Judge to say that it is within his discretion to permit or refuse him to do so or not.

No doubt, the sections only say that the High Court may interfere in revision, but "may" is the only word that could be used. VILLAGE MUNSIF RAMASWAMI GOUNDEN, *In re*, 15 CR. L. J. 285 **493**

——— ——— ——— **s. 439 (5)** **512**

——— ——— ——— **Ch. XXXIII**—*European British Subject—Special procedure—When accused European British Subject, he must be informed of his right to be tried according to special procedure.*

Where the accused, a European British Subject, was not informed of his right under the law to be tried according to the procedure laid down for the trial of European British Subjects the trial was *held* to be bad. CLARKE A. A. M. *v.* BALADEB MISRA, 18 C. W. N. 385, 15 CR. L. J. 297 **505**

——— ——— ——— **s. 476** **479**

——— ——— ——— **s. 476**—*Steps taken five months after close of trial—Order without jurisdiction.*

Where a Magistrate acts under section 476 of the Code of Criminal Procedure, five months after the close of the trial, and there is no explanation for the delay, the Magistrate acts without jurisdiction. KSHATRI SIVA SINGH, *In re* **491**

——— ——— ——— **s. 488**—*Maintenance of child—Mother's ability to maintain—Father's obligation—*Bona fide *offer to maintain if child lives with him.*

A father is bound to maintain his child whatever the position of the mother may be and merely sending a man to go and ask the child to come and live with the father does not amount to an offer to look after him and cannot absolve the father from his responsibility to maintain him. MI THEIN *v.* NGA PO NYUN, 7 BUR. L. T. 34; 15 CR. L. J. 278 **486**

——— ——— ——— **s. 494** **478**

——— ——— ——— **s. 497** **631**

——— ——— ——— **s. 503** **700**

——— ——— ——— **ss. 503, 522**—*Commission—Local inquiry—Case of wrongful restraint by obstructing path—Jurisdiction of Magistrate to issue commission for local inquiry—No notice taken by Magistrate of Commissioner's report or evidence—Accused misled—Further opportunity to be given for adducing evidence.*

The petitioners were convicted of wrongfully restraining the complainant by obstructing a path along which he was entitled to pass. They applied for a local inquiry and the Magistrate ordered a local inquiry by a Pleader who ultimately made a report, but no notice was taken either of the report or of any evidence on which it may have been based:

Held, that the Magistrate had no authority to issue the commission, and the accused must have been seriously misled by it, for they must have thought that the Magistrate would pay attention to its result and they might well have refrained from producing witnesses; and that, therefore, they should have a further opportunity of adducing evidence.

No order under section 522, Criminal Procedure Code, can be passed unless there has been dispossession from immoveable property. MOHAR KHAN *v.* GAYZUDDIN SHEIKH, 18 C. W. N. 359; 15 CR. L. J. 302 **510**

——— ——— ——— **ss. 514, 529, 531, 537**—*Bond for appearance—Non-appearance, forfeiture for—Court to order forfeiture, jurisdiction of.*

Criminal Procedure Code—contd.

Where the accused gave a personal bond for appearance before a Magistrate and failed to appear before him on the date fixed and a notice was issued to him to show cause why the bond should not be forfeited and in the meantime the case was transferred to another Magistrate:

Held, that the latter Magistrate had no jurisdiction to order the forfeiture of the bond under section 514 of the Criminal Procedure Code.

Section 531 of the Criminal Procedure Code relates only to proceedings in a wrong place and cures defects as to local jurisdiction. MIR HUSEN ABDUL RAHIMAN, *In re*, 16 BOM. L. R. 84; 15 CR. L. J. 295 **503**

——— ——— ——— **s. 522** **510**

——— ——— ——— **s. 522**—*Order passed twenty months after decision of Criminal case, whether legal.*

Section 522 of the Criminal Procedure Code is not mandatory but merely says a Court *may* pass a possession order. Such an order under it need not be passed simultaneously with the conviction in the criminal case. Therefore, where an order was passed twenty months after, but the delay was duly explained, the order was upheld as properly passed. GHULAM MUHAMMAD *v.* KARAM SINGH, 14 P. W. R. 1914 CR; 112 P. L. R. 1914; 15 CR. L. J. 275; 15 P. R. 1914 CR. **483**

——— ——— ——— **s. 526** **489, 731**

——— ——— ——— **s. 526**—*Transfer—Magistrate putting questions to witnesses prejudicial to accused—Sufficient ground for transfer.*

A Magistrate on the assurance of the Police *peshi* clerk in his Court asked a witness whether accused had ever been challaned in a *badmashi* case:

Held, (1) that it was improper for the Magistrate to put such question, unless he had satisfied himself on the highest and best information that there was some real foundation for the facts mentioned in the question. The assurance received from the Police *peshi* clerk in his Court was quite insufficient to justify such a question.

(2) that the action of the Magistrate was sufficient to cause the accused to apprehend that a fair and impartial trial would not be had and that the case should be transferred. SURAJ PROSAD *v.* EMPEROR, 12 A. L. J. 50, 15 CR. L. J. 234 **186**

——— ——— ——— **s. 526**—*Transfer of case—Fair and impartial trial not expected.*

Where it has not been shown that a fair and impartial trial cannot be had or that an order of transfer is expedient in the interests of justice, a case cannot be transferred from one Court to another. GHANSHIAM DAS *v.* EMPEROR, 15 CR. L. J. 368 **736**

——— ——— ——— **s. 526**—*Transfer of criminal case—Impartiality of Magistrate not doubted.*

N and four other persons were put on their trial, the fromer under section 411 and the latter under section 381 of the Indian Penal Code. The case of *N* was subsequently separated from that of the other four accused. The Magistrate proceeded first to dispose of the case under section 381 which resulted in conviction. The case under section 411 was then taken up:

Held, that as there was nothing to find that the Magistrate would not try the case with perfect impartiality the case could not be transferred. NATHIMAL *v.* EMPEROR, 15 CR. L. J. 253 **205**

Criminal Procedure Code—concld.

——— ——— ——— **s. 526**—*Transfer, grounds for.*

An appeal was preferred to the Sessions Judge from a conviction under sections 323 and 325 of the Penal Code. The Sessions Judge after hearing arguments came to the conclusion that if an offence was committed at all, it was one under sections 394 and 397, Indian Penal Code, and that the convicting Magistrate had no jurisdiction to try a case of so grave a nature. He accordingly set aside the convictions and sentences under sections 323 and 325 and directed the accused to be committed for trial on charges under sections 395, 394, 397 and 325 of the Code:

Held, that the circumstances did not justify a transfer of the case from the Court of the Sessions Judge who had directed the commitment and re-trial. RAM SEWAK *v.* EMPEROR, 15 CR. L. J. 367 **735**

——— ——— ——— **s. 526, sub-s. (8)** **727**

——— ——— ——— **s. 528** **722**

——— ——— ——— **ss. 529, 531** **503**

——— ——— ——— **s. 537** **478, 498, 503**

——— ——— ——— **s. 540** **743**

——— ——— ——— **s. 562**—*"Dishonest misappropriation and cheating," meaning of—Penal Code (Act XLV of 1860), ss. 403, 404, 417, 418, 419, 420—Statute, construction of.*

The words of a Statute should be given the extended meaning of which they are reasonably susceptible rather than the meaning as restricted by context, when such restriction would reduce them to mere surplusage.

The words "*dishonest misappropriation*" in section 562 of the Code of Criminal Procedure apply to the offence of criminal misappropriation in all its forms and are intended to include offences punishable under section 404 as well as under section 403 of the Indian Penal Code. Similarly, the word "cheating" in the same section covers the offence of cheating in all its forms and is intended to include offences punishable under sections 418, 419 and 420 as well as under section 417 of the Indian Penal Code. HAR NARAYAN *v.* RAMJI DAS, 12 A. L. J. 465; 15 CR. L. J. 375 **743**

Criminal trial—*Witness re-called on order of prosecuting officer—Magistrate—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 540.*

A complaint for misappropriation of Government moneys was filed by the order of an Assistant Collector. After the close of the case for the prosecution, the Assistant Collector directed the Magistrate

Criminal trial—concld.

to re-call and re-examine two of the prosecution witnesses and at the same time interviewed those witnesses and ordered them to give evidence. The Magistrate complied with the Assistant Collector's direction:

Held (reversing the conviction and sentence), that, as the Magistrate had virtually abdicated his magisterial function and become a mere delegate of the Assistant Collector, the trial was without jurisdiction. NABIBUX *v.* EMPEROR, 7 S. L. R. 82; 15 CR. L. J. 375 **743**

Custom. *See* HINDU LAW; PRE EMPTION.

——— **Adoption**—*Adopted son dying without lineal descendants - Succession to ancestral property and to self-acquired property of adoptor.*

According to general agricultural custom, the collaterals of an adoptor succeed to the ancestral property of the adoptor on the death of the adopted son without lineal descendants, but in the case of self-acquired property of the adoptor, the succession devolves not upon the collaterals of the adoptor but upon the heirs of the adopted son.

Special custom must, therefore, be established if the collaterals of the adoptive father claim the self-acquired propety of the latter. JOT RAM *v.* HARDAWARI, 22 P. L. R. 1914; 27 P. R. 1914 **527**

——— **Alienation** — Awans *of Talagang Tahsil, Attock District—Powers of father.*

An *Awan* of the Talagang Tehsil, who has sons living, has not unlimited powers when dealing with ancestral property. MUHAMMAD KHAN *v.* DALEL, 42 P. L. R. 1913 **934**

——— Khatri *traders of* Mouza *Khairabad, Jullundur District—Hindu Law or custom, test for applying—Presumption.*

The mere fact that the *Khatri* traders of *Mouza* Khairabad, Jullundur District, have owned land for six or seven generations does not create any presumption in favour of their being governed by agricultural custom in matters of alienation.

The primary test for determining whether agricultral custom or Hindu Law applies is whether agriculture is followed as a chief means of livelihood.

In the case of *Khatris*, the initial presumption is that they follow Hindu Law. HAKIKAT RAI *v.* RAM SARAN DAS, 16 P. R. 19.4; 130 P. L. R. 1914 **154**

——— *Rohtak District—Onus of proof.*

In the Rohtak District, there is no custom empowering an agricultural proprietor to deal with his ancestral property as he likes.

The onus of proving so exceptional a custom lies on those who affirm it. BUDAL *v.* KIRPA, 148 P. L. R. 1914; 76 P. R. 1914 **211**

——— *Widow—Widow's rights in absence of collaterals*—Patti, *owners of - Right to contest widow's alienation—Onus of proof*--Wajib-ul-arz - *Instances.*

A widow's estate is a limited one but it is only limited for the benefit of reversioners. Where

Custom—contd.

there are none, she is to all intents and purposes an absolute owner.

Where the proprietors of a *patti*, who were not a compact body, but belonged to miscellaneous tribes, sued for possession of a land willed away by a widow in favour of her brother's son, on the ground that the widow had no power to alienate except for necessity, and that, in the absence of collaterals, they were entitled to succeed:

Held, that the onus lay on the plaintiffs. ALLAH DITTA *v.* GAUHRA, 3 P. R. 1914; 129 P. L. R. 1914 **127**

——— **family**—Service land—Inalienability—Effect—Service land remaining in family for long period of years and descending by rule of primogeniture **221**

——— **of dhar-dhura** (deep stream boundary)—*Iqrar-namaa* or declarations filed by riparian owner **224**

——— **Hindu Law**—Ghirths *of the Kangra District.*

As among *Ghirths* of the Kangra District no custom either in favour of or against the right of succession of brother's daughters and their sons has been proved, the Hindu Law shall prevail. NIHALA *v.* BHUTI, 10 P. W. R. 1914; 29 P. L. R. 1914 **418**

——— **Malabar Law**—*Crulans*—Delegation or alienation of powers - Proof **141**

——— Mauza *Girote, Tahsil Khushab, District Shahpur—Submersion of* malik qabza's *land—Emersion—Special custom—Burden of proof.*

In the village of Girote, Tahsil Khushab, District Shahpur, a special custom exists whereby a *malik qabza*, whose land is submerged, loses all his proprietary rights in that land and on its re-appearance it becomes the exclusive property of the full owners of the village.

The onus of proving a special custom lies on those who affirm it. MUHAMMAD CHIRAGH KHAN *v.* AMIR CHAND, 18 P. R 1914, 38 P. W. R. 1914; 110 P. L. R. 1914 **276**

——— **Stridhanam**—*Widow of* Agambadia *caste—Succession—Parents succeed in preference to husband's kindred.*

According to custom, the *stridhanam* property of a widow of the *Agambadia* caste, who leaves no issue, goes to her parents and not to her husband's kindred. VELLAICHAMI SERVAI *v.* MAMMUNDI SERVAI **124**

——— **Succession** — *Daughter — Collaterals—Female descendants — Muhammadan* Jats *of Sanawan* Tahsil, *Muzaffargarh District—Self-acquired property—Ancestral property.*

In the Muzaffargarh District the rights of females are very generally recognized especially among Muhammadan Jats and Pathans.

The word *aulad*, when used with regard to succession in a tribe which recognizes females as heirs, must be taken to include female as well as male heirs. SULTAN *v.* ALI MUHAMMAD, 66 P. L. R. 1914 **535**

——— Usmani Sheikhs *of Gurgaon—Daughter not excluded by collaterals of eighth degree.*

Custom—contd.

Among the Usmani Sheikhs of the Gurgaon District daughters are not excluded by collaterals eighth degrees removed.

Usmani Sheikhs admittedly stand on the same footing as Qureshies, Siddiqis and Ansaries, in that they all are what are commonly described as true Sheikhs, tracing their origin from Arabia. GOSIA BEGAM v. UMED ALI, 21 P. R. 1914, 127 P. L. R. 1914 **541**

——— ———Suit, right of—*Lambardar*, customary agent of proprietary body, whether can sue alone **20**

——— ———*Transfer of reversionary rights by some reversioners to another reversioner, validity of—Acquiescence—Waiver—Assignment—Relinquishment—Reversioner suing for pre-emption, whether debarred from contesting validity of alienation—Necessity—Reversioner only bound to pay amount paid by original vendee for necessity—Immaterial what pre-emptor might have paid in respect of alienation—Deed of relinquishment by some reversioners in favour of others—Tantamount to assignment—Valid*

All that was decided in *Tata* v. *Abdullah Khan*, 66 P. R. 1897 (F. B.) was that among agriculturists governed by customary law a reversioner of a deceased male proprietor, whose widow is in possession of his estate, cannot transfer his reversionary rights to a stranger so as to engraft the latter into the family and to enable him to contest any alienations made by the widow to the prejudice of her husband's reversioners. The Full Bench ruling is no authority for the proposition that one reversioner of a deceased male proprietor is legally incapable of transferring his rights of succession to another reversioner.

By bringing a suit for pre-emption in respect of an alienation by a widow, a reversioner must be taken to have admitted that the alienation was legally valid, and his sons are bound by their father's recognition of the validity of the alienation.

Although a pre-emptor might have paid a larger amount before obtaining possession of the land alienated by a widow, a reversioner in a suit challenging the validity of the alienation cannot be called upon to pay to the said pre-emptor more than what was advanced by the original vendee to the widow for a necessary purpose.

Where some of the reversioners of a male proprietor executed a deed of relinquishment of their shares in favour of the other reversioners in consideration of the latter having undergone much trouble and expense in connection with a declaratory suit which they had successfully fought in respect of an alienation by the widow of the said male proprietor:

Held, that the deed was in effect and must be treated as a deed of assignment of reversionary rights, and since the assignment was made by some of the reversioners in favour of the remaining reversioners, it was a perfectly valid assignment. GUJAR v. AULIYA, 184 P. L. R. 1914; 78 P. R. 1914 **835**

——— ——— **of village,** *proof of*—Ikrar-i-malikan-e-deh *dictated by landlords alone, how far proof of custom recorded therein—Admissibility of evidence—Instances, citation of, in proof of custom, if indispensable—Trees, transferability of.*

Custom—concld.

The entries in *Ikrar-i-malikan-e-deh* recording a village custom as stated by the landlord is, in the absence of fraud or grievous error, binding upon persons whose interests are affected by reason of those entries, even though the said entries were not prepared in the presence of, and were not attested by, such persons.

Statements in *Ikrar-i-malikan-e-deh* and kindred documents regarding a custom are admissible in evidence to prove the custom.

It is not an indispensable condition to cite instances in proof of an alleged custom. SANAI PERSHAD v. BALAK RAM, 1 O. L. J. 78 **962**

Cutchi Memons—*Hindu Law of inheritance and succession—Joint family property—Cutchi son does not acquire interest in father's inherited property.*

The invariable and general presumption in the case of Muhammadans is that they are governed by the Muhammadan Law and usage, and it lies on a party setting up a custom in derogation of that law to prove it strictly. In matters of succession and inheritance, however, the Khojas and Memons are governed by the Hindu Law as applied to separate and self-acquired property.

Under the Hindu Law there is no such thing as succession and inheritance to joint family property and as such the law of joint family property is not applicable to Cutchi Memons.

Therefore a son of a Cutchi Memon does not acquire by birth an interest in property inherited by his father by the law of inheritance and succession. MANGALDAS v. ABDUL RAZAK, 16 BOM. L. R. 224 **565**

Dahyak right, when confers under-proprietary right upon holder of former right—Cash *dahyak* right, whether connotes right to possession—Jurisdiction of Civil and Revenue Courts—Transferability of *dahyak* right—Preferential right to lease, whether transferable—Holder of *dahyak* right and of preferential right to lease, whether an under-proprietor—Refusal of Settlement Court to grant sub-settlement to lessee of whole village, effect of **231**

Damages for breach of warranty—Vendee's previous contract with third person—No notice of this to vendor of goods—Vendor's liability **949**

———, *illegal levy of—Salvage—Rules framed by Government under G. O. No 586 Rev, dated 3rd November 1896, validity of—Proprietary rights of Government—Floating drift-wood—Common law right of Crown.*

In a suit by the owner of certain drift-wood floating in the river Godavari against the Secretary of State for India in Council and two other defendants for recovery of damages on account of salvage illegally collected from him under rules framed by Government under G. O. No. 586 Rev, dated 3rd November 1896:

Held, that the plaintiff was entitled to recover the sum from the Secretary of State for India in Council.

The drift-wood salvage rules contemplate full proprietary rights of Government in the drift-wood and as such the rules promulgated by Government under G. O. No. 586 are *ultra vires*, because the

Damages —concld.

ownership of a river does not necessarily imply the ownership of the drift-wood therein. The Common Law rights of the Crown under English Law to all unclaimed wrecks including flotsam, jetsam, lagan, etc., in territorial or tidal waters are not more extensive in India than in England and do not apply in this respect. MANDAVILLI SUBBA ROW *v.* GUDDA LAKSHMAYYA, 15 M. L. T. 121 **371**

——— ———, measure of **403**

——— ———*Suit for injunction and damages – Execution proceedings—If damages can be ordered to be ascertained in execution.*

In a suit for injunction and damages, it is altogether beyond the authority of the Court to leave the ascertainment of damages for determination in execution as if they were mesne profits. MOULA BAKSH *v.* STRUGHAN DEB DHABAL **595**

Dar-patnidar. *See* PATNI TALUKS REGULATION.

Dattaka Chandrika, authority of. *See* HINDU LAW.

Declaration, *suit for, that defendants are not under-proprietors — Previous decision of Revenue Court holding defendants to be something more than ordinary tenants—Subsequent decision of Revenue Court holding defendants to be under-proprietors—Cause of action, accrual of—Lessee under Settlement Court decree vacating holding for five years and getting it back on new lease not different from terms of decree, effect of—Ouster—*Dahyak *right, when confers under-proprietary right upon holder of former right—Cash* dahyak *right, whether connotes right to possession—Jurisdiction of Civil and Revenue Courts —Transferability of* dahyak *right —Preferential right to lease, whether transferable—Holder of* dahyak *right and of preferential right to lease, whether an under proprietor—Refusal of Settlement Court to grant sub-settlement to lessee of whole village, effect of—Costs—Court fee paid on withdrawn part of claim, whether allowable as costs.*

In a suit between the parties the Revenue Court decided that the status of the defendants was not that of ordinary tenants In the next case between the parties the same Court held that the defendants were under-proprietors. Then the plaintiff brought a suit in the Civil Court for a declaration that the defendants were not under-proprietors:

Held, that the cause of action for the civil suit arose not with the previous decision but with the entry of the defendants' names in the under-proprietary *khewat* under the subsequent order of the same Court.

Where a lessee under a Settlement Court decree vacated his position as such for five years and then had a new lease of the holding granted to him not materially inconsistent with the terms of the Settlement Court decree:

Held, that the rights of the successors in-interest of the lessee under the Settlement Court decree were not destroyed or diminished, as the ouster did not last long enough to bar their rights by limitation.

A *dahyak* right, *i. e.*, a right to ten per cent of the rent roll, unless accompanied by possession otherwise than by favour or force, does not necessarily connote that the holder of that right has also an under-proprietary right in the land.

Declaration—concld.

A cash *dahyak* right does not necessarily carry a right to possession.

It may be open to a Civil Court to declare that a tenant holds under a decree of Court, leaving it to the Revenue Courts to decide in detail upon the rights, liabilities and other incidents of that tenancy.

A *dahyak* right is, ordinarily speaking, transferable.

A preferential right to a lease does not become transferable even if coupled with a *dahyak* right.

A *dahyak* right coupled with the right to claim a lease over the total of villages by preference to all comers does not, therefore, confer on the lessee an under-proprietary right

The refusal of a Settlement Court to grant a sub-settlement to a lessee of the whole village conclusively shows that the lessee is not an under-proprietor.

The Court-fee paid on that part of the claim which is subsequently withdrawn cannot be allowed as costs. RAM JIYAWAN *v.* MOHAMMAD ABDUL HASSAN KHAN **231**

Defamation. *See* PENAL CODE, s. 499.

——— ——— Caste—*Panchayat*—Jurisdiction **301**

——— ——— Gross libel—False imputations—Justification—Absence of due care and attention—Bail—Charge to Jury—Misdirection—Privy Council practice—Criminal appeal—Royal prerogative—Constitutional and administrative reason—Court of Criminal Appeal in England, rules and procedure of, how far binding on Privy Council **661**

——— ——— Privileged—Imputation contained in petition to higher authorities for redress of grievances **489**

Dhar Dhura. *See* CUSTOM.

Diary not used to refresh memory, whether evidence—Improper admission of such diary, whether sufficient ground for interference **203**

Digwari tenure in Birbhum—*Nature of tenure—Government's approval of heir—Sanction of Government, whether solely matter for executive authorities—Power of Civil Court to interfere—Power of Government to supersede heir of Ghatwal, though fit person.*

A Digwari tenure in Birbhum is similar to a Ghatwali tenure.

These tenures are hereditary, though not governed by the ordinary rules of inheritance, and are subject to the condition of the Government's approval of the heir.

Held, per *Fletcher, J*—"Sanction" in its ordinary signification means prior approval and implies a power to disapprove It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post.

Approval of Government of the office of Digwar is a matter solely for the Executive Authorities.

The Civil Courts cannot interfere to re-instate a Ghatwal who has been dismissed by the Police authorities from the land which he formerly held as Ghatwal

Digwari tenure in Birbhum—concld.

Therefore, the Courts cannot interfere in favour of a person who has never been in fact appointed as a Ghatwal.

Held, per *N. Chatterjea, J.*—Where a Ghatwal is dismissed and has no male member of the family fit to be appointed at the time of his dismissal, there is a forfeiture of the tenure as far as his family is concerned, because the estate cannot remain in abeyance for the benefit of the heir who may be subsequently born. And where in such a case a stranger to the family is permanently appointed in his place, a subsequently born son of the dismissed Ghatwal on the death of the latter and after the tenure has passed to another family cannot claim it on the ground that it is his hereditary tenure.

The Government cannot disapprove of the heir of a Ghatwal or withhold its sanction upon any ground it likes and apart from the question whether he is a fit and proper person.

Consequently the heir of a Ghatwal, although fit, cannot be superseded by a stranger. HEMENDRA NATH ROY *v.* UPENDRA NARAIN ROY, 18 C. W. N. 1036 **849**

Divorce. *See* BUDDHIST LAW.

Divorce Act (IV of 1869), ss. 7, 45—*'Principles and Rules', meaning of—Civil Procedure Code (Act V of 1908), O. XVIII, r. 1—Restitution of conjugal rights, suit for—Marriage ceremony admitted—Coercion and non-consent pleaded—Right to begin.*

The words "principles and rules" used in section 7 of the Indian Divorce Act refer to rules of *quasi* substantive rather than of mere adjective law.

Where in a suit for the restitution of conjugal rights by a husband the wife admitted the marriage ceremony but pleaded coercion and non-consent:

Held, that having regard to the words "principles and rules" in section 7 of the Indian Divorce Act and to section 45 of the same Act, and Order XVIII, rule 1, of the Code of Civil Procedure, the right party to begin the case was the defendant. TUVURIAMMAL *v.* SANTIAGO, 7 BUR. L. T. 129 **242**

——— ——— **s. 45** **242**

Document—Execution of document—*Pardah-nashin* lady, conveyance by **10**

——— ——— *Material alteration, suit based on.*

Where a document has been materially altered so as to cast a definite liability on a party, the suit based thereon should be dismissed. GANGA NATH *v.* TARA, 28 P. W. R. 1914; 70 P. L. R. 1914 **596**

——— ——— Privilege—Adverse inference from non production when document privileged—Claim of privilege **25**

Drainage Act (VI B. C. of 1880), ss. 28 (2), 31, 36, 36A, 33 **782**

Drainage dues—*Instalment bond executed by proprietors in favour of Government to pay drainage dues—Suit for partition—Appointment of Receiver—Sale of property by Receiver to third person subject to drainage dues—Non-payment of instalments due by proprietors—Liability of third person to pay instalments—Public Demands Recovery Act (I B. C. of 1895), s. 7—Drainage Act (VI B. C. of 1880), ss. 28 (2), 31, 36, 36A, 38.*

The proprietors of certain properties executed in 1898 in favour of the Secretary of State an instalment bond under section 37 of the Bengal Drainage Act, 1880, for the payment of the amount which they were liable to pay under the terms of the Act. There was a partition suit in respect of the properties, in which a Receiver was appointed who sold the properties in suit to the plaintiff subject to the drainage dues. The proprietors having made default in payment of some instalments, a certificate was filed in the Collectorate against them. When the estate passed into the possession of the Receiver his name was added and after the plaintiff's purchase her name was added. The plaintiff's objection to this procedure having been rejected, she instituted this suit:

Held, that, under section 38 of the Drainage Act, the person liable to satisfy the engagement entered into with the defendant was the person who gave it; that under the terms of that section the provisions contained in the Public Demands Recovery Act, 1895, for summarily recovering the amount remaining due under the terms of the engagement, could be put in force against the persons who gave it; that as the plaintiff did not give it, she was not a person liable to pay the public demand within the meaning of section 7 of the Public Demands Recovery Act; and that no revision of the certificate having taken place under section 36A of the Drainage Act, the plaintiff was not bound to pay the instalments. NAGENDRA BALA CHOWDHURANI *v.* SECRETARY OF STATE, 18 C. W. N. 944; 19 C. L. J. 610 **782**

Dying declaration, *not bearing signature of deceased, whether admissible—Proof, oral testimony of person who may have heard it.*

A dying declaration not reduced to writing must be proved by the oral evidence of any person who heard it.

When a Police Officer is testifying to such a declaration, he can refresh his memory by reference to the notes he may have made or read at the time.

Such notes, to be themselves admissible in evidence as proof of the statement made then by the dying person, must bear the signature of the deponent. BHAGWAN *v.* EMPEROR, 10 N. L. R. 19; 15 CR. L. J. 243 **195**

Easement—*Light and air—Obstruction—Test of right—Nuisance—Substantial interference with comfortable enjoyment—Blocking up plaintiff's window to extent of three fourths.*

The test of the interference of the right to light and air is whether the obstruction complained of is a nuisance: in other words, whether there has been a substantial interference with the comfortable enjoyment of premises.

The fact that a wall has been erected right against the window blocking it up to the extent of three-fourths would render it very probable that there has been a substantial interference with the access of light and air, but the question must be decided upon evidence when the defendant asserts that there

Easement—concld.

has been no such obstruction. The mere fact that the wall erected by the defendant is in close proximity to the window of the plaintiff's house, is not decisive of the matter. BANOMALI ROOJ *v.* MOKUNDA LAL GHOSE **959**

Ejectment suit—*Burden of proof.*

In an ejectment suit the plaintiff must prove his title: but when he produces a title-deed which *prima facie* proves his title, the onus shifts to the defendant to show that the title-deed does not represent the true state of the facts of the case. SUKIRA NAINAR *v.* VIRASAWMI PILLAI **815**

Ejusdem generis, principle of **111**

Embezzlement. *See* SEYCHELLES PENAL CODE, s. 216.

Encumbrance Certificate—Oral application to produce **533**

Endowment—Hindu Law—Power to appoint *mahant*, in whom vests **18**

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Equitable mortgage—Facts to be proved—Deposit of title-deeds—Property outside Bombay—Proof of intention **140**

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——— ——— *Benamidar* and real owner—Transaction entered into by *Benamidar* alleged to be unauthorised by real owner—Fraud **333**

——— ——— Contract by minor void—Misrepresentation—Minor representing himself major, whether minor can subsequently plead minority **799**

——— ——— *Ex parte* decree, cancellation of, suit for—Decree obtained by fraud—Claim, falsity of, effect of plaintiff's knowledge as to—Fraudulent conduct **976**

——— ——— Landlord and tenant—Notice of higher rent **619**

——— ——— Mortgage suit—Defendant setting up permanent tenure created before mortgage—Defendant, if estopped from setting up tenancy before mortgage—*Benamidar* defendant in mortgage suit, estoppel against, whether binds beneficiary **762**

——— ——— Not stating first mortgage in sale proclamation—Misrepresentation **426**

——— ——— *Reversioner accepting mortgage of land sold by widow, whether estopped.*

A reversioner who unknowingly accepts mortgage of a land sold by a widow is not estopped from contesting the sale, if he understood the vendee to be mortgaging not what he had purchased from the widow, but his own share. SHERA *v.* HAYAT MUHAMMAD, 32 P. W. R. 1914; 108 P. L. R. 1914 **525**

European British Subject—Special procedure—When accused European British Subject, he must be informed of his right to be tried according to special procedure **505**

Evidence, acceptance as—Burden of proof to show entry incorrect—Record of Rights **604**

——— ——— Arbitration proceedings—Clerk taking note of evidence—Note, whether admissible **940**

——— ——— Compensation — Market-value — Price paid by owner **542**

——— ——— *Entries in books of Hardwar priests, their importance, if made ante litem motam—Joint ownership of an open plot of land, remote bearing on relationship of such owners—Oral evidence of persons as to relationship having no means of knowledge.*

Entries in the books of Hardwar priests, if proved to have been made *ante litem motam*, would be of great value in establishing a pedigree table

The fact that an open plot of land is the joint property of a large number of persons residing in the same locality has a very remote, if any, bearing upon the relationship *inter se* of the joint owners.

Oral evidence of persons who have no means of knowing the alleged relationship and are interested in the success of the case supported by them cannot be of much value for the purpose of proving an issue upon the decision of which the title to property of a large value depends. RAM SINGH *v.* DAULAT SINGH, 171 P. L. R. 1914; 97 P. W. R. 1914 **550**

——— ——— Land Acquisition—*Bustee* land—Market-value—Evidence relating to under-tenants and rents paid by them whether relevant—Value of other lands, which are not *bustee* lands, in the neighbourhood, if relevant **412**

——— ——— *Mortgage—Proof of copy from registration—Fixed-rate holding—Sub-tenancy in* sir *holding—Acquisition of fixed-rate holding—Land mortgaged by sub-tenant of* sir *—Mortgagee continuing in possession, effect of.*

The mere production of a copy of mortgage-deed is not sufficient to prove the mortgage.

A sub-tenancy of *sir* land in 1864 could not develop into a fixed-rate tenancy.

Obiter.—If the fact were established that a sub-tenant of *sir* land mortgaged his plot with possession to a mortgagee and the *sir* rights vanished and the mortgagee continued to hold as tenant and occupancy rights were acquired, then the acquisition would enure for the benefit of the mortgagor and on redemption the latter would be entitled to possession. MATA PROSHAD *v.* GAJADHAR **864**

——— ——— Mortgage deed—Fictitious entry—Property not in existence—Entry made to obtain registration at a certain place—Decree—Concurrent findings—No evidence—Decision of law—Mistake—Rectification of mistake—Pleadings **637**

——— ——— Out and out sale—Unregistered letter written next day to convert sale into mortgage or to deprive it of its legal effect, whether admissible in evidence **400**

——— ——— Recitals in deed, whether sufficient evidence of necessity—Alienation by widow—Legal neecessity—Onus of proof—Nature of evidence **715**

Evidence—concld.

——— Relevancy—Statement made by accused—Question asked by person in authority—Admissibility of statement—Relevancy—Weight—English Rules of evidence, how far binding on Supreme Court of Hong Kong—Privy Council criminal appeal—Grounds for interference—Consideration of evidence **678**

——— Sale before adjudication—Evidence given at insolvency proceedings, whether admissible against purchaser in proceedings under section 27 **597**

———, sufficiency of—Circumstantial evidence, nature of—Theft of currency notes—Opportunity of entering room not accused's exclusively—Encashment of stolen notes in presence of accused's relation—Money in accused's possession after theft, not accounted for satisfactorily **501**

Evidence Act (I of 1872), s. 3 **25**

——— **s. 13** **773**

——— **s. 34**—*Interpretation — Book — Books of account Regularly kept.*

An entry to be admissible in evidence under section 34 of the Indian Evidence Act must be shown to be in a *book*, that book must be a *book* of account, and that account must be one *regularly kept in the course of business.*

(*a*) The term 'book' may properly be taken to signify ordinarily a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume.

(*b*) A book which merely contains entries of items, of which no account is made at any time, is not a book of account for the purposes of section 34. The Legislature did not intend to include in that category any record in which there is no process of reckoning.

(*c*) The fact of regular maintenance and general accuracy of account-books, if not admitted, must be formally proved by the evidence of some person competent to speak to the facts.

The evidential value of account books will, of course, depend upon their formality and the checks against fraud secured by the method of keeping them, but that is not to be confused with admissibility. As regards admissibility section 34 makes no difference between the cash-books and ledgers of a large Bank and the day-book of a house-keeper. The difference lies in the weight to be given to the entries therein. MUKANDRAM *v.* DAYARAM, 10 N. L. R. 44 **833**

——— **s. 35**—Report of official of Native State **18**

——— **s. 41** **221, 325**

——— **s. 43** **773**

——— **s. 44**—*Confirmation of Court sale induced by fraud—Ejectment suit by auction-purchaser—Right of defendant in possession to prove plaintiff's fraud.*

Where the plaintiff in an ejectment suit relies on his title as a purchaser in a Court auction it is open to the defendants in possession of the property to show that such purchase was procured by fraud and, therefore, passed no title to the plaintiff. GNANIAR ROWTHER *v.* KRISHNA AIYAR, 1 L. W. 208 **1**

Evidence Act—concld.

——— **s. 63 (5)**—*"Seen", meaning of—Oral evidence of contents of document—Statement of illiterate witness as to contents, whether sufficient.*

An oral account of the contents of a document given by some person who merely saw it with his eyes but was unable to read it is merely the repetition of what was told or read out to him by somebody else. The word 'seen' in clause 5 of section 63 of the Evidence Act means something more than the mere sight of the document. The clause contemplates the evidence of a person who having seen and examined the document is in a position to give direct evidence of the contents thereof. Hence the evidence of an illiterate person as to the contents of a document is not sufficient within the meaning of the clause. GHURE *v.* CHATRAPAL SINGH, 12 A. L. J. 209 **11**

——— **s. 74**—*Evidence—Public document—Notice under s. 107, Criminal Procedure Code, whether public document — Proof of identity of persons concerned, if necessary.*

A notice under section 107 of the Criminal Procedure Code is a public document within the meaning of section 74 of the Evidence Act, being the record of the act of a tribunal, and in one sense the act of the tribunal itself. But it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence. SHEIKH AMJAD *v.* LACHMI KANT JHA, 18 C. W. N. 644 **529**

——— **s. 90** **773**

——— **s. 91** **975**

——— **s. 105**—Onus that game is game of "mere" skill **484**

——— **ss. 105, 114**—*Proposal—Drawing list, whether proposal.*

A drawing list which set out on the first page the list of the winners drawn on a certain day in the month of May, and on its back contained the description: "The sweep for June is now open. It will close on the 20th June 1913. Settling day 23 June 1913. All tickets must be taken in the name of a member etc.," was *held* to be a proposal within the meaning of section 294A, Indian Penal Code. EMPEROR *v.* A. J. COOKE, 15 CR. L. J. 243; 7 BUR. L. T. 187 **195**

——— **s. 114** **135**

——— **s. 122**—*Communications by husband to wife—Disclosure by widow after husband's death, whether permissible.*

The prohibition enacted by section 122 of the Indian Evidence Act rests on no technicality that can be waived on will but is founded on principles of high import which no Court is entitled to relax.

Therefore, where a widow disclosed certain communications which had been made to her by her husband in connection with a murder, immediately before his death, her disclosure was excluded from consideration by the High Court on the ground that not only she could not be compelled to disclose those communications but that she should not have been permitted to disclose the same, for there was no one who did or could consent to the disclosure. NAWAB HOWLADAR *v.* EMPEROR, 40 C. 891; 15 CR. L. J. 303 **511**

——— **s. 125** **25**

Excise Act (XII of 1896), ss. 44, 57—*Police officer, invested with powers under section 44, whether Excise Officer for purposes of section 57.*

A Police Officer invested with powers of an Excise Officer under section 44 of the Excise Act, is to be deemed an Excise Officer for the purpose of section 57 of that Act, because he is an Excise Officer for the purposes of sections 36, 37 and 38 of the Act. EMPEROR *v.* SHIBBAN, 2 P. R. 1914 CR; 138 P. L. R. 1914; 15 CR. L. J. 336 **688**

——— **s. 57** **688**

Excise Act (B. C. V of 1909), s. 46—*Cocaine—Illicit possession—Possession of cocaine exceeding five grains—Burden of proof of authority under which cocaine was obtained.*

Under the Government Notification of November 20th, 1911, it is an offence for any person other than those specified to have any cocaine at all except with medical man's prescription, and then only five grains. In all cases, the burden of proof to show under what authority he obtained cocaine lies on the accused. MAKUND SAHU *v.* EMPEROR, 15 CR. L. J. 262; 18 C. W. N. 1023 **470**

——— **s. 67**—*Excise officers assaulted before they entered any house or made any arrest or search—Rioting—Separate sentence—Penal Code (Act XLV of 1860), ss. 147, 353.*

A Deputy Inspector of Excise received information that he would find certain persons in the act of illicitly distilling liquor, if he went to a certain village. He accordingly went with two Sub-Inspectors and a large number of peons, who actually saw the accused and their men removing the distilling apparatus. But before they had time to enter the house and arrest those persons or to make any search whatever, the accused sallied out and proceeded to beat the peons. The accused were convicted of rioting and using criminal force to deter a public servant from the discharge of his duty:

Held, that the assault upon the officers was wholly unjustifiable and the riot was one of a very serious and lawless nature, that the Excise Officers were acting under section 67 of the Excise Act (V of 1909 B. C.); that before they had time to do anything lawful or unlawful in respect of any search, they were wantonly assaulted by the accused, and that as there was no search, it could not be said that there was a search not in accordance with law.

A separate sentence should not be passed upon people convicted of rioting for the offence which is specifically stated to have been the common object of the assembly, unless a specific charge is laid against the individual members of committing such an offence. Therefore, persons who are shown to have committed a separate offence under section 353, Indian Penal Code, should receive a separate punishment, even although the common object of the riot was to commit that offence. PRAKASH CHANDRA KUNDU *v.* EMPEROR, 15 CR. L. J. 251; 18 C. W. N. 918 **203**

Execution—Appeal—Dismissal for want of prosecution—Decree capable of execution, that of lower Court **649**

———*Application by subsequent transferee of decree—Objection by judgment-debtor—Court's duty to inquire.*

Execution—*concld.*

Where a subsequent transferee of a decree applies for the execution of the decree, and the judgment-debtor contends that the transfer is fraudulent, that the prior transferee owes him a sum of money and that the subsequent transferee took the assignment with the notice of his claim, the Court should inquire into the contentions and find upon them and should not summarily *refuse* to recognise the assignment. KOTHANDAPANI NAIDU *v.* KUPPUSAWMY NAICKER, 1 L. W. 206 **951**

———Attachment of one member's share—Jurisdiction of Small Cause Court **156**

———Executable decree—Limitation **644**

———Fraudulent execution of decree—Suit for damages, whether barred—Damages, measure of **405**

———*Informal application—Step-in-aid of execution.*

An informal application, though infructuous, to carry on the proceedings in execution, may still operate to keep the decree alive. SRINIVASA AIYANGAR *v.* TIRUMALAI CHETTY, (1914) M. W. N. 372; 15 M. L. T. 337 **99**

———Mortgage-decree—Satisfaction of part of decree **848**

———No process issued—Money paid into Court by judgment-debtor, whether money realized by the application **241**

———of rent-decree against other property of *dar-patnidar*, if allowable **393**

———Sale—Money-decree—Hypothecation—Construction of Statute **632**

———, step-in-aid of—Property attached—Encumbrance Certificate—Oral application to produce—Limitation Act (IX of 1908), Sch. I, Art. 182 (5) **533**

———Whether pre-emptor can get possession without re-paying the amount drawn by his creditor **869**

——— **of decree**—Application by alleged transferee of real decree—Judgment debtor served with notice—*Ex parte* order—*Res judicata* **286**

——— **proceedings**—Suit for injunction and damages—If damages can be ordered to be ascertained in execution **595**

———Sales, whether Court gives warranty of title in **871**

Ex parte decree, *cancellation of, suit for—Decree obtained by fraud—Claim, falsity of, effect of plaintiff's knowledge as to—Fraudulent conduct—Estoppel.*

If a plaintiff knowing his claim to be baseless puts a defendant into Court and succeeds in getting an *ex parte* decree, he cannot, in a subsequent suit brought by the latter for cancellation of the decree on the ground of its being obtained by fraud, plead that he was not guilty of fraudulent conduct. That very knowledge of the plaintiff amounts to fraud. MADARI SINGH *v.* RAM RATAN, 1 O. L. J. 92 **976**

Ex parte decree—concld.

——— ——— ——— Declaration of service good, under what circumstances—Indefinite absence of the defendant—Evidence apart from the return can be received by the Judge **14**

——— ——— ——— *Non-appearance of defendants at adjourned hearing—Decree ex parte in plaintiff's favour—Application by defendants for setting aside ex parte decree—Civil Procedure Code (Act V of 1908), O. IX, r. 13; O XVII, rr. 2 and 3.*

The provisions of Order IX of the Civil Procedure Code by themselves do not apply to a case in which the defendant has appeared in answer to a summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in Order XVII which deals with adjournments.

Where the hearing of a case is proceeding from day to day and the case is adjourned to the next day because the cross-examination of a witness is unfinished, the adjournment is not at the instance of a party under rule 3 of Order XVII, but at the instance of the Court under rule 2. Under such circumstances if the Court disposes of the suit *ex parte* on the default of the defendants, it does so under rule 2 of Order XVII in one of the modes under Order IX, and the defendant's application under rule 13 of Order IX for setting aside the *ex parte* decree may be entertained. ENATULLA *v.* JIBAN MOHAN ROY, 18 C. W. N. 775: 19 C. L. J. 535 **769**

Explosive Substances Act (VI of 1908), ss. 5 and 6.

It is immaterial under what section of the Explosive Substances Act an arrest is made, if, in fact, the circumstances are such that the Act justifies the arrest. The officer making the arrest is entitled to call in aid any Statute which justifies his action quite irrespective of whether or not it was present to his mind when he made the arrest. D. WESTON *v.* PEARY MOHUN DAS, 40 C. 898: 18 C. W. N. 185 **25**

——— ——— ——— **s. 6** **25**

Fair comment—Criticisim—Truth—Reasonable grounds **661**

Family Settlement. *See* HINDU LAW.

Fazendari tenure—*Sub-letting lease—Construction.*

All true Fazendars are persons holding plots of land upon perpetual tenure, subject only to the payment of nominal rents to the Government. Any true Fazendar might deal with the land he holds as he pleases and might sub-let it on any conditions he likes, and it would not necessarily follow that any element of the original tenure was introduced into the sub-contracts.

Where a tenant takes from a Fazendar, and in the lease it is expressed that the tenant takes on Fazendari tenure, and the terms of the lease are not in themselves inconsistent with such an expression, the term Fazendari must be read between the parties in the sense in which it has always been understood to denote the character of the tenure of the true Fazendar as between himself and the Government, that is to say, a permanent tenure. YESHVANT VISHNOO NENE *v.* KESHAVRAO BHAIJI, 16 BOM. L. R. 252 **880**

Fishery right in river, grantee of **136**

Foreclosure—Notice—Defect—Mis-description of mortgaged property **97**

——— ——— **decree**—*Pusine* mortgagee not party—Suit for sale by *pusine* mortgagee—Transferee from mortgagee—Transferee of property cannot plead Article 134 **559**

Foreign Jurisdiction Act, 1890, s. 4 (1)—*China and Corea Order in Council 1904, Arts. III, V, VI, XIX, XXII, XXXV, L—Supreme Court of Hong Kong—Jurisdiction—Foreigner—Afghan subject of the Ameer of Afghanistan enlisted in British Indian Regiment—Statement made by accused—Question asked by person in authority—Admissibility of statement—Relevancy—Weight—English Rules of evidence, how far binding on Supreme Court of Hong Kong—Privy Council criminal appeal—Grounds for interference—Consideration of evidence.*

The appellant, Ibrahim, an *Afghan*, was a natural born subject of the Ameer of Afghanistan. In 1911 he was enlisted and enrolled as a soldier in a British Indian Regiment and took the oath of allegiance to His Majesty. He also made a solemn declaration to go wherever ordered by land or sea. In 1912, while serving with the detachment of that regiment at Shameen, the appellant murdered the *Subadar* of the regiment and was taken into custody almost at once. Some ten or fifteen minutes after the occurrence the Officer Commanding the detachment came up and said to the appellant, "Why have you done such a senseless act?" To this the appellant replied, "Some three or four days he has been abusing me; without a doubt I killed him." The Judge of a Provincial Court having jurisdiction in the matter held the preliminary examination in the case and with the concurrence of the Commanding Officer sent it to the Supreme Court of Hong Kong for trial, which resulted in the appellant's conviction and death sentence being passed upon him. The Judge of the Court as well as the Commanding Officer were examined as prosecution witnesses in the case. The latter deposed as to the conversation he had had with the appellant, while the former deposed that the place of the murder was entirely within his jurisdiction; that the jurisdiction exercised at Canton on Shameen is the same ex territorial jurisdiction as is exercised throughout China by the Supreme Court; that it is still in force; that "the Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over them;" and that "Consular protection extends to trying persons and protecting them if they are improperly arrested."

By special leave an appeal *in forma pauperis* was preferred to the Privy Council on the grounds, *first*, that the Hong Kong Court had no jurisdiction to try the appellant, and, *second*, there was a grave miscarriage of justice by reason of the misreception of evidence:

Held, (1) that though there was no evidence of any treaty or other instrument by which the Ameer had agreed with the Crown for the exercise by His Majesty of power or authority over his subjects, yet it could be reasonably inferred from the practice of enlisting native *Afghans* in Indian Native Regiments—a practice which is matter of public knowledge—that thereby they were *de facto* brought under the authority of His Majesty and that the Ameer did in

Foreign Jurisdiction Act—contd.

fact consent to such enlistment with its consequences;

(2) that section 4 (1) of the Foreign Jurisdiction Act did not prevent the evidence of the Judge of the Provincial Court from being admissible upon the question of jurisdiction and that in the absence of contradiction and of any grounds of real doubt, that evidence by itself satisfied all the conditions of proof requisite to establish the jurisdiction of the Supreme Court at Hong Kong;

(3) that the evidence of the Judge of the Provincial Court shows: "that by 'usage, sufferance, or other lawful means,' His Majesty has jurisdiction at Canton; that it in fact extends to persons of the class to which the applicant belongs; that in the case of the appellant himself it was exercised, so far as the preliminary examination went; and that its exercise, both generally and in this particular case, was suffered by the Chinese authorities holding office *de facto*, and that they made no objection;"

(4) that even if a change in the constitution and form of Government in China took place or even if the Court could under the circumstances in any way take judicial notice of a political change in a neighbouring State, the evidence of the Judge was sufficient to show that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred;

(5) that as the appellant was a soldier of the Crown and subject to Military Law while stationed at Shameen and as he "enjoyed His Majesty's protection" in China, as of right he was subject to the jurisdiction of the Supreme Court of China;

(6) that the statement made by the appellant to his Commanding Officer was admissible in evidence.

When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country where all are serving together in the armed forces of His Majesty.

The words "and not otherwise" in Article V (3) of the China and Corea Order in Council, 1904, do not import that, if a person is in fact a foreigner, he can only be brought under the jurisdiction set forth in the order "in the cases and according to the conditions specified therein" They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such, is to be brought within the jurisdiction he can be so dealt with only in the cases and according to the provisions specified, but when a person is brought under the jurisdiction as "a British protected person," and the fact that he is a foreigner is only accidental, the limitation contained in the words "and not otherwise" does not apply.

The China and Corea Order in Council does not modify or exclude the principles and practice of English Law on the admissibility of statements of accused persons. English Criminal Law and practice apply to the Supreme Court at Hong Kong but they are not binding on that Court in all respects and particulars Sometimes a distinction must be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a

Foreign Jurisdiction Act—contd.

British possession in the Far East, where a mixed and fluctuating population is subject to the administration of the law by European Judges, whose duty it is to have regard alike to the principles of British justice and to the necessities of local order.

It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

The fact that a statement was made by an accused under circumstances of hope, fear, interest or otherwise, strictly speaking, goes only to its weight.

The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out or fear inspired by a person in authority, is a rule of policy.

If a Judge, after anxious consideration of the authorities, decides a legal point in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, his conduct does not amount to the violation of the principles of natural justice which has been said to be the ground for advising His Majesty's interference in criminal matters.

Leave to appeal to the Privy Council in criminal matters is not granted, except where some clear departure from the requirements of justice exists; nor unless, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.

The jurisdiction, which the Privy Council exercises in appeals in criminal matters, involves a general consideration of the evidence and of the circumstances of each particular case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter.

Where there is a great preponderance of unquestioned evidence on a point, the Privy Council cannot in any view conclude that there has been any miscarriage of justice, substantial, grave or otherwise.

Reg. v. *Thompson*, (1893) 2 Q. B. 12; 62 L. J. M. C. 93; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P. 312; *Rex* v. *Warwickshall*, 1 Leach C. C. 263; 2 East P. C. 658; *Reg.* v. *Baldry*, (1852) 2 Den. C. C. R. 430, 21 L. J. M. C. 130; 16 Jur. 599; 5 Cox C. C. 523; *Reg.* v. *Thronton*, (1824) 1 M. C. C. 27; *Reg* v. *Wilde*, (1835) 1 M. C. C. 452; *Reg.* v. *Kerr*, (1837) 8 Carr. & P. 176; *Reg.* v. *Cheverton*, (1862) 2 F. & F. 833; *Reg.* v. *Reason*, (1872) 12 Cox C. C. 228; *Reg* v. *Fennell*, (1889) 7 Q. B. D. 147 at p. 150; 50 L. J. M. C. 126; 44 L. T. 687; 29 W. R. 742; 14

Foreign Jurisdiction Act—concld.

Cox C. C. 607; 45 J. P. 666; *Reg.* v *Brackenbury*, 17 Cox C. C. 628; *Reg.* v. *Pettit*, (1855) 4 Cox C. C. 164; *Reg* v. *Berriman*, (1856) 6 Cox C. C 388; *Reg.* v. *Gavin*, (1885) 16 Cox C. C. 656 *Reg.* v *Male*, (1893) 17 Cox C. C. 689; *Reg.* v. *Goddard*, 60 J. P. 491; *Reg.* v. *Miller*, 18 Cox C. C. 54; *Reg.* v. *Histed*, 19 Cox C. C. 16 *Rogers* v. *Hawken*, 67 L. J. Q. B. 526; 78 L. T. 655; 62 J P. 279; 19 Cox C. C. 122; *Reg.* v. *Best*, (1899) 1 K. B 692; 78 L. J. K. B. 658; 100 L. T. 622; 25 T. L. R. 280; *Reg.* v. *Knight & Lhayre*, (1905) 20 Cox C. C. 711; 69 J. P. 108; 21 T. L. R. 310; *Reg.* v. *Booth & Jones*, (1910) 5 Cri App. Rep. 179; *Reg.* v. *Wong Chin Kwai*, 3 Hong Kong Law, Report 89, on the question of admissibili y of confession reviewed.

Clifford v *Emperor*, 22 Ind. Cas 496; (1914 M. W. N. 11; 16 Bom. L. R. 1; 12 A. L. J. 75; 15 M. L. T. 84; 19 C. L. J. 107; 18 C. W. N. 374; 15 Cr. L. J. 141; 7 Bur. L. T. 37; 40 I. A 241; *Riel* v. *Reg.*, 10 A. C. 675; 55 L. J. P. C. 28; 54 L. T. 339; 16 Cox C. C. 48, *Dillet's* case, 12 A.C. 459; 56 L. T. 615; 36 W.R. 81; 16 Cox. C.C. 241; *Ex parte Deeming*, (1892) A.C. 422; *Ex parte Mac Crea*, (1893) A. C. 346; 1 R. 375; 69 L. T. 734; 17 Cox. C. C. 702; *Reg.* v. *Bertrand*, 16 L. T. (N. S) 752; 10 Cox. C. C. 618; 36 L. J. P. C. 51; 1 P. C. 520; 16 W. R .9; 4 Moore P. C. (N. S) 460; *Makin* v *Attorney-General for New South Wales*, (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T 778; 17 Cox C. C. 704; 58 J. P. 148, were reviewed on the question of the grounds on which the Judicial Committee will grant special leave to appeal and hear appeals in criminal matters. IBRAHIM v. EMPEROR, 18 C. W. N. 705; 15 CR. L. J. 326 **678 P. C.**

Forfeiture on failure to comply with condition as to reclamation—Condition as to grant of fresh lease on application within one month of forfeiture notice **622**

Forgery. *See* CRIMINAL PROCEDURE CODE, s. 195.

Fraud. *See* CONTRACT ACT, s. 11.

——— , allegation of, to be formulated definitely and not merely hinted at **25**

——— of decree-holder—Purchaser not misled thereof **383**

——— *Impugning previous decree on ground of fraud—Mere general allegations, whether sufficient—Nature of fraud to be proved*—Res judicata.

One who seeks to impugn a decree passed after contest takes on himself a very heavy burden, which is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit were erroneous.

A prior judgment cannot be upset on a mere general allegation of fraud or collusion, it must be shown how, when, where, and in what way the fraud was committed.

The fraud must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining the decree by that contrivance.

Fraud—concld.

Where there is no suggestion that the decree in a previous suit between the parties was fictitious or that the plaintiff in the second suit was prevented by any contrivance from placing before the Court in the former suit any materials relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit:

Held, that the decree was binding upon the parties. NANDA KUMAR HOWLADAR v. RAM JIBAN HOWLADAR, 18 C. W. N. 181; 19 C. L. J. 457 **337**

——— ——— Transaction entered into by *benamidar* alleged to be unauthorized by real owner—Estoppel **363**

Fraudulent transfer—Benami *transaction—Real owner suing for possession from* Benamidar *on the ground that the intended fraud was wholly inoperative—Burden of proof, real owner to prove that fraud was inoperative.*

The respondents sought to recover some land which they alleged they had transferred *benami* to the appellant and another by a registered deed in order to defeat the claims of their creditors. The first Court dismissed their suit, but the Divisional Court granted them possession, without, however, ordering the cancellation of the sale-deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative:

Held, that they were entitled to recover the land under the Privy Council ruling in *T. P. Pethepermal Chetty* v. *R. Muniandy Servai*, 35 C. 551 (P. C.); 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 280; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B R. 266 35 I. A. 98.

Held, also, that it lay upon the plaintiffs to prove that no part of the intended fraud had in fact been carried out; that as they were alleging an intended fraud on their part and seeking to escape the consequences of it, they were bound to allege and to prove that the intended fraud was in fact wholly inoperative: and further that unless they alleged and proved that fact their suit must fail. SWEYDALI v ESNALI, 7 BUR L. T. 12 **370**

——— ——— ——— Suit to avoid—Frame of suit—Intent, must be to defraud creditors generally—One creditor securing payment of his debt—Purchaser for present consideration—Difference in their liability—Proof, required of each—Relationship—Presumption **341**

Gambling—Gaming materials found on premises—Presumption. **1003**

Gambling Act (II B. C. of 1867), ss. 10, 11—*Gambling—Ring-game—Game of mere skill—Meaning of "mere"—Evidence Act (I of 1872), s. 105—Onus that game is game of "mere" skill.*

The words "mere skill" in section 10 of the Bengal Gambling Act of 1867 import the meaning "pure skill." No form of the ring game can be a game of pure skill.

The games of skill spoken of in section 10 obviously refer to games where there are two parties pitting their skill against each other. Therefore, a ring-game kept for the profit of a man who does not play himself and does not pit his skill at all against anybody cannot fall within the exception to section 10 of the Act.

Gambling Act—concld.

The onus to show that any offence falls within a general exception of the Gambling Act is upon the accused and it is for him to show, in order to bring the case under section 10 of the Gambling Act, that the game played is a game of mere skill.

Where in a ring-game it was found that the particular position in which the table was slanted rendered it a matter of almost mere chance whether any ring alighted on the peg or encircled the coin:

Held, that the game was not a game of mere skill and did not fall under section 10 of the Gambling Act. RAM NEWAZ LAL *v.* EMPEROR, 15 CR L. J. 276 **484**

Ghatwal, power of Government to supersede heir of—Power of Civil Court to interfere **849**

——— **mahals,** suit for possession of—Court-fee according to market-value **89**

——— ——— **tenure.** *See* DIGWARI TENURE.

Gift. *See* MUHAMMADAN LAW.

——— *Issue general — Agent — Account — Relief — Pleadings.*

P while going on a pilgrimage to Mecca executed a deed of gift of her properties in favour of *D* and the latter on the same day executed a Nirbandhapatra in favour of the former, providing that a four-annas share of the properties thus conveyed should remain in the possession of *P* till her death and after that it would come into the possession of *D*. *P* on her return sued *D* to get the deed of gift set aside on the ground of fraud and misrepresentation and to render an account:

Held, that the deed of gift executed by *P* was a deed which operated *in præsenti* in favour of *D* and that although there was a general issue as to whether *D* was liable to account, the Court was not justified in passing a decree directing *D* to render an account in respect of the four-annas share comprised in the Nirbandhapatra on the footing that in regard to such share *D* occupied the position of an agent. MAHMUDA KHATUN CHOWDHURANI *v.* MAHOMED ELAHADAD KHAN PANI, 17 C. W. N. 427 **332 P. C.**

——— to mistress and her sons by unmarried person—Provision that property "shall be no concern of mine"—Illegitimate sons, whether meant—"Intimation to the contrary"—Man, whether father of illegitimate children **343**

———, validity of—Muhammadan Law—Seizin in case of property not admitting of physical possession—Gift, when complete—Gift of two distinct properties of only one of which possession is delivered—Possession obtained subsequent to gift, effect of **453**

Good behaviour—Qualifications of sureties—Conditions, validity of **476**

——— ——— ——— Security—Warrant case—Opportunity to bring witnesses **721**

Good faith. *See* PRIVILEGE.

Grant *of land under* Darkhast *rules—Rules not complied with—Jurisdiction—Adverse possession—Presumption—Confined to spot actually in possession*

Grant—concld.

The fact that a Divisional Officer contravened certain rules framed for his guidance, does not affect his jurisdiction to cancel a grant made by a Tahsildar.

The ordinary presumption that a person having title has possession over the whole if he exercises acts of ownership only over a portion leaving the rest as waste, does not arise in the case of a trespasser whose adverse possession will be restricted to the particular portions in his possession. KARIA KOWNDEN *v.* RAGHAVA REDDI, 1 L. W. 410 **520**

——— of waste land as *inam*—Both *warams* granted—Presumption—Suit of ejectment and for rent—Jurisdiction of Civil Court **553**

Groves—Custom in respect of, as recognised in Oudh **957**

Grove—Rights and interests of grove-holder in grove **963**

Guardians and Wards Act (VIII of 1890), s. 7—*Mother living in open adultery—Appointment of boy's paternal aunt.*

The appointment of a minor's paternal aunt as guardian is proper when it is found that the minor's mother is living in open adultery and has borne children to a man to whom she is not married. *Musammat* HARNAMI *v. Musammat* PARTAPI, 30 P. W. R. 1914, 67 P. L. R. 1914 **938**

——— ——— ——— ——— ——— **s. 42,** *order under—Appeal.*

An order appointing a guardian under section 42 of the Guardians and Wards Act is one passed in exercise of powers conferred by section 7 of the Act and as such is appealable under section 47 of the Act. GULAM HYDER GHOUSBUX *v.* ABDUL FATEH MAHOMED-KHAN, 7 S. L. R. 90 **776**

——— ——— ——— ——— ——— **s. 43**—*Power of Court to demand security from guardian of person of female ward.*

A District Court can demand security from the guardian of the person of a female infant ward to prevent his giving the infant in marriage to any person without the consent of the proper male relation of the girl. Such an order does not abate by the death of the person upon whose application it is made. GANDA MAL *v.* RAMJI DAS, 20 P. L. R. 1914; 12 P. W. R. 1914 **351**

Harbouring proclaimed offender—Criminal Intelligence Gazette, publication in, whether sufficient notice—Offender adopting false name—Harbourer misdescribing offender as his relation—Knowledge **701**

Hiba-ba-shart-ul-ewaz. *See* MUHAMMADAN LAW.

Hiba-bil-ewaz. *See* MUHAMMADAN LAW.

High Courts Act (24 & 25 Vic. C. 104). *See* CHARTER ACT.

Hindu Law—Adoption by widow—*Reservation of control over property by widow—Such reservation, whether fair and reasonable.*

A Hindu widow while adopting a boy stipulated with the natural father of the boy to have all the

Hindu Law—contd.

rights of management in her husband's estate in herself till her death:

Held, that the agreement was not binding upon the adopted boy inasmuch as it was not fair and reasonable. PURSHOTTAM MUKUND SAMANT *v.* RAKHMABAI, 16 BOM. L. R. 57 **539**

——— **Alienation by widow** —*Legal necessity—Onus of proof—Nature of evidence—Recitals in deed, whether sufficient evidence of necessity—Evidence—Witnesses, statements of—Discrepancies on material points, effect of.*

The onus of supporting a sale by a Hindu widow is on the purchaser and there must be evidence to prove legal necessity as would bind the husband's estate. Recitals in mortgages or deeds of sale with regard to the existence of necessity for alienation are not evidence by themselves of the fact and in order to substantiate the allegation there must be some evidence *aliunde*.

Discrepancies in the statements of witnesses on material points should not be lightly passed over, as they seriously affect the value of their testimony. BRIJ LAL *v. Musammat* INDA KUNWAR, 25 M. L. J. 443; 18 C. W. N 649; 12 A. L. J. 495 36 A. 187; 19 C. L. J. 469; 15 M. L. T. 395; 16 BOM. L. R. 352; (1914) M. W. N. 405 **715 P. C.**

——— ——— ——— *Part of consideration not binding on reversioners—Bona fide purchaser may retain property on paying to reversioners part of consideration not found binding—Proper decree.*

Where in a *bona fide* sale by a Hindu widow a portion of the consideration money is found not to be binding on the reversioners, it is at the option of the alienee to retain the property and pay the amount so found to the reversioners. KALAGARA RAMANNA *v.* KALAGRA GANGAYYA **778**

——— **Custom**—*Ghiths of the Kangra District.*

As among *Ghiths* of the Kangra District no custom either in favour of or against the right of succession of brother's daughters and their sons has been proved, the Hindu Law shall prevail. NIHALA *v.* BHUTI, 10 P. W. R. 1914; 29 P. L. R. 194 **418**

——— **Endowment**—*Power to appoint mahant, in whom vests—Evidence Act (I of 1872), s. 35—Report of official of Native State.*

In the absence of any provision to the contrary the power to appoint a *mahant* of an endowment would vest in the founder and his successors.

In connection with the appointment of a *mahant* of a temple situated in a Native State, the Political Agent referred the matter to the *Kotwal* of the State for inquiry. The *Kotwal* made a public inquiry and reported who had built the temple, who was the first *mahant* and by whom he was appointed:

Held, that the report was a public record of a public enquiry, and as such was admissible in evidence in a suit relating to the appointment of a future *mahant* of the temple. BALDEO DAS *v.* GOBIND DAS, 12 A. L. J. 179, 36 A. 161 **18**

——— **Family business**—*Attachment of one member's share—Execution—Jurisdiction of Small Cause Court.*

Hindu Law—contd.

The share of an undivided brother in the ancestral family money-lending business cannot be attached in execution of a decree against him personally.

A Small Cause Court has no jurisdiction to attach a half share in a joint family property, consisting partly at least of immoveable property. UMRAOSINGH *v.* SUGANCHAND, 10 N. L. R. 17 **156**

——— **Family settlement**—*Alienation by widow—Necessity—Consent of reversioners—Acquiescence of reversioners.*

In 1858 a Hindu widow, harassed by litigation and other difficulties, created an *ijara* extending over 60 years in favour of two out of three reversioners to save her husband's estate, of which she was in possession, from the operation of adverse possession. Subsequently a *dar ijara* of a portion of the estate was granted in 1863 to the son of the third reversioner. One of the two reversioners died in 1882, and after his death his four sons remained in the full enjoyment of the *ijara* until 1893 when the widow herself died. Upon her death, the said four sons brought a suit to set aside the *ijara* on the ground that it had been created by the widow without necessity:

Held, that as the creation of the *ijara* and *dar-ijara* was a part of a general family settlement which was effected for the benefit of the estate and injured nobody, that as the conduct of the objecting reversioners raised a presumption that they believed the arrangement to have been made in good faith and under such circumstances of necessity as would give it validity according to Hindu Law, and that as it has always been a feature of Hindu Law to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid, the plaintiffs' case must fail. PIJOY GOPAL MUKERJI *v.* GIRINDRA NATH MUKERJI, 18 C. W. N 673; 12 A. L. J. 711; 19 C. L. J. 620 16 BOM. L. R 425 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533 **162 P. C.**

——— **Father's debt**—*Liability of sons—Illegal debt—Enquiry by creditor—Necessity—Burden of proof, whether burden on creditor to prove that he made enquiries and bona fide believed that the debt was for necessary purpose.*

In order that the sons of a Hindu father may claim exemption from liability to a mortgage-debt contracted by their father, on the ground that it was illegal, *viz.*, contracted to redeem jewels pledged to pay a fine imposed upon the father when convicted of a criminal offence, it is not necessary for the sons to prove that the creditor also had notice of the illegality of the debt. It is for the creditor to establish that he made inquiries and *bona fide* believed that the debt was required for a purpose binding on the family. Where such inquiry was confined only to ascertaining that the debt was required to redeem jewels pledged to obtain money for payment of fine imposed upon the father, and did not proceed further, *viz.*, to ascertain the nature of the offence of which he was convicted, the inquiry is not sufficient and the creditor is not protected. SAVUMIAN *v.* NARAYANAN CHETTIAR, 15 M. L. T. 372 **248**

——— **Gifts to females,** *construction of—Gift by father-in-law in favour of his widowed*

Hindu Law—contd.

daughter-in-law — Presumption as to life estate—Possession by female without title—Adverse possession—Prescription.

Documents of gift to daughters or other female members of a Hindu family are not to be construed to mean necessarily that no absolute interest could have been intended to be transferred by them.

Therefore, there is no presumption in law that a gift by a father-in-law of his ¼th share in certain properties to his widowed daughter-in-law is only of a life-estate and much more so when he, along with this gift, has made other absolute gifts to others.

A female in possession of property without any legal title for more than twelve years acquires by prescription an absolute title to such property. BODI MUTIAYYA *v.* KAVOORI KODANDARAMAYYA, (1914) M. W. N. 387 **594**

——— **Impartible estate**—Widow of junior member—Right to be maintained out of estate—Member cannot bind his heirs by his compromise—Nature of widow's maintenance Facts to be considered, when allowing arrears—Denial—Burden of proof **831**

——— **Inheritance**—Yati, *meaning of*—Sat sisya—Chela *and* sisya, *distinction between.*

The virtuous pupil, *sat sisya*, takes the property of a *yati* or ascetic.

The virtuous pupil is one who is assiduous in the study of theology, in retaining the holy science and in practising its ordinances.

There is a clear distinction between a *chela* and a *sisya*. A *chela* is a personal attendant who may be raised to the rank of a *sisya*.

A *yati* means a *bhikshu*, a *sanyasi*, an ascetic or an anchorite.

A *Brahmin*, who left his home in the Punjab, lived in Burra Bazar, the very heart of Calcutta, earned money by *paths* and *pujas*, did not give up his sacred thread, did not take the *danda*, wore leather shoes, did not dress himself in *gerooa* or red clothes, deposited money in different Marwari firms in Calcutta which carried interest, and on one occasion went to his native village and purchased property of considerable value, was not a *yati* or ascetic.

A person who lives with his mother and brother, although he is always with a certain *sadhu*, cannot be said to be a *sat-sisya* of that *sadhu* to entitle him to inherit the *sadhu's* property. GOURI SHANKAR BYAS *v.* NIADAR SINGH, 15 C. W. N. 50 **231**

——— **Inheritance**—*Nucleus of family property—Self-acquisition—Burden of proof—Disqualifications—Congenital defect.*

Where there is a substantial nucleus of family property, the onus to prove that the property afterwards acquired by the father was his self-acquisition lies on those who assert it to be such property.

A mere tumour in the nasal cavity and on the nose is not a sufficient disqualification for inheritance as it is not congenital. SUBBA NAIDU *v.* VENKATARAMA NAIDU, 25 M. L. J. 208; 15 M. L. T. 418 **523**

——— **Joint family**—*Agreement to sell by one brother with consent of other binding as against subsequent sale by both.*

Hindu Law—contd.

An agreement to sell joint property by one of the two brothers, who constitute a joint Hindu family, with the consent of the other, is binding as against a subsequent sale of the same property by both the brothers. THAKUR DIN *v.* SEETLA SAHAI, 12 A. L. J. 52 **530**

——— **Madras Presidency**—*Adoption by widows under Will of husband—Will—Construction, rule of—Power to act given to more than one person, whether can be exercised by one of them—Executor—Trustee—Power to adopt given jointly to two widows—Whether surviving widow can adopt after other's death.*

In the Madras Presidency, a Hindu widow has no power to adopt a son to a deceased husband, except by express authority given by the husband in his life-time or by Will. Where a deceased leaves more than one widow, only one of them can receive the child in adoption so as to step into the position of being its adoptive mother. But a power given to more than one wife to adopt is not necessarily invalid. Their Lordships without deciding the question of the validity of a joint power of adoption and its interpretation, assumed that in this case such a joint power of adoption was validly given to the two widows by their husband.

In construing a Will, it is the primary duty of a Court in all cases to ascertain from the language of the testator what were his intentions. In so doing, the Court is entitled and bound to bear in mind other matters than merely the words used; for example, it must consider the surrounding circumstances, (such as the testator's race and religious opinions and aims arising therefrom, or in the case of Indian testators, their ignorance of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect), the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things summed up in the picturesque figure: "The Court is entitled to put itself into the testator's armchair." So soon as the construction is settled, the duty of the Court is to loyally carry out the intentions as expressed and none other. The Court is in no case justified in adding to the testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession to property in the absence of testamentary directions applying thereto. This duty of the Court is universal and is true alike of Wills of every nationality and every religion or rank of life.

If power is given to *A* and *B*, *persona designata*, to do an act if and when they think it desirable, the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. However, the case is different when the power is vested not in *persona designata* but in the occupants for the time being of a specified office, such as executors or trustees.

Hindu Law—contd.

A Hindu testator conferred upon his two widows the power of adopting a son in the following words: "That it it should strike them (*i. e*, the widows) to continue the *simustanum* (family), they should adopt a boy who is my *sannihita* (near relative)." No steps were taken to adopt a boy till some years after the death of one of the widows, when the surviving widow adopted one:

Held, (1) that the language of the testator pointed to the predominance of the secular and not of the religious motive of the testator, inasmuch as he did not direct that an adoption should take place, but he left it to depend upon the problematic concurrence of his widows in their views as to its desirability;

(2) that the words of the Will when properly construed related to choice and adoption by the two widows acting jointly, and referred only to the period of time when both widows were living, that at the death of one of them, the power to adopt given to both came to an end, and, therefore, the adoption by the surviving widow was of no validity. VENKATA NARASIMHA APPA ROW *v* PARTHASARATHY APPA ROW, (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 5.4; 26 M. L. J. 411; 15 M. L. T. 2.5; 16 BOM. L. R. 328; 37 M. 199 **165 P. C.**

——— ——— **Maintenance** *-Step-mother, right of—Partition among sons—Status of step-mother.*

Under Hindu Law, *Dayabhaga* as well as *Mitakshara*, a step son is not bound to contribute to the maintenance of his step-mother after a partition of the joint property has been effected between him and his step brother (the son of his step-mother). BISHEN DAS *v.* MANSA DEVI, 6) P. L. R. 1914, 47 P. R. 1914 **536**

——— ——— **Mitakshara** *-Berar—Succession—Sister—Uncle's son.*

Under the *Mitakskara* Law, as interpreted and followed in Berar, a sister comes after the paternal grandmother, but before the paternal grandfather and, therefore, necessarily before any descendant of the grandfather, *e. g.*, uncle's son. LHADIA *v. Musammat* BHAGI, 10 N. L. R. 24 **229**

——— ——— ——— *in Bombay Presidency—Succession—Sister and son of half brother—Res judicata—Co defendants.*

According to the *Mitakshara*, as understood in the Bombay Presidency, the sister comes next after the grandmother and *a fortiori* after the half brother's son in the order of succession.

In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants and that there was a judgment defining the real rights and obligations of the defendants *inter se*. HARI ANNAJI DESHPANDE *v.* VASUDEV JANARDHAN SATBHAI, 16 BOM. L. R. 283 **544**

——— ——— **Partition**—*Construction of partition-deed—Family consisting of father and three sons—Status after partition.*

Hindu Law—contd.

Where a Hindu father and his minor son by his second wife effected a partition with his two major sons by his first wife and the partition-deed recited that some of the immoveable properties shall be enjoyed by the two sharers (father and minor son) and that such and such property shall pass to and be enjoyed by each of the other two sons:

Held, that the father and the minor son still constituted a joint family and in a sale by the father the interest of the minor son also would pass SINGA IYER *v.* VENKATARAMANA IYER: (1913) M. W. N. 1016; 14 M. L. T. 555 **6**

——— ——— **Partition** *of ancestral property between adopted grandson and natural grandson—Authority of* Dattaka Chandrika.

According to the Hindu Law, on the partition of ancestral property between the adopted son of a natural son of a common ancestor and the natural son of another natural son of the common ancestor, the former is entitled only to one-fifth of the property, the remaining four-fifths going to the latter.

The *Dattaka Chandrika* is in the Bombay High Court a leading authority on the subject of adoption. BACHOO HARKISONDAS *v.* NAGINDAS BHAGWANDAS, 16 BOM. L. R. 261 **912**

——— ——— ——— ——— *Marriage, whether obligatory—*Samskara*—Reasonable marriage expenses—Necessity—Provision for marriage expenses of unmarried brothers, whether can be made in partition—Mesne profits, whether can be claimed in partition—Step-mother—Maintenance—Ancestral and self acquired property, distinction between.*

Per *Sundara Aiyar* and *Spencer, JJ.*—

As a marriage is an obligatory *samskara* for Hindus the reasonable expenses of performing the marriage of a male member of a co-parcener, if already incurred out of family funds, are necessary expenses and must be treated as binding upon the other co-parceners.

As the marriage is a *samskara* and it is not usual to omit it and it is necessary that *samskaras* should be performed out of faimly funds, the expenses for the marriage of unmarried co-parceners should be set apart at partition of the joint family property.

Par *Sadasiva Aiyar* and *Sundara Aiyar, JJ.*—

As the manager of a Hindu family is expected, after making all proper expenditure, to add any surplus that may be left to the family funds, no member of the family is entitled to claim a share of past profits on the ground of a separate residence, but if he is excluded by the act of the manager he is entitled to call upon the manager to account for the profits received during the time of his exclusion and to get his share of such profits as the manager is unable to account for.

Where an infant member of a Hindu family was living separately not owing to any fault on the part of the manager of the family:

Held, in a suit for partition by the infant, that he is not entitled to recover mesne profits, *i. e.*, a share of the past profits.

Hindu Law—contd.

In awarding maintenance to a Hindu mother in partition of family property, the word 'mother' should be taken as including the 'step-mother' whose right of maintenance is ordinarily against the share of her own son or sons.

Per *Sundara Aiyar, J.*—

A brother who has had his own marriage performed before partition of the family property is not entitled at the time of partition to object to a provision being made for the marriage expenses of his unmarried brothers.

Per *Sadasiva Aiyar, J.*—

The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu Law. The expression "paternal estate" when used in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain "*through his relations as such son*" to his father.

As the marriage of males is not an indispensable *samskara* the initiated brothers are not bound to perform the marriage *samskaras* for their uninitiated brothers, and, therefore, the expenses of the future marriage ceremonies of the latter ought not to be deducted out of the patrimony before it is divided SRINIVASA IYENGAR *v.* THIRUVENGADATHAIYANGAR, (1913) M. W. N. 282 and 1 34; 15 M. L. T. 307 **264**

——— **Religious office**—*Alienation of religous office—Custom—Heredity, devolution of religious office by—Disqualification, personal, permanent or temporary, effect of*—Puja miras, *meaning of—Civil Procedure Code (Act V of* 1908), *O. XXIII, r.* 3—Razinama—*Lawful agreement—Plaintiff representing public—Compromise by such plaintiff, whether binding on public—Contract Act (IX of* 1872), *s.* 16—*Undue influence—Pressing necessity of borrower.*

Per *Sadasiva Aiyar, J.*—The mere fact that a man is obliged to part with his properties for what he considers an unduly low price owing to his pressing necessities, is not a ground for holding that the contract by which he parts with his rights is affected by undue influence within the meaning of section 16 of the Contract Act.

A *pujah miras* involves the duty of touching, bathing and adorning, etc, the idols in a temple, the making of offerings to the idols, the reciting of *mantrams* and the doing of other similar services.

While sex is no disqualification for a woman to hold the office of management of a religions trust, whether Hindu or Musalman, a disqualification to inherit by reason of sex exists in the case of the office of temple *pujari* or *acharya pursha* or other priestly office in a temple or a mosque. Just as an outcaste cannot inherit a religious office by reason of his permanent disqualification, women also cannot.

It is settled custom that females by reason of their sex are permanently disqualified from performing the duties of the office of *archaka* in a *Saivite* temple which has been established according to both Vedic and Tantric rites

Hindu Law—contd.

Temporary disqualifications, such as minority or curable insanity, death pollutions and birth pollutions and so on, are not obstacles to obtain a right to a religious office by heredity. But permanent personal disqualifications (*e. g*, conversion to another religion, or female sex) do prevent the acquisition of the right to hold a religious office, notwithstanding that the condition of being the next heir to the previous holder of the office is fulfilled.

A religious office in a Hindu temple can be held by a right of heredity, but mere heredity *alone* cannot form a complete qualification entitling the heir to become the owner of such an office, that is to say, though the office is hereditary, it cannot be acquired through mere heredity.

A personally disqualified heir, *e. g*, a woman who is permanently disqualified to do the duties of an office cannot inherit the office and at the same time perform the duties of the office through a male proxy.

A permanent personal disqualification to perform the duties of a religious office is also a disqualification to inherit the right to enjoy the emoluments attached to the office.

As the duties of the *archaka* office are more important than the *rights* of the office-holder, that is, as the *rights* of the deity to have the office performed are entitled to much more consideration than the so called hereditary *rights* of any particular person to hold the office, a dispute involving the right to such an office, when it has once been brought before a Court for adjudication, cannot be settled lawfully by a mere *razinama* between the parties.

The alienation of a religious office by which the alienors obtain a pecuniary benefit cannot be upheld, even if a custom is set up sanctioning such an alienation. Such a custom, even if established by practice, would be illegal.

In a case in which a plaintiff is allowed to represent the public, a judgment by consent will not bind the public even if the consent was not purchased, and *a fortiori* if such consent was purchased.

In this case a *razinama* was held to be unlawful, because:

(1) it was really an alienation of a portion of a religious office;

(2) the alienation was made in favour of persons permanently disqualified to hold the office;

(3) there can be no lawful compromise of a dispute in respect of a religious office, the proper performance of the duties of which concerns not merely the parties to the compromise but principally affects the religious trust itself and the Hindu public for whose benefit the religious trust exists.

Per *Tyabji, J.*—It is not in every case opposed to public policy to provide that a religious office should devolve hereditarily even on persons not themselves qualified to discharge the duties of the office. The question must, in each case, be decided with reference to the particular facts of that case, including the nature of the functions to be performed by the office-holder according to the directions of the founder, the remuneration provided

Hindu Law—contd.

for the performance of those functions, and similar other matters.

Where the functions of an office are of such a nature that they can be performed equally well by any one of a large body of persons, and where the emoluments, provided for the performance of those functions, are far in excess of the necessary usual fees to be paid to the person who is engaged to perform them, the heir of the last office-holder should not be deprived of the office. But where the functions of the office are such that they require peculiar qualifications, intellectual or moral, for performing them, and accordingly a large income has been set apart by the founder for remuneration of the office-holder, the heir of the last office-holder should be superseded in favour of another sufficiently competent. SUNDARAMBAL AMMAL *v* YOGAVANAGURUKKAL, 26 M. L. J 315; (1914) M. W. N. 286; 1 L. W. 276 **72**

——— **Re-union**—*Difference of joint Hindu family and re-united family pointed out—Burden of proving re-union—Jewels made for ladies of family out of family funds—How far family property—Presumption.*

Re-union depends upon the intention of the parties as well as on the properties being constituted into joint family property. After a re-union the subsequent interest of the members in the re-united family would not be the same as if they had originally remained undivided. It would depend upon the properties which they bring into the common stock and in a subsequent partition the shares will be proportionate to the properties originally united.

The position of the members who re-unite is not the same as that of the members of a joint Hindu family. In the one case it is co-parcenary, they are joint tenants. In the other case they are tenants-in-common. Before partition the property goes by survivorship. After re-union the case is one of succession, though the persons who might take the property as heirs after re-union are not the same as those who would take if they were divided and there had been no re-union.

The burden of proving re-union is on the persons who set up re-union.

When it is found in a Hindu family that jewels were made from family funds for the use of a lady and it is also found that she alone has been using them and it is further proved that when other ladies came into the family, they had similar jewels made for their use and they have been using those particular jewels, such jewels form their separate property and are not the family property.

In the absence of rebutting evidence, the presumption is that the jewels belonged to the ladies who alone have been using them. ALAMELUMANGATHAYARAMMAH *v.* NAMBERUMAL CHETTY, 15 M. L. T. 352 **824**

——— **Reversionary heirs**—*Agreement between widow and reversionary heirs settling reversion on latter, whether legal.*

A Hindu widow and the expectant reversionary heirs cannot legally enter into an agreement whereby the latter's expectant reversionary rights become converted into vested reversionary rights. PALLA KANAKAMMA *v.* CHALLA RAMASAMI, 1 L. W. 237 **98**

——— ——— Right of son to contest liability under father's agreement **621**

——— ——— *Sale by father of joint family property—Part consideration not antecedent debt or for legal necessity—Cancellation of sale-deed—Son not bound to pay whole consideration.*

A son in a joint Hindu family can ask for the setting aside of an alienation made by his father, provided the consideration for the alienation is not an antecedent debt or for legal necessity. Therefore a sale-deed, the consideration of which is partly antecedent debt and party an advance made to the father which is neither an antecedent debt nor for legal necessity, can be cancelled only on the payment of that portion which is an antecedent debt. RAM DAYAL *v.* SURAJ MAL **891**

——— **Succession** — Daughter-in-law — Prescription—Person claiming limited interest entering upon land—Prescription cannot confer better title **719**

——— **Widow** — *Alienation without legal necessity—Voidable or void—Binding against all but reversioners—Symbolical possession—Effect of formal delivery—Suit for possession of land held by raiyats—Rent decrees obtained by plaintiff's predecessor—Saving of limitation—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144.*

An alienation by a Hindu widow, if made without legal necessity, is voidable and not void. Until the reversioner, including in that term the Crown, if there is no nearer reversioner, decides to avoid it or to treat it as a nullity, it stands good.

A formal delivery of symbolical possession is conclusive evidence between the parties that possession was delivered. It is perhaps somewhat of a legal fiction in many cases, but it is a very valuable one as it affords a starting point for limitation. But it cannot be denied that it is often little more than a fiction and it is not in the least conclusive evidence that the possession so delivered continued. There may be a presumption that such possession would continue until the contrary was proved, but that is all.

In a suit for possession of land held by *raiyats*, limitation is saved by rent decrees obtained by the plaintiff's predecessors within twelve years before suit. DEO NANDAN PERSHAD *v.* UDIT NARAYAN SINGH, 18 C. W. N. 940 **298**

——— **Widow**—*Rate of maintenance—Principle on which to be awarded—Arrears—Principle on which right of action depends.*

Where a Hindu widow asks for separate maintenance, the principle on which Courts should fix it is to look, *first*, at the mode of life of the family during her husband's life-time and to find out what amount will be sufficient to allow the widow to live, as far as may be consistently with the position of a widow, in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's

Hindu Law—concld.

life-time, *then* to see what the husband's estate is and how far that estate is sufficient to supply her with maintenance on this scale without doing injustice to the other members of the family, who also have their rights as heirs, or their rights to maintenance out of the estate.

Where the husband's share of the estate is amply sufficient to supply the widow with maintenance to live in the way of life to which she has been accustomed, and where the family belong to a class of people, *e g*, traders, who take greater pleasure in the accumulation than in the spending of riches, and are shown to have lived in a modest manner at an expenditure averaging about Rs. 400 a month, exclusive of house-rent, a monthly allowance of Rs. 140 a month to the widow is sufficiently liberal.

The right of action in respect of arrears does not depend upon the wrongful withholding of maintenance, nor is any demand necessary to give such a right, as her own status as the widow of one of the members of a joint family holding property in common is sufficient to entitle her to receive maintenance from the date of her husband's death. Arrears can be refused only when the person liable to make the payment has justifiable ground for inferring that the claim was abandoned, but waiver or abandonment cannot be necessarily inferred in every case from the fact of separate residence alone. PUSHPAVALLI THOYARAMMAL *v.* RAGHAVAIAH CHETTY, 15 M. L. T 95 **413**

——— **Widow**—*Suit by widow—Decree, when binding on reversioner—Invalid transfer by widow—Permissive or adverse possession—Transferee's title by adverse possession.*

The heirs of a Hindu widow are bound by a decree fairly and properly obtained against her.

Where the property in suit had been in the defendants' ancestors' possession for more than half a century under an invalid transfer by a Hindu widow to her brother and the plaintiffs' case for possession entirely depended on this possession being permissive, which the Courts below held he had entirely failed to show:

Held, that, as there is one continued chain of succession in the defendants' family without any title, the plaintiffs' suit must fail, as the defendants have got title by adverse possession. GOBINDA NATH *v.* MOHINI MOHAN MOJUMDAR **931**

——— **Will** — *Construction — Survivorship—Succession.*

In a Will in favour of two daughters with benefit of survivorship among themselves there was a provision that in the case of the death of either daughter leaving sons the share of such daughter would be paid to her sons:

Held, that on the death of one of the daughters her sons, who were born during the testator's life-time, would take the share of their mother in which she had got a life-interest.

The question of the rights of the sons born or adopted after the death of the testator was left open. SRIMUTTY RANIMONI DASSI *v.* RADHAPRASAD MULLICK, 26 M. L. J. 653; 18 C. W. N. 873 **713 P. C.**

Hire-purchase agreement—*Conditions not fulfilled—Sale.*

A hire-purchase agreement is not an agreement of sale until the conditions specified therein are fulfilled SINGER MANUFACTURING CO. LD *v.* GOBIND, 7 S. L. R. 103 **801**

Homestead land—Transferability **246**

House-trespass with intent to commit adultery—Husband's possession of house essential—Connivance or consent of husband, effect of **703**

Hundi—Days of grace—Contract, not allowing days of grace, whether permissible. **431**

———*insufficiently stamped—Original consideration, falling back upon.*

Where a *hundi*, which is the renewal of a prior *hundi*, is not sufficiently stamped, the plaintiff can fall back on the prior *hundi*. JAGAN PRASAD *v.* INDER MAL, 12 A. L. J. 361: 36 A. 259 **589**

Hypothecation. *See* PATNI TALUKS REGULATION **632**

Ijmali lands. *See* PARTITION.

Immoveable property—Kolhu *fastened to the ground.*

A *kolhu i. e.*, an iron sugar-cane press) fastened to the ground is immoveable property. MUSAI KURMI *v.* SUB KARAN KURMI **250**

Impartible estate. *See* HINDU LAW.

Improvement by tenant—Fixtures—Right to remove after determination of tenancy—Equitable right **762**

Inamdar and lessee—*Increase in quit-rent consequent on enfranchisement—Tenant, whether liable for increase.*

Where an *inam* is held by lessees for a fixed period and the *inamdar* gets it enfranchised for his own benefit, his lessees are not liable for the consequent increase in the quit-rent. RAVIPATI RAMAYYA *v.* ADDANKI SESHAYYA **765**

Income Tax Act (II of 1886), ss. 35, 36—*False statement—Prosecution, who can direct.*

No person can be prosecuted under section 35 of the Income Tax Act except at the instance of the Collector under section 36 of the Act. BANKAT LAL *v.* EMPEROR, 12 A. L. J. 258; 15 CR L. J. 296 **504**

——— **s. 36** **504**

Inherent power—District Court—Powers of transfer—Subordinate Judge's Court—Jurisdiction **425**

Inherent power of Court—Application to cancel sale by Insolvency Court on the ground of fraud—Inherent power of Court to entertain such application—When time begins to run **336**

Inheritance. *See* BUDDHIST LAW.

Injunction, *mandatory, suit for—Damages—Balance of convenience.*

Injunction—concld.

Where upon a balance of convenience, damages will be an adequate remedy, relief by way of mandatory injunction should not be granted. SETHURAM MADIGAI ROW v. GOPAL ROW PEISHWA, 1 L. W. 166 **785**

——— ——Perpetual injunction to keep door closed – Door closed but re-opened—Remedy of decree-holder—Suit or execution **247**

Inoculating Children—Trade or occupation **205**

Insolvency—Adjudication—Creditor of insolvent, if can enforce claim, without leave of Court **755**

Insolvency Act (II and 12 Vic. C. 21), s. 39—*Provincial Insolvency Act (III of 1907), s. 30 – Insolvency—Set-off – Fraudulent claim —Notice of available act of bankruptcy committed by debtor.*

The right of set-off is a doctrine of equitable jurisdiction and its object is not merely to avoid cross-actions but to do substantial justice. Therefore this doctrine would apply to prevent the great injustice which would arise if a person who is the insolvent's creditor on one account and his debtor on the other is compelled to pay 15 annas in the rupee on what he owed to the insolvent and to receive less than that amount on what the insolvent owed him, but it cannot be extended to cover cases where at the time of insolvency the debtor of the insolvent, with full knowledge that the latter has become hopelessly involved, buys up a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debt:

Held, also, that the transaction relied upon by the defendants being a bogus one, the set-off claimed could not be allowed The English Law on the subject discussed. RADHA KISHEN v. FIRM OF GANGA RAMS-RADHA KISHEN, 95 P. L. R. 1914, 53 P. R. 1914 **927**

Insolvency petition—*Purchaser of judgment-debt due to creditor—Entitled to be entered as creditor.*

A purchaser of a judgment-debt due to an insolvent creditor is entitled to have his name entered in the schedule of the creditors of the insolvent. VAIDYA NATH AIYAR v. P. S RAMASAMI AIYAR, 16 M. L. T. 58 **815**

Interest—*Arrears of rent—Absence of contract to contrary—General law as to interest – Bengal Tenancy Act (VIII of 1885), ss. 67, 68 – Mokarari lease.*

In the absence of any express or implied contract to the contrary, a landlord is entitled to the benefit of the general law with regard to the payment of interest on arrears of rent, that is to say, he is entitled to the benefit of sections 67 and 68 of the Bengal Tenancy Act.

Section 67 is applicable to *mokarari* leases when there is no contract to the contrary. AJEB BHARTHI v. RAM NARAIN SINGH **103**

——— ——— Usufructuary mortgage—Terms—Mortgagor resuming possession upon abandonment by mortgagee—Personal covenant to pay, becomes operative **131**

Interlocutory matters. *See* APPEAL TO PRIVY COUNCIL.

Inter-pleader suit, whether mortgagor bound to bring — Mortgage-bond—Assignment—Mortgage-debt paid to assignee—Cancellation of assignment—Notice of cancellation—Assignment treated by mortgagee as void **607**

Interpretation **238**

——— ——— **of document** **871**

Jagir income, suit to recover arrears of **445**

Joint family. *See* HINDU LAW.

——— ——Promissory-note—Payee dying leaving widow - Suit by surviving members, whether maintainable **612**

Joint trial *of thief and receiver of stolen property, legality of.*

A joint trial of two accused, one for theft and the other for receiving stolen property, is illegal. GOVINDARAJULU MUDALI, *In re*, (1914) M. W. N. 352; 15 CR. L. J. 256; 1 L. W. 171 **208**

Judicial inquiry—Surety not to be rejected without taking evidence **746**

Jurisdiction. *See* PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 31.

——— ——**Civil**—Bond for appearance—Non-appearance, forfeiture for **503**

——— ——— Commission—Local inquiry—Case of wrongful restraint by obstructing path **510**

——— ———Discharge—Case of non-compoundable offence—"Struck off" for complainant's absence—Cognizance **182**

——— ——— ———Grant of land under *Darkhast* rules—Rules not complied with—Adverse possession—Presumption **520**

——— ——High Court's power of superintendence —Proceedings for settlement of fair rent before Revenue Officer **896**

——— ——— of Civil Courts—Sale—Declaratory suit to set aside sale **524**

——— ——— Suit for ejectment and for ren **553**

——— ——— of Civil and Revenue Courts —Compromise, petition of, filed in mutation proceedings — Estoppel — Mutation proceedings, whether evidence of title — Consent to entry of one's name in revenue papers, effect of—Admission, gratuitous, withdrawal of Revenue Court's decision on questions of title raised in partition proceeding bars Civil Court from re-opening those questions - Procedure, proper, not adopted by Revenue Court in deciding titular questions, effect of—Objection to partition filed beyond time fixed by Revenue Court, whether entertainable, if partition not yet granted – Partition, complete, effect of —Appeal from order of Revenue Court disallowing objection to partition on ground of opposite party being recorded co-sharer, forum of **955**

——— ——— ——— Suit for declaration by landholder that lease granted by his agent was without authority **705**

Jurisdiction—contd.

——— ——— of Civil or Revenue Courts—Partition of *mahal*—Suit for declaration that plaintiff is entitled to land allotted to defendants in partition—Civil Court, power of, to rectify errors in partition by Revenue Court—Revenue Court, order of, referring objector in partition proceedings to Civil Court, effect of—Second appeal, fresh case set up, entertainability of—Practice—Pleadings **860**

——— ———Jurisdiction of Court to amend sale certificate **811**

——— ———Jurisdiction of Court to hear review application not taken away by presentation of appeal **513**

——— ———Jurisdiction of District Court to recognize transfer—Transmission of decree for execution to District Court—Application by transferee of decree for recognition of transfer **235**

——— ———*Lower Burma Town and Village Lands Act (IV of 1898), ss. 15 (2), 41—Jurisdiction of Civil Courts.*

Sections 41 (*a*) and 15 (2) of the Lower Burma Town and Village Lands Act do not debar a Civil Court from adjudicating the rights of two private persons litigating over land which is at the disposal of Government. NALLAN CHETTY *v.* MUTHUSAWMY PILLAI **961**

——— ———Natural justice—Caste—*Panchayat*—Defamation **301**

——— ———Order awarding compensation not contained in order of discharge—Irregularity, fatal **498**

——— ———Presidency Small Cause Court, when can pass order under s. 41 **572**

——— ———Transfer by insolvent made two years before adjudication—Order—Provincial Insolvency Act (III of 1907), s. 36 **924**

——— ———*Remand—Suit originally heard by District Judge—Remanded to him by High Court—Transfer by him to Sub-Judge—Trial by Sub-Judge with consent of parties—Jurisdiction of Sub-Judge to try suit—Onus of proof—Suit for possession—Defendant setting up tenancy—Defendant found to be tenant of plaintiff—*Onus, *on whom lies.*

A suit valued at Rs. 1,368 was dismissed by a District Judge on the ground of limitation. The High Court on appeal set aside the decree and remanded the suit to him for trial. The District Judge transferred the suit to the Sub-Judge who tried it after taking the consent of the parties:

Held, that the validity of the proceedings before the Sub-Judge could not be questioned by the parties, as the case was not one of the exercise of jurisdiction by a Court which had no local or pecuniary jurisdiction over the subject-matter of litigation, but one of irregular assumption of jurisdiction by a competent Court, though with the consent of the parties.

Where a defendant in a suit for possession of land is found to be a tenant of some land under the plaintiff, the burden is not cast thereby

Jurisdiction—concld.

upon the plaintiff to establish that the land he seeks to recover is outside the tenancy of the defendant, but the defendant must prove that the land falls within his tenancy. PROTAP CHANDRA ROY *v.* JUDHISTER DAS, 19 C. L. J. 408 **69**

——— ———Suit—Valuation—Interest claimed by plaintiff—Value of suit is value of interest claimed in suit **964**

——— ———Suit by *inamdar* for recovery of rent—Civil or Revenue Court **96**

——— ———Civil Court—Suit for rent—"Estate," meaning of—*Inam* of part of village, whether estate **859**

——— ———Supreme Court of Hong Kong—Foreigner—*Afghan* subject of the Ameer of Afghanistan enlisted in British Indian Regiment **678**

——— ———Transfer of case from one Magistrate's Court to another—Commitment on evidence recorded by Magistrate from whose file case was transferred **722**

——— ——— **(Criminal)**—Criminal trial—Witness re-called on order of prosecuting officer—Magistrate **743**

——— ———Fence—Obstruction to public pathway—Magistrate, whether can pass an order under s. 147, Cr. P. C. **730**

——— ——— **of Magistrate** — *Issuing warrant—Acting on advice of Crown's Law Officers—Jury—Verdict—Repugnancy, if justifies quashing of conviction—Opinion of Judge, how to be weighed.*

Two persons were tried for murder but acquitted. It was alleged that there were three co-conspirators, of whom the petitioner was one. A warrant was issued against the petitioner which was re-called. Subsequently the District Magistrate, on the advice of the law officers of the Crown that the case against the petitioner could go on on the evidence, again issued a warrant against the petitioner:

Held, that the District Magistrate had jurisdiction to issue the warrant.

The repugnancy in the verdict of a Jury in India is not in itself sufficient to justify the quashing of a conviction. The technicalities, which are borrowed from the English Law and founded on ideas as to the sacred character of a verdict by a Jury whose findings of fact are unknown, cannot be imported so as to give such a character which, by the express provisions of law, does not attach to Jury verdicts in this country.

In this country, the opinion of the Judge is to be weighed by the High Court in exactly the same balance as the opinion of the Jury. MANINDRA CHANDRA GHOSE *v.* EMPEROR, 18 C. W. N. 580 **1002**

——— ——— ——— Surety — Restriction to local men **206**

Jury—Verdict—Repugnancy, if justifies quashing of conviction—Opinion of Judge, how to be weighed **1002**

Kabuliat—*Kabuliat* executed by tenant—Stipulation that increased rent would be paid on increased area found on measurement—Area in boundaries—Landlord, if entitled to additional

Kabuliat —concld.

rent on excess area being found to be in tenant's possession—Prevailing rate in vicinity—If rent stated in *kabuliat* to be enhanced according to prevailing rate in vicinity—Procedure to be adopted by landlord **961**

——— ——— *Kabuliat* taken at enhanced rate on promise to grant *pattah* including extra land in tenant's holding Grant of *pattah* but not including promised land—Promised land in tenant's possession—Suit for recovery—*Pattah* invalid—Oral settlement before *pattah*, whether effectual—Bengal Tenancy Act VIII of 1885, s. 29 **570**

——— ——— *Reclamation lease—Forfeiture on failure to comply with condition as to reclamation—Condition as to grant of fresh lease on application within one month of forfeiture notice—Transfer to plaintiff of rights under lease after forfeiture and before new lease—Certificate sale of land—Auction purchase by defendant—Suit for possession—Right of plaintiff.*

On August 12th, 1895, a *kabuliat* was executed by one *K* in favour of the Government in respect of certain lands for reclamation There was a provision that on failure to comply with the condition as to clearing, the lessee was to forfeit all rights in the land under the existing lease, but this was subject to a provision that if the lessee gave up the lease to a certain officer of the Government within one month of the date of the notice of forfeiture, a fresh lease would be given to him on certain conditions. There was a failure to comply with the clearing condition, notice was given to the sons of the lessee who had died, and they within one month made an application for a fresh lease which was granted. In the meantime, the defendant No. 2 purchased the property at a certificate sale for arrears of cesses, and after that the sons of the original lessee sold their interest under the lease to the plaintiff. The certificate sale was of no valid effect for lack of observance of the statutory requirements and so nothing passed to defendant No. 2 under the sale. The plaintiff brought this suit and prayed that the certificate sale might be declared fraudulent and irregular and that the same might be set aside and possession of the property purchased under the sale might be given to the plaintiff:

Held, (1) that the plaintiff was entitled to possession, as claiming under the original lessee and his sons, on the strength of the original *kabuliat* of 1895; and

(2) that the plaintiff, even before the new lease was granted, was entitled to possession by virtue of his right to possession under the lease in the circumstances that happened UPENDRA NATH BOSE *v.* SAILENDRA NATH GHOSH, 19 C. L. J. 249 **622**

Karta, *liability of—Place where several persons have acted.*

Where articles are found in a house in such a place or places as several persons living in the house may have access to, there is no presumption that those articles are in the possession or control of any other person than the *karta* or house-master. D WESTON *v.* PEARY MOHAN DAS, 40 C. 898; 18 C. W. N. 185 **25**

Kudivaram right, meaning of **113**

Laches or delay in instituting suit—No ground for refusing specific performance—Discretion **560**

Lambardar—Customary agent of proprietary body, whether can sue alone **20**

Land Acquisition—*Acquisition by Calcutta Municipality Bustee land—Market-value—Future advantageous disposition not to be taken in account—Valuation of bustee land not to be made on supposition of its adaptability for use as building land—Present disposition only to be considered—Evidence—Evidence relating to under-tenants and rents paid by them, whether relevant—Value of other lands which are not bustee lands, in the neighbourhood, if relevant.*

The words "the market-value to be the market-value according to the disposition of the land at the date of the publication of the declaration" in clause (c) of section 557 of the Calcutta Municipal Act, 1899, mean that when a land is compulsorily acquired by the Calcutta Municipality, any use to which the land may be put in future shall not be taken into consideration in determining its value, but the valuation shall be determined according to the market-value then existing of the land in the position that the matters then were.

The clause precludes any valuation based on the most advantageous disposition of land, *e g*, a valuation of *bustee* land on the supposition of its adaptability for use as building land to carry expensive structures.

Consequently, the clause precludes evidence being given of other purposes to which *bustee* lands can be put in future.

Therefore, evidence relating to under-tenants and the rents paid by them is not relevant for the purpose of ascertaining the market-value as defined by clause (c) of section 557.

Evidence as to sales of other lands in the neighbourhood which were not *bustee* lands is not admissible. MANINDRA CHANDRA NANDY *v.* SECRETARY OF STATE, 18 C. W. N. 884 **412**

Land Acquisition Act (I of 1894)—Streets, laying of Railway lines upon—Whether Land Acquisition Act to be resorted to **765**

——— ——— ——— **s. 23**—*Compensation—Market value—Price paid by owner—Evidence.*

The mere fact that the owner of the property, acquired under the Land Acquisition Act, had obtained it cheap would not entitle the Government to get it under the fair market-value, but the price which was paid by the owner very shortly before the publication of notification would be a valuable piece of evidence to help the Court in ascertaining the true market-value of the property. QAMAR ALI *v.* COLLECTOR OF BAREILLY **512**

——— ——— ——— ——— **s. 54**—*Civil Procedure Code (Act V of 1908), s 96 (1)—Bombay Civil Courts Act (XIV of 1869), s 16—Award below Rs 5,000—Reference to Assistant Judge—Appeal to District Judge—Second appeal to High Court, whether maintainable.*

As no second appeal is allowed by law in a Land Acquisition case, no appeal would lie in the High Court when on a reference under the Land Acquisition Act an Assistant Judge awarded less

Land Acquisition—concld.

than Rs. 5,000 and an appeal against his award was dismissed by the District Judge. AHMEDBHOY HABIBBHOY v. WAMAN DHONDU, 16 BOM. L. R. 72; 38 B. 337 **614**

Land cess. *See* MADRAS ESTATES LAND ACT.

Land-holder. *See* MADRAS ESTATES LAND ACT, 1908, s. 3.

Landlord and tenant—*Abandonment by tenant of holding—Question of intention.*

The question, whether in any individual case there has been an abandonment by a tenant of his holding, is a question to be determined upon the facts of each case.

Dictum of Mr. Justice Mookerjee in *Ram Pershad Koeri* v. *Jawahir Roy*, 12 C. W. N. 89; 7 C. L. J. 72, relied upon. MAHADEO PERSHAD v. DURGI SAHUN **368**

——— ——— ——— ——— *Dispossession of tenant by landlord or person claiming under him, effect of—Dispossession from certain lands of tenure—Suspension of rent of other lands during dispossession.*

When a landlord or a person claiming under him has dispossessed a tenant from certain land of the tenure, he is not entitled to recover rent for the remaining lands in the possession of the tenant, inasmuch as it could not be said in that case that each *bigha* of land is separately assessed and separately chargeable with rent.

Where an intermediate tenure has been created by the landlord between himself and his tenants, and that intermediate tenure-holder has dispossessed the tenants of a portion of their land, he cannot recover rent from them. If the landlord tries to step into the shoes of the intermediate tenure-holder and to do that which the intermediate tenure-holder is not entitled to do, he cannot do so. FATEH ALI CHOWDHURY v. PARSHA NATH DAS **552**

——— ——— ——— ——— *Enhancement of rent—Homestead land—Kabuliat executed by tenant—Stipulation that increased rent would be paid on increased area found on measurement—Area in boundaries—Landlord, if entitled to additional rent on excess area being found to be in tenant's possession—Prevailing rate in vicinity—If rent stated in kabuliat to be enhanced according to prevailing rate in vicinity—Procedure to be adopted by landlord.*

Where there is an express stipulation in a *kabuliat* that the landlord is entitled to excess rent in case the area of the land let out and described within certain boundaries be found on measurement to be more than what is mentioned in the *kabuliat*, the landlord is entitled to rent for the excess land which the tenant is found to hold within the boundaries mentioned in the *kabuliat*.

If the rent of a tenant in respect of a homestead land is not a fixed one and the rent paid by him is inadequate, the landlord can call upon him to pay such rent as is proper and if the tenant does not agree to this the proper course for him is to give the defendant a proper notice to quit and then to sue him for ejectment.

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A landlord is not entitled to a decree for enhanced rent on the ground that the prevailing rate of rent of similar lands in the vicinity was higher than the rate stated in the *kabuliat*. JADU NATH DAS v. MANINDRA CHANDRA NANDI **937**

——— ——— ——— ——— *Kabuliat taken at enhanced rate on promise to grant pattah including extra land in tenant's holding—Grant of pattah but not including promised land—Promised land in tenant's possession—Suit for recovery—Pattah invalid—Oral settlement before pattah, whether effectual—Bengal Tenancy Act (VIII of 1885), s. 29.*

The defendant originally held a *jama* of Rs. 24 under the plaintiff which did not include the lands now in dispute. At the Settlement in 1897, the *jama* upon that holding was increased to Rs. 29-8. Subsequently the defendant was found in possession of these disputed lands and he agreed to pay Rs. 38-8 for his holding provided that the disputed lands were included in that Settlement. The defendant executed a *kabuliat* and the plaintiff agreed to grant a *pattah* of all the lands, but, as a matter of fact, the *pattah* which he granted did not include the disputed lands. The plaintiff sued for recovery of possession or in the alternative for Rs. 37-2 as rent and cesses:

Held, (1) that the *pattah* was invalid under section 29 of the Bengal Tenancy Act as well as under section 113;

(2) that the *jama* stated in the *kabuliat* was void and not by law recoverable by the plaintiff;

(3) that nothing more could be given to him in any case as there had been already an illegal enhancement;

(4) that a go-by must be given to the *pattah* and the oral Settlement before it was given effect to;

(5) that the plaintiff had no claim to recover the land, nor could any more rent as claimed be decreed to him. BIRENDRA KISHORE MANIKYA BAHADUR v. JINA GAZI **579**

——— ——— ——— ——— *Landlord's failure to repair—Tenant's right to make deductions from rent—Conditions to pay enhanced rent in default of regular payments.*

If a landlord fails to repair leased premises according to the terms of the lease and the tenant is thereby deprived of the use of a portion of it and is also put to loss and inconvenience, the latter is entitled to deduct from the rent a reasonable amount with regard to the non use, loss and inconvenience.

A condition to pay enhanced rent in default of regular payments is penal. NIADAR MAL v. B. BORROOAH & CO., 5 P. W. R. 1914; 26 P. L. R. 1914 **353**

——— ——— ——— ——— Lease for fixed term—Six months' notice given before expiry of term—Jurisdiction **572**

——— ——— ——— ——— *Lease of premises, portion of which is already in possession of another tenant—Relation of lessee and former tenant—Lessee giving up entire premises after termination of his lease, effect of—Sub-tenant.*

Where a lessee accepts the lease of premises a portion of which is already in the occupation

Landlord and Tenant—contd.

of a tenant, the latter becomes the sub-tenant of the former. But when the lessee gives back the possession of the premises in his actual possession to the lessor at expiry of the lease, this amounts to entire vacation of the premises and the former tenant again becomes the tenant of the lessor. NIADAR MAL *v.* B. BORROOAH & Co., 6 P. W. R. 1914; 30 P. L. R. 1914 **359**

——— ——— ——— ——— Non-transferable occupancy holding — Transfer of portion of holding — Sale of holding in execution of rent-decree — Application by transferee for reversal of sale, if maintainable—Transfer of entire holding and that of portion, distinction between **839**

——— ——— ——— ——— *Possession of plots of land with trees thereon, suit for—Trees planted by tenant on his cultivatory holding before accrual of tenancy, effect of, ejectment decree upon—Groves, custom in respect of, as recognised in Oudh.*

When a landlord obtains a decree for ejectment against a tenant, the latter is bound, in the absence of any special rule or custom to the contrary, such as that existing in the case of groves, to deliver over possession of the trees along with that of the cultivatory holding on which they stand, even though they were planted by him before he acquired the status of a tenant. SARDAR SINGH *v.* GAJA SINGH, 1 O. L. J. 63 **957**

——— ——— ——— ——— Raiyat *executing usufructuary mortgage of holding—Abandonment—Question of fact—*Raiyat *continuing to pay rent—No intention of leaving village—Receipt of rent by landlord after notice of alleged abandonment—*Khas *possession, whether landlord entitled to.*

The mere execution of a usufructuary mortgage may not be sufficient to establish abandonment by a *raiyat* of his holding, which question is principally one of fact.

Where a *raiyat* executed a usufructuary mortgage of his holding but covenanted to continue to pay the rent thereof, and it was found that though he left the land because he was ill and there was no one to take care of him yet he intended to come back to the village, and that rent was received by the landlord after he came to have notice of the *raiyat's* leaving the place:

Held, that there was no abandonment of his holding by the *raiyat* entitling the landlord to *khas* possession. GOUR CHANDRA DAS *v.* ASIMUDDI **546**

——— ——— ——— ———, *relationship of—Temporary Settlement under Government—Permanent sub-lease to plaintiff—Plaintiff granted sub-lease to defendant—Renewal of Settlement from time to time by Government, effect of, upon defendant.*

S held lands under the Government under a temporary Settlement during the currency of which he granted a permanent sub-lease to the plaintiff who again granted a permanent sub-lease to the defendants. The Settlement was renewed from time to time by Government in favour of S:

Held, that the effect of the re-settlement by the Government with S was to keep alive the contractual obligations of the subordinate holders as amongst themselves, and that the relationship of landlord and tenant existed between the plaintiff and the defendants. MOHENDRA NATH BISWAS *v.* SHYAM LAL BANERJEE, 19 C. L. J. 308; 18 C. W. N. 907 **16**

——— ——— ——— *Rent-decree against* dar-patnidar — *Mortgage-decree against* dar-patnidar *by landlord—Execution of mortgage-decree—Sale of* dar-patni mahal *subject to encumbrance of rent-decree —Execution of rent-decree against other property of* dar-patnidar, *if allowable—Merger, doctrine of—Intention—Benefit of person in whom the two estates have become vested—Transfer of Property Act (IV of* 1882), *s.* 101.

The superior landlord of a *dar-patni mahal* got a mortgage-decree against the *dar-patnidar* in respect of the *mahal*. In execution of this decree, he put up the *mahal* to sale and himself purchased it. Previously he had obtained a decree for rent due to him from the *dar-patnidar* on account of the *dar-patni*. In execution of the mortgage-decree, the sale of the *dar-patni mahal* was subject to incumbrances including the encumbrance of the rent-decree. The landlord wanted to execute his rent-decree against some other property of the *dar-patnidar*:

Held, that the landlord was entitled to do so.

In applying the doctrine of merger, the dominating principle by which a Court is guided is the intention, and in the absence of express or implied intention, the Court looks to the benefit of the person in whom the two estates have become vested. GOPAL LAL ROY *v.* SHAILENDRABASINI CHOWDHURANI **393**

——— ——— ——— *Sub-letting — Forfeiture of lease—Meaning of* "Dokandari khud"—*Transfer of Property Act (IV of* 1882), *ss.* 108 *(j) and* 111 *(g).*

In the absence of a covenant to the contrary a tenant is authorised to sub-let.

A breach of the condition of a lease does not effect its forfeiture unless the lease expressly so provides.

The words '*dokandari khud*' (for the purposes of his own shop business) standing alone in a lease do not mean that sub-letting is prohibited. ALLAH DITTA *v.* FARZ BIBI, 35 P. W. R. 1914; 106 P. L. R. 1914; 33 P. R. 1914 **395**

——— ——— ——— ——— Suit for additional rent for increased area—Excess of land found in tenant's possession—Standards of measurement same on both occasions—Allowance for difference in systems of measurement, if to be granted **794**

——— ——— ——— ——— *Year by year tenancy—Suit for ejectment—Burden of proof—Present right to possession—*Jus tertii—*Pleadings.*

In a suit for ejectment against a tenant from year to year, not being a possessory suit brought within six months of a wrongful dispossession, the plaintiff in order to succeed must establish such title as carries a present right to possession and the defendants are entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim. SITARAM BHIMAJI DESHPANDE *v.* SADHU AWAJI PARIT, 16 BOM. L. R. 132; 38 B. 240 **786**

Lease, determination of—Possession of heir after determination—Full proprietary right acquired by heir—Sale of property—Remainder-man, right of **364**

Lease—concld.

———, forfeiture of sub-letting **395**

——— of palmyra trees for enjoyment of toddy fruits, etc.—Registration Immoveable property—Moveable property **102**

——— of premises, portion of which is already in possession of another tenant—Relation of lessee and former tenant—Lessee giving up entire premises after termination of his lease, effect of—Sub-tenant **359**

Lease-deed—*Registration.*

A compulsorily registrable lease is inadmissible without registration to prove the nature of lessee's possession. YURUVA VENKATA REDDY *v.* MADDI VEERANNA, 15 M. L. T. 192 **376**

Legal Practitioners Act (XVIII of 1879), s. 14—*Mukhtear—Mukhtear having no license to practise in Revenue office—Misconduct—Commission of misconduct as private individual—Jurisdiction of Commissioner to report to High Court.*

In the course of a Land Registration Appeal the Commissioner found that the conduct of a Mukhtear, who had no license to practise in a Revenue office, had been grossly improper and fraudulent, because he had fraudulently transferred certain properties and made certain discrepant statements one or other of which must have been false. He accordingly submitted a reference to the High Court recommending the Mukhtear's dismissal:

Held, that, as the misconduct according to the Commissioner's report was committed not in the capacity of a Mukhtear but as a private individual and came to light only at the hearing of an appeal in a case to which he was not a party but only a witness, the matter did not fall within the purview of section 14 of the Legal Practitioners Act and the Commissioner had no authority to report the Mukhtear to the High Court. DINESH CHANDRA BHATTACHARJEE, *In re*, 19 C. L. J. 710; 15 CR. L. J. 378 **746**

Legal representative—Grove-holder and tenant dying without heirs—House and grove escheating to *zemindar—Zemindar's* liability for decree against grove-holder and tenant—Execution of decree **969**

Legatee. *See* WILL

———, right of **143**

Letters of Administration—*Application by husband—Estate of deceased wife—Issue as to title, whether ought to be allowed to be raised—Probate and Administration Act (V of 1881), s. 23.*

It is not the practice of the High Court in its Testamentary and Intestate Jurisdiction to go into questions of title.

It is sufficient under the Probate and Administration Act if the person making an application for grant of Letters of Administration is, according to the rule for the distribution of the estate of the deceased, entitled to the whole or a part of the property and alleges that there is property of that nature.

An application by a husband for grant of Letters of Administration to the estate of his deceased wife was opposed by the wife's brother. In the application

Letters of Administration—concld.

it was alleged that part of the property was the *yautuka stridhan* of the deceased. An issue was settled as to whether any portion of the property left by the deceased was her *yautuka stridhan*:

Held, (1) that the issue as to title ought not to have been allowed to be raised:

(2) that it was not necessary for the husband to prove his title, and that as there was no other application before the Court, the Letters of Administration should be issued to him. NISHIKANT CHATTERJEE *v.* ASHUTOSH MUKHERJEE, 17 C. W. N. 613 **296**

Letters Patent (Bombay) (Amended), cl. 39—*Civil Procedure Code (Act V of 1908), ss. 109, 110—Application of legal representative to have his name recorded—Rejected by High Court—Order interlocutory—No appeal lies to His Majesty in Council.*

A judgment or order in order to be final within the meaning of clause 39 of the Letters Patent must finally determine the rights of the parties.

An order by a High Court rejecting the application of the legal representative of a deceased party to have his name brought on the record is not final but interlocutory and as such no appeal lies to His Majesty in Council from such order under clause 39 of the Amended Letters Patent. GANGAPPA REVANSHIDDAPPA *v.* GANGAPPA MALLESHAPPA, 16 BOM. L. R. 195 **373**

Letters Patent (Calcutta), 1865, cls. 15, 16, 39 **977**

Letters Patent, (Madras), cl. 10—*Vakil—Professional misconduct—Suggestion by Vakil that he can influence Judge by improper means.*

A Vakil is guilty of professional misconduct meriting more than a mere warning for suggesting that he is in a position to influence a Judge by indirect and improper means. PRESIDENT, VAKILS' ASSOCIATION, HIGH COURT, MADRAS *v.* A VAKIL, 26 M. L. J. 429 **789**

Libel. *See* DEFAMATION.

License—*Right to weigh in market—Exclusive privilege.*

A weighman in an old market, if permitted by Government to continue the same calling in the new market opened at a different place, does not acquire any exclusive right to act as weighman in the latter market as his position is merely of a licensee. SECRETARY OF STATE *v.* KANHAI LAL, 12 A. L. J. 447 **922**

Limitation—Adverse possession **521**

——— ———Amendment of plaint—Suit brought in wrong name **764**

——— ———*Appeal—Failure to file copy of decree—Further time allowed for appeal—Sufficient cause—Limitation Act (IX of 1908), s. 9.*

Failure to present a copy of the decree appealed against within the time allowed for an appeal amounts to not filing the appeal at all and time cannot be extended for the purpose of making up the deficiency, particularly when the appellant has already lost the opportunity once granted to him for doing so. ACHHAR SINGH *v.* NIKKU, 2 P. W. R. 1914; 25 P. L. R 1914 **319**

Limitation - concld.

——— ——— ———Burden of proof - Burden of proving age to bring suit within time—Plaintiff to prove his age under 2 at date of institution of suit—Proof to be affirmative and clear—Court reluctant to throw out case as barred by time if suit just or equitable **432**

——— ——— ———*Cause of action—Partition proceedings—Party referred to civil suit—Cause of action arising by institution of partition proceedings—Effect of entry in Revenue papers—Several plaintiffs suing jointly—Withdrawal of suit with permission to bring fresh suit—Separate claims—Not barred.*

The land in suit had been shown in the Revenue Records for many years past as joint. Defendant, a recorded co-sharer, applied to the Revenue Authorities for partition. The plaintiff, who claimed the land in suit as his sole property, was referred to a civil suit for declaration of title:

Held, that the cause of action arose only when the defendant applied for partition, and the suit was not time-barred by reason of the land having been recorded for many years past as joint.

Where several plaintiffs had sued jointly, but with a view to avoid difficulties as to misjoinder had withdrawn the suit with permission to bring a fresh suit, and subsequently filed separate claims:

Held, that the former suit did not bar the subsequent claims. NATHA SINGH *v.* ISHAR SINGH, 161 P. L. R. 1914, 90 P. W. R. 1914 **438**

——— ——— ——— of suit for sale on mortgage not affected by subsequent transaction between mortgagee and third person who pays off mortgage-debt—Right of priority, limitation for enforcement of—Purchaser of property subject to mortgage—Right to plead limitation, when mortgagee neglects to recover money within limitation **448**

Limitation Act (XIV of 1859), Art. 129—*Hindu Law—Impartible estate—Widow of junior member—Right to be maintained out of estate—Member cannot bind his heirs by his compromise—Nature of widow's maintenance—Facts to be considered, when allowing arrears—Denial—Burden of proof*

The widow of a junior member of the family of a holder of an impartible estate is entitled to maintenance out of the impartible property.

It is at least doubtful whether such member can bind by a compromise his heirs to receive a particular amount as maintenance out of the impartible estate in lieu of such rights as they might have independently of his right to receive maintenance for his life.

The widow's maintenance is properly such allowance as may keep her in a suitable condition of comfort, whereas the maintenance of a male member of a joint family represents at least to some extent his interest in the property of the family.

In fixing the rate of arrears of maintenance to be paid to a widow it is not improper to take into consideration the fact that the widow, during all the time she received no maintenance, did not borrow money, had no difficulty in obtaining all the comforts which she required, delayed long to demand maintenance and would be receiving a lump sum.

Under Article 129 of the Limitation Act, where there has been no denial, there is no bar, and the

Limitation Act - (1859)—concld.

person pleading the bar of the Article must prove the denial. KACHI YEVA RANGAPPA KALAKKA THOLA UDAYAR *v.* KULANDAI AYAL, 26 M. L. J. 305; (1914) M. W. N. 174 **831**

Limitation Act (XV of 1877), Sch. II, Arts. 19, 23, 36, 120 - *Suit on joint torts—Fraud, allegation of, to be formulated definitely and not merely hinted at—Evidence, rule of—Evidence Act (I of 1872), ss. 3, 125—Proof—"Proved", "Disproved" meaning of—Document—Privilege—Adverse inference from non-production when document privileged—Claim of privilege—Liability of officer acting on reports—Honest belief on reports—Finding of explosive articles—Place where several persons have access—Liability of karta—Possession—Explosive Substances Act (VI of 1908), ss. 5, 6—Arrest made under Statute—Immaterial under what section arrest made if arrest may be justified—Arrest under law—Immaterial whether it was present or not to mind of officer making arrest—Pleadings—Erroneous statement in pleadings, if can overcome fact apparent on record or admitted—Counsel—Instructions—Cross-examination—Making charge—Right of Court to ask Counsel—Counsel's responsibility—Disciplinary action of Court—Reliance by Court on materials to be made known to parties at trial—Opportunity of adducing evidence—Counsel—Knowledge of important facts—Propriety of accepting retainer—Counsel giving evidence in case in which he is retained—Whether unprofessional conduct—General practice—Undesirable that Counsel engaged in case should give evidence—Withholding evidence—Inference, adverse—Cause of action—Conspiracy—Torts.*

A suit on joint torts, in which the plaintiff alleges that the torts of malicious arrest and prosecution and trespass were committed by the three defendants acting in conspiracy, instead of by one, is governed by the one-year rule of limitation contained in Articles 19 and 23 of the Limitation Act, 1877.

Counsel appearing in a case ought to give his deposition if he can thereby throw light upon the case.

Per *Woodroffe* and *Coxe, JJ.*—In a suit based upon fraud, what is required of the plaintiff is that he should at least know and formulate precisely what the fraud is which he alleges and against whom he charges it, and he should be able also to definitely formulate in an intelligible way what his theory and scheme is and how it fits in with the facts. Charges should be formulated and not merely hinted at. A charge may be met but not a suspicion. The charge should be put forth in a precise form and then presented in that form, and not in some changed form, by all honest means.

There is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of the terms "proved" and "disproved" in section 3 of the Evidence Act. The test in each case is, would a prudent man, after considering the matters before him, (which vary with each case), deem the fact in issue to be proved or disproved? In a matter of this kind, the conscience of the Court can never be bound by any rule, but that which coming from itself

dictates a conscientious and prudent exercise of its judgment.

Where charges of a fraudulent or criminal character are made against a party to a suit, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is, the greater, of necessity, is the force of the evidence required to overcome such presumption.

The English rule in these matters does not, as such, apply to India.

When a document is in fact privileged, no adverse inference can be drawn from its non-production, for to allow this would be in fact to destroy the privilege. This rule applies as regards the party claiming privilege. *A fortiori*, where privilege is claimed by a third person, no adverse inference can be drawn against any party to the suit in consequence of such claim and allowance of privilege.

Though section 125 of the Evidence Act does not, in express terms, prohibit a witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is the duty of the Judge, apart from the objection taker, to exclude the evidence. *A fortiori*, if objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness.

An officer is not liable who acts on false reports, provided that he acted honestly in respect of them.

Where articles are found in a house in such a place or places as several persons living in the house may have access to, there is no presumption that those articles are in the possession or control of any other person than the *karta* or house-master.

It is immaterial under what section of the Explosive Substances Act an arrest is made, if, in fact, the circumstances are such that the Act justifies the arrest. The officer making the arrest is entitled to call in aid any Statute which justifies his action quite, irrespective of whether or not it was present to his mind, when he made the arrest.

An erroneous statement in the pleadings can not overcome an actual fact apparent on the face of the record and admitted by the plaintiff himself and his Counsel.

A Court is entitled to ask Counsel, who in cross-examination makes a charge, whether he makes it on instructions, and if so, on whose. Instructions to Counsel are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. But if the Court calls for written instructions, it cannot use them as evidence in the cause which is tried. They could be called for then and there, and be used after the trial on the determination of the question whether disciplinary action should be taken against the Counsel. It is not sufficient

even to plead instructions. Counsel have a responsibility in the matter and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

Whatever a Court relies on should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point.

If Counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein. If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client. If Counsel knows or has reason to believe that his own professional conduct, on matters out of which the action arises, is likely to be impugned in the case, he ought not to accept a retainer. If he accepts a retainer, not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought not to continue to appear in the case unless he cannot retire without jeopardising the interests of his client.

There is nothing necessarily unprofessional in Counsel giving evidence in a case in which he appears as such; and Counsel engaged in a case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer.

But as a matter of general practice it is undesirable, when the matter to which Counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting.

When evidence which could be produced is not produced, the inference is that if produced it would be unfavourable to the person who withholds it. The same rule applies to the case of a Counsel who ought to have been called but is not called.

The same set of facts cannot constitute two causes of action, *viz*, for a tort and for a conspiracy to cause damage. The one excludes the other. If a joint tort is committed there is no necessity to have recourse to any law of conspiracy.

D. Chatterjee, J.—A tort, committed by several persons acting in concert, is not different from the same tort committed by a single individual. A trespass is a trespass, whether it be committed by one person or by more, and so is a malicious prosecution or false imprisonment. The combination in such cases may be an element of aggravation in the assessment of damages, but it does not suffice to make it a different tort. D. WESTON *v.* PEARY MOHUN DAS, 40 C. 898; 18 C. W. N. 185 **25**

—— —— —— —— arts. 23, 36, 120 25

—— —— —— arts. 136, 137—

Sale certificate—Amendment—Jurisdiction of Court

Limitation Act—(1877)—contd.

to amend sale certificate—Suit as representative of auction-purchaser for recovery of possession—Plaintiff to prove possession of judgment-debtor at date of sale—Symbolical possession, effect of.

A Court has an inherent jurisdiction to amend a sale certificate which incorrectly describes the property actually sold.

Where a plaintiff sues for recovery of possession as the representative-in-interest of the purchaser at a sale in execution of a rent-decree, the suit must be commenced within 12 years from the date when the judgment-debtor is first entitled to possession, under Article 137 of the second Schedule of the Limitation Act of 1877, if the judgment-debtor was out of possession at the date of the sale. On the other hand if the judgment-debtor was in possession at the date of the sale, the suit must be commenced within twelve years from the date when the sale becomes absolute, under Article 138.

It is upon the plaintiff to prove whether or not the judgment-debtor was in possession at the date of the sale, and he does not discharge the burden merely by proof that the judgment-debtor was in possession at some time antecedent to 12 years before the suit.

A delivery of symbolical possession is effective as against the judgment-debtor, but it would not be operative as against a stranger to the suit. NASIR-UDDIN *v.* SAYADUR RAHMAN, 19 C. L. J. 209 **811**

——————— **art. 137** **811**

——————— **arts. 142, 144**—*River shifting course*—Dobas *in old bed remaining joined with new channel at all seasons—Grantee of fishery right in river—Exercise of fishery right in new channel—Possession of* dobas.

Where a river shifts its course, leaving *dobas* in its old bed, the grantee of the exclusive right of fishery in the river retains his right over such *dobas* so long as the latter remain in communication with the main channel at all seasons of the year.

Therefore, so long as the grantee has been fishing in the new channel, he cannot be said to have ceased to be in possession of the *dobas* and if he exercised his rights in the channel within the peroid of limitation, Article 142 of the Limitation Act is no bar to a suit by him for possession of the *dobas*. In such circumstances, the plea of limitation would prevail only if the defendant can show that he has held adverse possession of the *doba* portions of the fishery for more than twelve years; that is to say, the defendant must rely on Article 144 and the onus is on him and not on the plaintiff. HEM CHANDRA CHAUDHRI *v.* SECRETARY OF STATE FOR INDIA **136**

——————— **art. 144** **136**

——————— **art. 148**—*Mortgage by conditional sale—Term of mortgage fixed—Mortgage-debt re-paid within term—Redemption—Limitation, whether runs from end of term or from time of payment.*

Ordinarily, and in the absence of a special condition entitling a mortgagor to redeem during the term for which he has created a mortgage, the right of redemption can only arise on the expiration of that specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property.

A certain property was mortgaged by way of conditional sale in 1830, with the stipulation that the mortgagor would be entitled to recover it back within the period of nine years on the liquidation of the debt with the usufruct of the property. It was alleged that the mortgage-money was paid up by the usufruct in eight years, that is up to 1838. In 1899 the mortgagor sued to redeem the mortgage:

Held, that, as the suit was brought sixty years after the satisfaction of the mortgage-debt, it was barred by time. BAKHTAWAR BEGAM *v.* HUSAINI KHANAM, 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 36 A. 195; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 BOM. L. R. 344 **355 P. C.**

——————— **art. 179** **644**

——————— **art. 179**—*Property attached—Encumbrance certificate—Oral application to produce—Step-in-aid of execution—Limitation Act (IX of 1908), Sch. I, Art. 182 (5).*

An application by a decree-holder for an adjournment to enable him *to produce an encumbrance certificate* in respect of attached property is made to further the execution proceedings with effect and is a step-in-aid of execution within the meaning of Article 179 (5) [Article 182 (5) of the present Act] of Schedule II of the Limitation Act, 1877. ABDUL KADIR ROWTHER *v.* KRISHNA MALAMAL NAIR, 1 L. W. 271; (1914) M. W. N. 563 **533**

——————— **arts. 179, 180**—*Appeal—Dismissal for want of prosecution—Decree capable of execution, that of lower Court—Interpretation of statutes—Barred rights cannot be revived.*

An order dismissing an appeal for want of prosecution does not deal judicially with the suit and can in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognizes authoritatively that the appellant has not complied with the conditions under which the appeal was open to him, and that, therefore, he is in the same position as if he had not appealed at all

Where an appeal pending before the Privy Council is dismissed for want of prosecution the decree of the lower Court is not constructively turned into a decree of His Majesty in Council. The only decree which is in existence is the decree of the lower Court, inasmuch as there is no decree of His Majesty in Council in which it has become merged. Consequently, the period of limitation for executing such a decree is three years under Article 179 and not 12 years under Article 180 of the Limitation Act.

A right to enforce a decree which had become barred before the Civil Procedure Code of 1908 came into force cannot be revived. CHAUDHRI ABDUL MAJID *v.* JAWAHIR LAL, 12 A. L. J. 624; 16 BOM. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 **649 P. C.**

——————— **art. 180** **644, 649**

Limitation Act (IX of 1908), s. 5 240

——— **s. 5**—*Appeal filed after time—Sufficient cause—Gross carelessness of Pleader.*

Where an appeal, which should have been filed in the Chief Court, was owing to the gross carelessness of a Pleader filed in the Divisional Court and on being returned to be presented in the Chief Court was filed there after the expiry of the period of limitation:

Held, that the provisions of section 5 of the Limitation Act did not apply to the case, because under the circumstances of the case the appellant had no sufficient cause for not filing the appeal in the Chief Court within the prescribed period. MOHAMDA *v.* LADHA SINGH, 9 P. L. R. 1914; 23 P. W. R. 1914 **86**

——— ——— ——— **s. 5**—*Registration Act (III of 1877), ss. 26, 71, 77—Suit to compel registration—Time expired when Court closed—Suit filed immediately on opening of Court—Extension of limitation on general principles—Refusal to register, mere return of document amounts to—Order of refusal not endorsed on returned document, effect of.*

On general principles and apart from section 5 of the Limitation Act, which does not apply to a suit provided for by section 77 of the Registration Act, when a plaintiff in such a suit cannot, owing to the Court being closed, present his plaint on the particular day on which it ought to be presented, he should not be allowed to suffer if he presents it at the earliest possible opportunity thereafter.

The act of a registering officer in returning a document presented to him for registration on the ground that the executant failed to appear, is equivalent to a refusal to register, though those words are not actually written on the document. SIVARAMANIAN PATTAR KARIKAR *v.* EDATHIL MADATHIL *v.* KRISHNA IYER, 26 M. L. J. 307; 15 M. L. T. 233 **23**

——— ——— ——— **ss. 5, 12**—*Appeal filed beyond time—Sufficient cause—Application for copies—Time allowed.*

A Munsif gave his judgment on the 1st of October 1913. The 2nd of October was a working day and the Court was open. From the 3rd of October to the 2nd of November the Court was closed for long vacation The Court re-opened on the 3rd of November and on that day the defendants applied for copies of the judgment and decree. These were ready and delivered to them at Muzaffarnagar on the 14th of November. They filed the appeal at Meerut on the 15th of November:

Held, that the application for copies of the judgment and the decree was made within the time allowed by law for the filing of the appeal and hence the time spent in obtaining the copies should be excluded in computing the period of limitation.

Held, further, that under the circumstances of the case there was "sufficient cause" within the meaning of section 5 of the Limitation Act to explain the delay in filing the appeal. BUDHU *v.* SULTAN **874**

——— ——— ——— **s. 9** 319

——— ——— ——— **s. 12** 874

Limitation Act—(1908)—contd.

——— ——— ——— **s. 12**—*Application for copy by whom to be made.*

Section 12 of the Limitation Act does not require that an application for copy should be made by the party himself. RUDAR PRATAB SINGH *v.* RAGHURAJ GIR **209**

——— ——— ——— **s. 18** 240

——— ——— ——— **s. 18, Sch. I, Arts. 166, 181**—*Application to cancel sale by Insolvency Court on the ground of fraud—Inherent power of Court to entertain such application—When time begins to run.*

An application either of an insolvent or his creditor for cancelling, on the ground of fraud, a sale of immoveable property of the insolvent conducted by the Insolvency Court in realizing assets of the insolvent under sections 20 and 23 of Act III of 1907 is governed by Article 181 and not by Article 166 of the 1st Schedule to Act IX of 1908.

Section 18 of this Act is general and under its force the time for making such an application begins to run only when the fraud becomes first known to the applicant.

A Court has an inherent power to entertain such an application. AFZAL ALI *v.* AMAN ALI, 36 P. W. R. 1914, 107 P. L. R. 1914 **397**

——— ——— ——— **s. 19**—Acknowledgment of debt by Manager of Hindu joint family, whether other members bound **429**

——— ——— ——— **s. 19**—Acknowledgment of liability—Letter saying writer will sign after looking into account **587**

——— ——— ——— **s. 19, Sch. I, Arts. 66, 116**—*Bond—Suit for money due under—Compensation—Breach of contract—Acknowledgment.*

A suit in form of a suit for money due on a bond is in substance a suit for compensation for breach of contract within the meaning of Article 116 of the Limitation Act and the period of six years provided in that Article applies if the bond is registered.

Where some years after executing a mortgage-deed the mortgagor passed a promissory note to the mortgagee for an another debt and therein referred to the mortgage-debt as an extra or additional debt:

Held, that such reference amounted to an acknowledgment within the meaning of section 19 of the Limitation Act. DINKAR HARI KULKARNI *v.* CHHAGANLAL NARSIDAS, 16 BOM. L. R. 20; 38 B. 177 **353**

——— ——— ——— **s. 20**—*Mortgagee authorized to pay off debt of mortgagor, whether "agent duly authorized" of mortgagor.*

A mortgagee authorized to pay off a debt due by the mortgagor to a third person is not "an agent" of the mortgagor "duly authorized" within the meaning of section 20 of the Limitation Act, so as to keep alive the debt by payment of interest on such debt. ALAGAPPA CHETTIAR *v.* SUBRAMANIA PANDIA THEVAN, 26 M. L. J. 509 **810**

Limitation Act—(1908)—contd.

—— —— —— **s. 20**—*Payment of interest—Burden of proof—Limitation.*

Under section 20 of the Limitation Act the payment of interest must be proved to have been made either by the debtor himself or by his agent duly authorized in this behalf. RAMCHANDRA SINGH *v.* DURGA DEVI **863**

—— —— —— **s. 28, Sch. I, Art. 44**—*—Suit by minor after attaining majority for possession of land sold by his guardian during his minority.*

Where the mother of certain Hindu minors, acting as their guardian, sold certain grove lands belonging to the minors during their minority and the minors brought a suit for possession of the grove lands more than three years after attaining majority but within 12 years of the sale:

Held, that under the provisions of section 28 and Article 44, Schedule I, of Act IX of 1908, the claim of the plaintiffs became extinguished three years after their attaining majority. *Musammat* SHEONATHA *v.* SHEORAJ SINGH, 17 O. C. 52 **406**

—— —— —— —— **art. 44** **406**

—— —— —— —— —— **art. 49** **174**

—— —— —— —— —— **arts. 61, 120**—Limitation, when right to sue accrues **410**

—— —— —— —— **arts. 62, 131**—*Suit to recover arrears of* jagir *income wrongfully received by defendant from third persons—Limitation—Article* 131, *applicability of.*

The claim was to recover from the defendant six years' arrears of *jagir* income, which, according to the plaintiff, he was entitled to receive as *jagirdar* from the *lambardars* of the *jagir* village, but which had been wrongly received and appropriated by the defendants:

Held, that the suit was governed by Article 62 of the Limitation Act, and the plaintiff could only recover the *jagir* moneys received by the defendants for the three years immediately preceding the date of the suit.

Article 131 of the Limitation Act would not be applicable to a case unless it was proved that more than 12 years before the institution of the suit the plaintiff expressly demanded from the defendants the enjoyment of his right and was refused. KIRPA RAM *v.* JAI CHAND, 46 P. W. R. 1914; 140 P. L. R. 1914 **445**

—— —— —— —— —— **art. 64** **779**

—— —— —— —— —— **art. 66** **353**

—— —— —— —— —— **art. 75**—*Instalment bond—Waiver.*

A bond payable by instalments contained the provision that in default of payment on due dates the whole amount with interest shall be payable:

Held, that the creditor was not compelled to sue for the whole amount on default of any one instalment only and was, therefore, competent to sue for any instalment due within the period of three years. BOHRA MOTI RAM *v.* LAL KHAN **830**

—— —— —— —— —— **art. 106** **771**

Limitation Act—(1908)—concld.

—— —— —— —— **art. 113** **360**

—— —— —— —— **art. 116** **353**

—— —— —— —— **art. 116**—*Suit for rent—Registered document.*

A suit for rent under a registered document is governed by Article 116. RAMANADHAN PATTAR *v.* ACHUTA VARIER, (1914) M. W. N. 323 **753**

—— —— —— —— —— **art. 120** **410**

—— —— —— —— —— **art. 131** **445**

—— —— —— —— —— **art. 131**—*Recovery of sums due under periodically recurring right—Prayer for declaration, whether made or not.*

Article 131 of Schedule I of the Limitation Act applies to suits brought to recover sums due under a periodically recurring right (*a*) whether there is a prayer for a declaration that the plaintiff is entitled to such a right and (*b*) whether there is no such prayer. MANAVIKRAMA ZAMORIN RAJA AVERGAL OF CALICUT *v.* ACHUTHA MENON, (1914) M. W. N. 228; 15 M. L. T. 226; 26 M. L. J. 377 **806**

—— —— —— —— **art. 134**—*Foreclosure decree—*Puisne *mortgagee not party—Suit for sale by* puisne *mortgagee—Transferee from mortgagee—Transferee of property cannot plead Article* 134.

A prior conditional mortgagee brought the suit on the basis of his mortgage without impleading the puisne mortgagee as a party to the suit and after foreclosing the property sold it to the defendant. The puisne mortgagee then brought the suit for sale of the property on the basis of his mortgage:

Held, that the defendant could not plead Article 134 of the Limitation Act, as his position was not of a transferee from a mortgagee but that of a transferee of property which was sold as free of incumbrances, although it was subject to a mortgage charge. MUNNA LAL *v.* MUNNU LAL, 12 A. L. J. 457; 36 A 327 **559**

—— —— —— —— **arts. 142, 144** **298**

—— —— —— —— —— **art. 166** **397**

—— —— —— —— **art. 166**—Application to set aside sale **251**

—— —— —— —— **art. 181** **397**

—— —— —— —— **art. 182 (5)** **533**

Limited Company Person—Liability of, to be convicted and punished **689**

Local Self-Government Act (III B. C. of 1885)—*By-laws—District Board Roadside Land, encroachment on—Acquisition of right by District Board over land adjacent to road, how to be made.*

A District Board can only take action and acquire right over a *zamindar's* land adjacent to its road under Act III B. C. of 1885.

Where some accused were convicted under sections 15 and 19 of the District Board By-laws for

Local-Self Government Act—concld.

having encroached upon and cultivated land claimed by the District Board to be their roadside land from which its officers had been taking earth, although there had never been any formal acquisition of these lands by the District Board:

Held that the conviction must be set aside. JADU GHOSH *v.* DISTRICT BOARD OF MURSHIDABAD, 15 CR. L. J. 267; 19 C. L. J. 635 **475**

Lower Burma Town and Village Lands Act (IV of 1898), ss. 15 (2), 41 **961**

Madras City Police Act (III of 1888), ss. 43, 46, 47—*Gambling—Gaming materials found on premises—Presumption.*

The presence of cards, counters and so-called *hundi* boxes on the premises is a strong presumption that it is used as a common gaming house and the owner of it when he makes a profit out of it is presumed to keep a common gaming house and the persons present on the spot are guilty of gaming, in the absence of rebutting evidence. DESIKACHARI *v.* EMPEROR **1008**

——— ——— ——— ——— **ss. 46, 47** **1008**

Madras Civil Rules of Practice, r. 279, cl. (6)—*Execution—No process issued—Money paid into Court by judgment-debtor, whether money realized by the application—Civil Procedure Code (Act XIV of 1882), s. 295.*

Payment into Court by a judgment-debtor of the decree money, without any process having been issued on the execution application, is money "realized by the application" within the meaning of rule 279, clause 6, of the Civil Rules of Practice, though it may not come within the terms of section 295 of the Code of Civil Procedure, 1882. UTHAMI CHETTIAR *v.* JUTTU NAGASWAMI IYER, (1914) M. W. N. 309 **241**

Madras District Municipalities Act (IV of 1884), ss. 10A, 39A, 268 and 280—*Complaint by Secretary, withdrawal of—Municipal Council—Criminal Procedure Code (Act V of 1898), s. 248.*

It is not open to a Municipal Council to withdraw a complaint duly instituted by the Secretary of the Municipality under section 248 of the District Municipalities Act. PARAMANANDA NADAR *v.* KARUNAKARA DOSS, 15 CR. L. J. 299 **507**

——— ——— ——— **s. 39A** **507**

——— ——— ——— **ss. 53, 60**—*District and Sessions Judge of Cuddalore—Stay for over 60 days in Kodaikanal—Payment of profession tax in Kodaikanal—Liability to pay in Cuddalore.*

Section 53 of the District Municipalities Act distinguishes two classes of persons

(*a*) salaried persons holding offices or appointments;

(*b*) persons exercising particular avocations.

The word "holding" does not necessarily involve any suggestion of discharging duties connected with the offices or appointments.

The cause of liability is participation in the benefit and convenience conferred by the Municipality upon those residing within the Municipal limits.

No distinction can be drawn between the administrative and judicial duties a District and Sessions Judge has got to perform.

Where the District and Sessions Judge of Cuddalore spent his vacation in Kodaikanal and paid profession tax there:

Held, that he was not liable to pay the tax again at Cuddalore and could claim the benefit of section 60 of the District Municipalities Act. HENRY MOBERLY *v.* MUNICIPAL COUNCIL OF CUDDALORE, (1914) M. W. N. 171 **398**

——— ——— ——— **s. 60** **398**

——— ——— ——— **ss. 268, 280** **507**

Madras Estates Land Act (I of 1903), s. 3 **96**

——— ——— ——— **s. 3, cl. (2) (A)**—*Grant of waste land as inam—Both warams granted—Presumption—Suit for ejectment and for rent—Jurisdiction of Civil Court—Burden of proof on tenant to oust—Jurisdiction to show that the grant was of land revenue only.*

In a suit brought by an *inamdar* in a Civil Court to eject tenants from lands which was an "eternal waste" on the date of the grant, the burden of proof, in order to oust the jurisdiction of Civil Courts, is on the tenants to show that the grant was *only of land revenue*, and the *inamdar* is only an "estate-holder" within the meaning of section 3, clause (2) (*a*), of the Madras Estates Land Act. The presumption, in cases of such grant, is of a grant of both *warams*. VOGOTI CHENGIAH *v.* PUTTU RAMADU, (1914) M. W. N. 367 **553**

——— ——— ——— **s. 3, cl. 2 (d)**—*"Estate," meaning of—Inam of part of village, whether estate - Suit for rent—Civil Court—Jurisdiction.*

All *inamdars* are not land-holders under the Estates Land Act and the mere fact that the landlord is an *inamdar* and the tenant has got the permanent occupancy right, will not bring the *inam* lands within the definition of an "estate."

A few acres of *inam* land forming part of a village, the whole of which village had not been granted in *inam*, do not form part of an estate within the meaning of section 3, clause 2 (*d*), of the Estates Land Act.

The Civil Courts do not lose jurisdiction over a suit for rent brought by an *inamdar* unless it is also shown that the *inam* lands come within the definition of estate or part thereof. MOHANAMBAL *v.* DAVOODSA ROWTHER **859**

——— ——— ——— **s. 3, cl. 2 (d)**—Suit to compel acceptance of *patta*—Revenue or Civil Court—Jurisdiction **113**

——— ——— ——— **s. 3, cl. 5, sub-cl. (2)**—*Inferior proprietor, holding under 'Missal' conditions—Land-holder*—Cowledar, *whether tenant—Waste land.*

An inferior proprietor holding an estate under a "Missal" is a land-holder under section (3), clause 5, of the Estates Land Act.

Madras Estates Land Act—contd.

A *Cowledar* under an inferior proprietor, whose *cowle* provides that he is to be placed in possession of the lands, that he is to pay the *kist* due to Government, that he is to bear the charges of establishment etc, that he is to act subject to "Missal" conditions and pay the inferior proprietor a profit, is not a tenant but one merely dealing with the land on behalf of the inferior proprietor.

The provisions of section 3, clause 7, sub-clause (2), apply only to a letting after the passing of the Act. TUNNGLA MALLANNA *v.* GOTTUMUKKALA RAMARAJU, (1914) M. W. N. 345; 15 M. L. T. 401 **531**

——— ——— ——— ——— **ss. 5, 52, cl. (3)**—*Madras Local Boards Act (Mad. Act V of 1884), s. 73—*Pattah, *when comes into force—*Pattah *under old Act—Land cess--Tenant, whether liable to pay full cess—Rent, whether charge on produce in hand of purchaser.*

Under section 53, clause (3), of the Estates Land Act, a *pattah* tendered for a particular *fasli*, comes into force in that *fasli*, unless a *pattah* previously tendered for more than one revenue year is in force on that date.

Where, therefore, the previous *pattah* tendered was under the old Act and as such did not enure beyond the *fasli* for which it was tendered, the provision of section 53, clause (3), would not apply and the new *pattah* would become effective at once.

Under section 73 of the Madras Local Boards Act a landlord can claim only half of the land cess from the tenant and, therefore, a provision to pay the full land cess cannot be inserted in the *pattah*.

Section 5, clause (1), of the Estates Land Act provides that rent shall be the first charge upon the holding and the produce thereof, therefore, a provision in the *pattah* to this effect is superfluous. The charge does not extend when the produce has passed into the hands of a purchaser.

Sankarnami mamool is not part of the rent and a provision in the *pattah* to pay it cannot be allowed. VADDADI JAGANNADHA BHUPATI DEO GARU *v.* RADDALA APPALASWAMY **576**

——— ——— ——— ——— **ss. 30, 40**—*Commutation of rent—Discretion—Enhancement of rent—Limit of enhancement—Not applicable to commutation.*

In fixing cash rent in commutation of grain rent, the Collector need not confine himself to the considerations set out in clause (3) of section 40 of the Act.

The limit prescribed in section 30, clause (1) (*b*), of the Estates Land Act for enhancement of rent does not apply to the commutation of rent fixed under section 40 of that Act. CHELLAKKOTTI UDAYAN *v.* H. H. THE PRINCE OF ARCOT **984**

——— ——— ——— ——— **s. 40** **984**

——— ——— ——— ——— **s. 52, cl. (3)** **576**

——— ——— ——— ——— **s. 60, Sch., part A, Art. 8**—*Arrears of rent—Limitation—Time runs from end of* fasli*—Suit for possession—Limitation not saved.*

For a suit for arrears of rent under the Madras Estates Land Act limitation begins to run from the end of the *fasli*, when, in the absence of any contract to the contrary, the rent becomes payable. The pendency of a suit for possession does not save the limitation for the rent suit. BHAVARAJU VENKATA SUBBA RAO *v.* YENUMULA MALLU DORA, 1 L. W. 438 **942**

——— ——— ——— ——— **ss. 73, 212**—*Penal provision not exclusive—Penal Code (Act XLV of 1860), s. 424.*

The penal provisions of the Estates Land Act, I of 1908, are in addition to, and not in substitution for, those contained in the Indian Penal Code. Where, therefore, an act is an offence under the Penal Code, but not punishable under the Estates Land Act, the accused can be tried for it. SIVANUPANDIA THEVAN, *In re*, 15 CR. L. J. 295 **503**

——— ——— ——— ——— **ss. 111, 115, 189, 213 (3)**—*Sale—Declaratory suit to set aside sale—Jurisdiction of Civil Courts—Bengal Tenancy Act (VIII of 1885), s. 119.*

A suit for declaration to have a sale, under section 111 of the Estates Land Act, declared void is triable by a Civil Court and not by a Revenue Court. CHIDAMBARAM PILLAI *v.* MUTHAMMAL, 1 L. W. 414; 15 M. L. T. 340 **524**

——— ——— ——— ——— **ss. 115, 189** **524**

——— ——— ——— ——— **s. 212** **503**

——— ——— ——— ——— **s. 213 (3)** **524**

——— ——— ——— ——— **Sch., part A, Art. 8** **942**

Madras Local Boards Act (V of 1884), s. 73 **576**

Maintenance. *See* CRIMINAL PROCEDURE CODE, s. 488; HINDU LAW.

——— ——— ——— ———, rate of. *See* HINDU LAW.

Malabar Compensation for Tenants' Improvements Act (Mad. I of 1900), ss. 3, 5—*Mortgage by* Jenmi *—Land leased after mortgage—Improvements by tenant—Compensation on eviction by purchaser.*

Where, after mortgaging his land, the mortgagor leases it out to a tenant, and that tenant in the *bona fide* belief that he is in possession as a "tenant" effects improvements on the land, he is a "tenant" within the meaning of that term in section 3 of the Malabar Compensation for Tenants' Improvements Act; and, therefore, is entitled to claim compensation under section 5 of Act I of 1900, even from a purchaser in execution of the mortgage-decree who tries to evict him from the land. CHURIYAYI KANARAN *v.* THATTARAI CHIRUTHA, 26 M. L. J. 183; 15 M. L. T. 149; (1914) M. W. N. 221; 1 L. W. 160 **321**

——— ——— ——— ——— **s. 5** **321**

Malabar Law—Urulans—*Delegation or alienation of powers—Custom—Proof.*

Ordinarily, the powers and duties of the office of *Urulan* are incapable of alienation to a stranger or delegation to an agent. But if such a custom is set up and strictly proved, it may be recognised provided that the alienation or delegation is strictly confined to its narrowest limits. MANNIAN NAMBUDRIPAD *v.* AGNIHARMAN NUMBUDRIPAD, (1914) M. W. N. 251; 15 M. L. T. 277 **141**

Malice—Damages, measure of **3**

Market-value. *See* LAND ACQUISITION ACT.

Marriage—*Breach of contract of marriage—Damages - Suit maintainable.*

Damages for the breach of a contract of marriage may be awarded to a man.

Between Burman Buddhists a suit by the man will lie, unless it can be shown to be forbidden by the Burmese Buddhist Law.

The respondent sued appellant for damages valued at Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being loss incurred by him over purchase of furniture for the marriage and Rs. 17 for injury to his reputation in public.

Both sides appealed and the District Court increased the damages to Rs. 20 for the furniture and Rs. 30 for injury to his social standing and reputation.

The defendant on second appeal urged, *inter alia*, that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation:

Held, that there was no evidence of actual loss having been sustained by reason of the purchase of the furniture, much less of what the amount of that loss was, and that, therefore, there was nothing to base the finding of either Rs. 13 or Rs 30 upon.

Held, also, that there was nothing on the record to indicate that the plaintiff had suffered injury either to his social standing or to his reputation, nor any evidence indicating any measure of damages for such injury.

Held, further, that the fact that a man had merely become the butt of his acquaintances' jests or had experienced a feeling of shame, did not constitute an injury for which damages could be awarded in a suit of this nature. MA NGWE YIN *v.* MAUNG PO TAW, 7 BUR. L. T. 14 **376**

——— *Muhammadan marriage—Proof of requirements of valid marriage—Suit for restitution of conjugal rights.*

In a suit for restitution of conjugal rights by a Muhammadan husband against his wife, the plaintiff must establish the requirements of a valid Muhammadan marriage.

Where in the judgment of the lower Appellate Court it is not stated who gave the consent on behalf of the infant girl:

Held, that the judgment was defective. HANU SHEIKH *v.* JURYO SHEIKH, 19 C. L. J. 216 **921**

———, whether obligatory. *See* HINDU LAW.

Mens rea—Innocence—Proof—Interpretation of Statute—Ambiguous language—Penal act **689**

Merchandise Marks Act (IV of 1889), ss. 6, 7 **689**

Merger, doctrine of—Intention—Benefit of person in whom the two estates have become vested—Transfer of Property Act (IV of 1882), s. 101 **393**

——— Leases created prior to passing of Transfer of Property Act—Vesting of superior and leasehold interests in one person after passing of Act—Doctrine of merger in *Mofussil—Sikmi taluq*—Specified boundaries—Creation of new *taluq* **612**

Mesne profits—*Co-sharers—Recovery of possession—Ouster.*

Mesne profits may be awarded to a co sharer suing another co-sharer for recovery of possession of his (plaintiff's) share in a certain joint property, if there has been an ouster. The mere excess of enjoyment does not in itself amount to an ouster. In the absence of ouster, mesne profits cannot be given. GORA CHAND CHATTERJEE *v.* KESHAB CHUNDER KHOWAS **122**

———, whether can be claimed in partition **264**

Minor—*Guardian—Bond for ancestral debt, executed by mother as guardian of minor son—Liability of son or mother.*

Where the mother of a minor son executed a bond, purporting to be on behalf of the minor, to pay a debt of his deceased father by instalments, but did not describe herself as his guardian:

Held, (1) that the son was liable for the repayment of the debt as it was his pious obligation to pay that debt and as it could have been recovered by the creditor out of the assets in his hand;

(2) that no decree could be given against the mother. SIVA NARAYAN GHOSH *v.* KAMAKHYA GHOSE **877**

Mirasi tenure—Chingleput District—*Melvaram—Thundavaram—Kudivaram—Kudivaram* right, meaning of—*Ullkudi Payakar—Swatantrums—Inamdar - Mirasidar* also ancient *Inamdar*—Presumption—*Ekabogam Mirasidar—Shrotriam Inam* granted to *Mirasidar* in 1802, whether "estate" **113**

Mischief. *See* PENAL CODE, s. 426.

Misdirection. *See* CHARGE TO JURY.

Misrepresentation. *See* CONTRACT ACT, s. 11.

Missal conditions, inferior proprietor, holding under—Land-holder **531**

Mitakshara. *See* HINDU LAW.

Mokarari lease. *See* BENGAL TENANCY ACT, s. 67.

Mortgage. *See* PARDAHNASHIN LADY.

——— *Consideration—Mortgage without consideration is inoperative.*

A mortgage without consideration is a nullity and, therefore, inoperative. It creates no charge on the property and cannot be enforced against a subsequent purchaser. RAMASWAMI CHETTIAR *v.* SUNDARA REDDIAR **805**

Mortgage—contd.

——— ——— Decree for recovery of money due under mortgage, not satisfied—Subsequent suit for sale of property, whether maintainable **429**

——— ——— Evidence—Proof of copy from registration—Fixed-rate holding—Sub-tenancy in *sir* holding—Acquisition of fixed rate holding—Land mortgaged by sub-tenant of *sir*—Mortgagee continuing in possession, effect of **864**

——— ——— Immoveable property—Rights and interests of grove-holder in grove - Registration **963**

——— ——— by *Jenmi*—Land leased after mortgage—Improvements by tenant Compensation on eviction by purchaser **321**

——— ——— *Limitation of suit for sale on mortgage not affected by subsequent transaction between mortgagee and third person who pays off mortgage-debt—Right of priority, limitation for enforcement of—Purchaser of property subject to mortgage—Right to plead limitation, when mortgagee neglects to recover money within limitation.*

Where a puisne mortgagee, who had paid the amount due on a decree for sale obtained by a prior mortgagee, brought a suit for sale on the basis of his mortgage and claimed priority as against intermediate mortgagees in respect of the amount spent by him in redeeming the prior mortgage:

Held, that the suit, in so far as it sought to enforce the priority, must be governed by the same rule of limitation as would have applied to a suit by the prior mortgagee.

The period of limitation in respect of a suit for sale on a mortgage cannot be extended by a subsequent transaction between the mortgagee and a third person who pays off the mortgage-debt.

If a person purchases property subject to a mortgage and the mortgagee allows his right to recover the money to be lost by lapse of time, the purchaser is not debarred from taking advantage of the negligence of the mortgagee and raising a plea of limitation. DEPUTY COMMISSIONER, LUCKNOW *v.* SUKHNANDAN, 17 O. C. 148 **448**

——— ——— *Pardanashin* lady—Mortgage by lady and her brother—Property solely of lady—Extortionate bargain—Gross advantage taken of unprotected position of lady—Mortgaged property—Condition—More property to be considered subject to mortgage after partition of mortgagor's share **642**

——— ——— *Payment of debt by mortgagor to one of several co-mortgagees, whether valid discharge of debt.*

The payment of the mortgage-debt to one of several co-mortgagees, without the concurrence of the others, is not a valid discharge thereof. RAMJIT *v.* KHEMCHAND **8**

——— ——— Rateable contribution, principle of—Determination of proportionate liability by Court **339**

——— ——— *Subsequent mortgagee redeeming prior mortgage—Intention to keep prior mortgage alive.*

Mortgage—contd.

Where a simple mortgagee of certain property paid a prior mortgagee of a portion of the property, but the mortgagor and not the simple mortgagee took possession of the portion thus redeemed:

Held, that the intention of the simple mortgagee was not to keep alive the prior mortgage for his benefit. HAR NARAIN *v.* HAR PRASAD, 12 A. L. J. 470 **827**

——— ——— *Suit by first mortgagee without making second mortgagee party—Purchase by first mortgagee—Purchase by second mortgagee in suit on his mortgage previous to purchase by first mortgagee—Whether first mortgagee entitled to possession subject to second mortgagee's right to redeem.*

A first mortgagee, who has bought the mortgaged property in a suit upon his own mortgage, to which suit the second mortgagee was not a party, is entitled to possession as against the second mortgagee, though the latter had previously obtained possession by a sale under his own mortgage, as he is merely entitled to redeem the prior mortgage. CHHATTUR DHARI CHOWDHURY *v.* GAYA PROSAD SINGH **791**

——— ——— *Two mortgages on same property—Decree on second mortgage—Sale in execution—Purchase by mortgagee—Judgment-debtor sold part of mortgaged property to other persons in presence of mortgagee—Decree money paid to mortgagee-purchaser—Satisfaction entered by mortgagee—Sale set aside—Suit by mortgagee upon first mortgage—Right of mortgagee to sell portion of mortgaged property sold to other persons—Estoppel—Not stating first mortgage in sale proclamation—Misrepresentation.*

The defendants Nos. 1 to 4 executed a mortgage-bond in favour of the plaintiffs. A subsequent mortgage was executed by those defendants in favour of the plaintiffs on the same property. The plaintiffs got a decree upon this second mortgage and put the property up for sale. The property which consisted of 21 *bighas* of land was sold and the plaintiffs purchased it and obtained possession. The defendants Nos. 1 to 4 made arrangements with defendants Nos. 5 to 10 to sell to the latter 15 *bighas*, out of the 21 *bighas* mortgaged, for Rs. 1,000 and out of this money, Rs. 958 odd were paid to the plaintiffs, who were present, in satisfaction of their decree. The plaintiffs certified satisfaction and allowed the sale to be set aside. The plaintiffs then sued on their first mortgage-bond and sought to make not only the lands remaining in the hands of defendants Nos. 1 to 4 liable but also the 15 *bighas* which had passed into the hands of defendants Nos. 5 to 10:

Held, (1) that it was open to the plaintiffs in the present suit to proceed only against the mortgaged property remaining in the hands of defendants Nos. 1 to 4;

(2) that the plaintiffs could not be barred by estoppel merely by reason of their not having stated in the sale proclamation that there was a prior incumbrance;

(3) that as the plaintiffs kept silent as to their prior lien when part of the property was sold to defendants Nos. 5 to 10, they were guilty of misrepresentation, and, therefore, they could not touch the part of the property sold to those defendants. ATAB PRAMANICK *v.* MEHRULLA SARDAR, 19 C. L. J. 590 **426**

Mortgage—contd.

——— — *Usufructuary—Not to be redeemed before 35 years—Not invalid in absence of fraud or duress—Redemption.*

The mere provision in a usufructuary mortgage that the mortgage would not be redeemed before the expiry of 35 years from the date of the mortgage is not hard and unconscionable in the absence of fraud or duress. DALTHAWAN SINGH *v.* AMARDEO SINGH, 12 A. L. J. 492 **926**

——— ——— Usufructuary mortgagee pre-empting equity of redemption—Possession neither claimed in suit nor obtained in execution, effect of **876**

——— ——— Void—Personal covenant to compensate mortgagee, whether enforceable **602**

——— ——— **-bond**—*Assignment — Mortgage-debt paid to assignee—Cancellation of assignment—Notice of cancellation—Assignment treated by mortgagee as void—Inter-pleader suit, whether mortgagor bound to bring.*

Where a mortgagee assigns his rights under the mortgage-bond to another, and gives notice of such assignment to the mortgagor, the latter is entitled to treat the assignee as the person to whom payment should be made, provided that before such payment the assignment has not been cancelled.

A notice cancelling such an assignment, in order to be effective, should at least signify an intention to bring a suit to cancel it.

A decree, subsequently obtained, setting aside the assignment, speaks only from its date, and does not effect payments previously made.

Where the mortgagee does not deny the assignment but only treats it as one entirely void and of no effect, the mortgagor is not bound to bring an interpleader suit to make the mortgagee and the assignee interplead between themselves as to their respective rights under the assignment. VENKATASUBBAIYAR *v.* SUBBARATHINAM AIYAR, 1 L. W. 419; 15 M. L. T. 331; 27 M. L J. 134 **607**

——— ——— **by conditional sale**—*Foreclosure*—Post diem *interest—Interpretation of document—Mortgage lien—Decree for foreclosure against auction-purchasers of mortgaged property—Execution-sales, whether Court gives warranty of title in.*

In a foreclosure suit based upon a mortgage by conditional sale, containing the stipulation to the effect that if the principal with interest at the stipulated rate was not paid by the date on which the period of the mortgage expired the mortgage was to be foreclosed in lieu of the sum so due on that particular date, the mortgagee claimed interest for the period subsequent to the date on which the term of the mortgage expired:

Held, that on the true construction of the document the mortgagor was liable to pay *post diem* interest so claimed.

A certain lien was legally enforceable as against a certain property. The property was attached in execution of a decree, but the Court ordered only half of the lien to be notified, and the auction purchaser bought it subject to this half of the lien. Subsequently a suit was brought for the enforcement of the whole lien on the property thus purchased:

Mortgage—contd.

Held, that the auction-purchaser could not avail of the Court's notification as to only half of the lien over the property purchased by him, for the Court in execution-sales gives no warranty of title. RAHAS BEHARI LAL *v.* BACHCHU SINGH, 1 O. L. J. 50 **871**

——— ——— **by conditional sale**—Term of mortgage fixed—Mortgage-debt re-paid within term—Redemption—Limitation, whether runs from end of term or from time of payment **355**

——— ——— **-decree** against *dar-patnidar* by landlord—Execution of mortgage decree—Sale of *darpatni mahal* subject to encumbrance of rent-decree **393**

——— ——— ——— against two defendants—Private sale by one defendant to decree-holder for part of decretal money, whether adjustment of decree—Application for personal decree against both, whether competent **544**

——— ——— ——— *Direction in decree that no application shall be entertained against property other than mortgaged property, whether legal—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6*

A Court cannot direct in a mortgage-decree that no application against property other than the mortgaged property shall be entertained. The question whether it is open to the decree-holder to proceed against property other than the mortgaged property is one which should be left to be determined when an application, if any, under Order XXXIV, rule 6, is made. PITAMBAR BAUR *v.* CHANDI CHARAN HALDAR **389**

——— ——— ——— *Execution—Satisfaction of part of decree.*

B obtained a decree on foot of a mortgage against *T* and *L*. In execution of another decree *T*'s share in the property was put up for sale; *B* applied that half of the money due under his decree was a charge on *T*'s property which was being put up for sale *B* himself purchased *T*'s property:

Held, that under the circumstances *B*'s decree must be deemed to have been satisfied to the extent of one-half. BALWANT SINGH *v.* CHET SINGH **848**

——— ——— ——— *Interest—Contractual rate—Discretion of Court in awarding less than contracted rate.*

The date referred to in Order XXXIV, rule 2, is the date fixed by the Court for the payment of the money by the defendant to the plaintiff. The clear meaning of the rule is that the Court must ascertain the amount due on the mortgage up to the date mentioned. The amount must be according to the contract between the parties unless the Court for some legal reason sees fit to interfere with the contract as to the rate of interest.

The only section of the Civil Procedure Code which gives any discretion in the matter of interest to the Court is section 34. This section applies to decrees for the payment of money, and does not, in any way, permit the Court to reduce the interest below the contracted rate when taking the accounts and making the decree as provided for by Order XXXIV. RAJWANTA KAUR *v.* SHAM NARAIN SINGH, 12 A. L. J. 283; 36 A. 220 **88**

Mortgage—concld.

——— ——-**decree**—*Personal decree—Decree-holder when entitled to proceed against person or other than mortgaged property of mortgagor—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6.*

The holder of a mortgage-decree is not entitled to proceed against other than the mortgaged properties of the judgment-debtor unless the latter has no saleable interest in the property mortgaged.

A mortgage-decree which directs payment before a fixed date and in default of payment orders the sale of the hypothecated property, is a personal decree and the decree-holder can proceed against the person and other property of the judgment-debtor without obtaining a decree under Order XXXIV, rule 6, of the Civil Procedure Code. PERIASAMI KONE *v.* MUTHIA CHETTIAR, 15 M. L. T. 232 **515**

——— ——— ——— Preliminary decree executed—No objection by judgment-debtor—Not open to parties to plead subsequently that there was no executable decree—*Res judicata* **390**

——— ——— **deed**—Fictitious entry—Registration **637**

——— ——— **suit**—Estoppel—Defendant setting up permanent tenure created before mortgage—Decree that defendant, subsequent incumbrancer, could redeem—Defendant, if estopped from setting up tenancy before mortgage—Improvement by tenant—Fixtures—Right to remove after determination of tenancy—Equitable right—*Benamdar* defendant in mortgage suit, estoppel against, whether binds beneficiary **762**

Mortgagee in possession, right of, to recover expenses incurred in suit to recover arrears of rent—Act of management **456**

Muhammadan Law—*Gift, essentials of—Possession—Presumption—Father—Gift of corpus—Son—Life-estate in produce reserved, effect of.*

Where a gift under the Muhammadan Law is the subject-matter of a suit, it is necessary to consider its validity under two aspects, *viz.*, whether the transaction is permissible under that law and, if so, whether the requirements of the law for giving effect to it have been fulfilled.

In considering what is the exact kind of possession that must be required to complete and effectuate a particular gift, two things have to be considered, *firstly*, the nature of the subject of the gift, or when the subject of the gift consists of rights in or over some object, the nature of that object or thing as well as of the rights themselves, and *secondly*, whether the donee is in need of anything being done by the Court in order that he may derive that benefit which he alleges it to be the purpose of the gift that he should derive.

There is nothing inherently impossible in possession being transferred of the corpus of the subject of the gift though there is a stipulation that the donee will give to the donor the income of the subject of the gift.

The presumption that after the gift by a father to his minor son possession by the father must be deemed to be on behalf of the son, cannot be extended to cases where the property is of such a nature that a mere physical control over it is not the only indication as to the ownership of the property.

Where a father made a gift of his house to his minor son under a registered-deed of gift which ran as follows: "I have this day given to you as a present the aforesaid house and ground according to the condition mentioned below out of my affection towards you. The condition is as follows: Till my death I myself will collect and take the rent of the aforesaid house and ground for my livelihood," and there was nothing to show that anything was at all done beyond the execution of the registered deed:

Held, that the gift could not be said to be valid without a consideration of the question whether possession of the property was transferred and in what way. RAHIMAN BI *v.* MAHOMED FATIMA BIBI, 15 M. L. T. 345 **651**

——— ——— ——— *Gift*—Hiba-bil-iwaz—Hiba-ba-shart-ul-iwaz—*Delivery of possession necessary.*

Gifts under Muhammadan Law, whether of the nature of *Hiba-bil-iwaz* or *Hiba ba-shart-ul-iwaz*, are not valid without delivery of possession.

A *hiba-bil iwaz* is a gift which has been completed and for which an *iwaz* or return has been accepted. It consists of two gifts (i) the original gift and (ii) the reciprocal gift and both are subject to the law of gift pure and simple, and it postulates the completion of both these gifts.

A *hiba-ba-shart-ul-iwaz* is a gift the legal incident of which is that the two parties agree to make an exchange of the properties forming the subject of the two gifts and after mutual possession has been taken neither party can revoke the transfer. RASOOL BEE *v.* GULAM KASIM, 1 L. W. 505 **802**

——— ——— ——— *Gift of house—Possession, delivery of—Contingent gift—Conditional gift.*

A gift of a house is not invalidated by the mere residence of the donor therein after the gift.

Contingent gifts are generally considered invalid while conditional gifts can be enforced as absolute gifts, although the condition may be bad. ALLA PICHAI THARAGANAR *v.* MAHOMED MOIDEEN, 15 M. L. T. 216 **520**

——— ——— ——— Marriage—Muhammadan marriage—Proof of requirements of valid marriage—Suit for restitution of conjugal rights **921**

——— ——— ——— Pardanashin *lady—Independent advice*—Ghosha *not observed*—Marcayers *of Southern India—Gift*—Mushaa—*Transfer of Property Act (IV of 1882), s. 123—Registration.*

The doctrine of "*independent advice*" should be applied only where the *pardah* system is rigorous and even voluntary deliberate acts of a *pardanashin* woman should not be lightly set aside.

Under Muhammadan Law a gift by a wife to her husband does not require strict proof of its being of a voluntary nature.

A gift of an undivided share in property capable of division and in possession of the donor is valid if such possession is transferred to the donee, although a mere registered gift-deed without transfer of such possession is not valid. ABDUL RAHIMAN *v.* MUHAMMAD NURDIN **547**

Muhammadan Law -contd.

——— ——— ——— *Pre-emption—Right of pre-emption, when arises—Whether right arises before transfer to stranger is completed*

A Muhammadan pre-emotor's right of pre-emption does not accrue until the transfer to the stranger has been completed by the registration of the *kobala*.

A, a co-sharer of *S*, offered to sell his share of a certain *jote* to *S*, but *S* refused to buy. Subsequently *A* executed a *kobala* conveying the share to *B*, an outsider, for Rs. 300; but no consideration passed then, and there was no delivery of possession. Having become aware of the execution of *B's kobala*, *S* approached *A* and obtained another *kobala* purporting to transfer the share to him for Rs. 400. The latter transaction fell through owing to *S's* failure to produce the purchase-money at the time of registration: but the transfer to *B* was completed by the payment of the consideration by *B* and the registration of his *kobala*. *S* then duly performed the ceremonies prescribed by the Muhammadan Law and eventually brought a suit to enforce his right:

Held, (1) that *S's* right did not arise when he heard of the execution of *B's kobala* although that was sufficient under the Muhammadan Law to pass the share to *B*, but it arose when it came to his knowledge that the registration required by the general law to complete the transfer had been effected;

(2) that, as *S's* right of pre-emption did not accrue until the transfer to *B* had been completed by the registration of *B's kobala*, *S* could not have lost it by anything done or omitted by him prior to that date. BUDHAI SIRDAR *v.* SONAULLA MRIDHA, 18 C. W. N. 890; 19 C. L. J. 601 **385**

——— ——— ——— *Settlement—Deed to be construed according to Muhammadan Law—Life-estate—Donee takes absolute estate.*

In construing a deed of settlement executed by a Sunni Muhammadan of Rangoon the law applicable is the Muhammadan Law.

The creation of a life-estate is inconsistent with the Muhammadan Law, and where a life-estate is attempted to be created the donee takes an absolute estate. ANNAMALAY CHETTY *v.* MUHAMMAD ISMAIL, 7 BUR. L. T. 75 **903**

——— ——— ——— **Shia school** — *Gift made in* maraz-ul-maut—*Possession delivered to donee—Gift valid to one-third of donor's estate—More than one year's illness, whether* maraz-ul-maut—*Burden of proof of character of disease—Evidence.*

Where a gift made by a Shia Mussalman is impugned as having been made in *maraz ul-maut* (death-illness), the onus of proving the character of the disease lies upon the person who contests the gift

Under the Shia Law if a person dies of a disease of more than one year's duration, such disease is not considered a death-illness. But there is this condition attached to it that if the illness increases to such an extent as to give, or another supervenes which gives, an apprehension of death in the mind of the donor, the increase or the new disease is a death illness

Under the Shia Law a gift made in *maraz-ul-maut* (death illness) holds good to the extent of only one-third of the donor's estate in spite of the delivery of possession prior to his death. KHURSHED HUSSAIN *v.* FAIYAZ HUSSAIN, 12 A. L. J. 417; 36 A. 289 **253**

Muhammadan Law -concld.

——— ——— ——— **Shia school**—*Wakf made during* maraz-ul-maut—*Valid to the extent of one-third.*

Under the Shia Law, a *wakf* made in death-illness (*maraz-ul-maut*) is valid only to the extent of one-third, unless assented to by the heirs, even if possession has been delivered under the *wakf*. ALI HUSSAIN *v.* FAZAL HUSSAIN KHAN, 12 A. L. J 868 **291**

Municipal Council—Complaint by Secretary, withdrawal of **507**

Murder. *See* PENAL CODE, s. 299.

Mushaa - Gift. *See* MUHAMMADAN LAW.

Nankar grant - *Land subject to burden of service—Right of grantor to put end to tenure when grantee is willing to perform service—Ejectment.*

Where a grant of land is subject to a burden of service, that is to say, is *nankar*, and not a mere grant in lieu of wages, the grantor has no right to put an end to the tenure, whether the services are performed or not, as long as the grantee is willing and able to perform the services.

The defendants and their ancestors had been dwelling upon the land in dispute for more than half a century, being inducted into the land by the plaintiff's predecessor in permissive possession, owing to the facts that the parties were on very friendly terms and the defendants were *kavirajs* by profession. This good feeling led the plaintiff's ancestor to allow the defendants' ancestor to occupy the land and raise huts on it for habitation without payment of rent. The lower Appellate Court held that this evidence amounted to a proof of presumed *nankar* grant to the defendants' ancestor. The defendants were still holding the profession of *kavirajs* and did not decline to render any service to the plaintiff:

Held, that the plaintiff was not entitled to eject the defendants JOGENDRA NARAIN SIRKAR *v.* RAM CHANDRA ADHIKARI **300**

Negotiable Instruments Act (XXVI of 1881), s. 22—Hundi—*Days of grace—Contract, not allowing days of grace, whether permissible.*

Per *Seshagiri Aiyar, J.*—It is open to parties to enter into a contract that the provisions of section 22, Negotiable Instruments Act, relating to days of grace shall not apply to them, and it is not open to the promisee to insist that the maker of the note should be compelled to take advantage of the days of grace.

Where the giving up of a benefit secured by law does not offend against public policy, the Courts will enforce a contract to that effect.

No question of public policy is involved in the inclusion or omission of provisions for days of grace.

Per *Sadasiva Aiyar, J.*—As section 22 of the Negotiable Instruments Act omits in a marked manner the provision in section 14 of the English Bills of Exchange Act allowing the parties to contract that the bill shall come to maturity on the date fixed in it without the addition of days of grace, it is not open to the parties to contract themselves out of the

Negotiable Instruments Act—concld.

benefit of that section by agreeing that the days of grace shall be dispensed with. VALLIAPPA CHETTY *v.* SUBRAMANIAN CHETTY, 26 M. L. J. 494; 15 M. L. T. 342 **431**

——— ——— ——— **s. 78** **545**

Nethersole Settlement Khasra—*Public record—Certified copy produced at late stage—Evidence, acceptance as—Burden of proof to show entry incorrect—Record of Rights—Central Provinces Tenancy Act (I of 1898 B C), ss. 44, 56 (2)—Occupancy right—Village service lands.*

The *khasra* of the Nethersole Settlement in Sambalpur is a public record.

A certified copy of it produced by the plaintiff before the witnesses for the defendant were examined, may properly be accepted in evidence, though filed at a late stage.

The burden of proof is upon the party who alleges that a certain entry in a Record of Right is incorrect.

Under section 44 of the Central Provinces Tenancy Act, occupancy rights cannot be acquired in village service lands, and under section 56, sub-section 2), any sub-lease of such lands for a period not exceeding one year is void. BHUBAN SAHU *v.* LAL SUNDAR JHANKAR **604**

Notice—Agreement to sell—Subsequent purchaser—Specific performance **621**

———Criminal Intelligence Gazette, publication in, whether sufficient notice **701**

Nuisance. *See* EASEMENT.

———Obstruction to channel not used by public **181**

Obstruction. *See* EASEMENT.

Occupancy right acquired in land by vendee before purchase—Re-emergence of occupancy right **364**

———Village service lands **604**

Officer, *liability of—Acting on reports—Honest belief on reports.*

An officer is not liable who acts on false reports, provided that he acted honestly in respect of them. D. WESTON *v.* PEARY MOHUN DAS, 40 C. 898; 18 C. W. N. 185 **25**

Official Acts—Presumption **195**

Onus of proof. *See* CUSTOM.

——— ——— ———Lottery, whether authorized **195**

Order in Council, 1853, rule 5 **644**

Order passed twenty months after decision of criminal case, whether legal **483**

Oudh Laws Act (XVIII of 1876), s. 3—*Muhammadan Law—Gift, validity of—Seizin in case of property not admitting of physical possession—Gift, when complete—Gift of two distinct properties of only one of which possession is delivered—Possession obtained subsequent to gift, effect of.*

Oudh Laws Act—concld.

A gift is not valid without seizin. But where the property given does not admit of physical possession and the donor gives such possession, actual or constructive, as he is capable of giving, provided he himself is not out of possession, the gift would be valid. A gift is not, however, complete until possession is taken of the thing given.

If a gift is made by a Muhammadan of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety, but takes effect as to the property which has been duly delivered.

Under the Muhammadan Law, which has been made applicable under section 3 of the Oudh Laws Act to questions relating to gifts between Muhammadans, a gift of a house conveys no title unless it is accompanied by delivery of possession or followed by the taking of possession with the permission, express or implied, of the donor. *Musammat* MUNIFA BIBI *v.* FATEH ALI, 17 O C. 60; 1 O. L. J. 133 **453**

——— ——— ——— **s. 7**—*Pre-emption—Presumption, statutory*—Wajib-ul-arz, *interpretation of—Claim for pre-emption relating to village decreed in absence of any defence as to non-prevalence of such custom, whether establishes custom in village.*

The presumption as to a right of pre-emption is, in Oudh, a statutory presumption created by section 7 of the Oudh Laws Act which lays down that such a right is, in the absence of any custom or contract to the contrary, presumed to exist.

Where the entry in a *Wajib-ul-arz* stated that every co-sharer in the village was entitled to sell his share to whomsoever he liked:

Held, that the above entry was sufficient proof of a custom excluding the right of pre-emption in the village.

Where in a previous suit relating to a village a claim for pre-emption had been put forward and allowed and it was contended in a subsequent suit for pre-emption relating to the same village that the previous decision proved the existence of the custom of pre-emption in the village, but it was found that in the previous suit no defence like that in the subsequent suit was put forward to the effect that the custom did not obtain in the village:

Held, that the above previous decision could not establish the custom of pre-emption in the village. ABDUL RAHMAN *v.* KALE KHAN, 1 O. L. J. 152; 17 O. C. 105 **943**

Oudh Rent Act (XXII of 1836), ss. 2, cl. 5, 124C and 124D—*"Portion of the produce of land," meaning of—Landlord's remedy against tenant failing to cultivate holding held on rent payable in kind—Applicability of ss. 124C, 124D.*

The words "portion of the produce of land" in the definition of "*rent*," as given in section 2, clause 5, Oudh Rent Act, mean a portion of what the land has actually produced and not a portion of what it might have produced. They cannot be held to be a portion of the produce which ought to have been grown upon the fields.

Oudh Rent Act—concld.

Where a tenant deliberately omits to cultivate a holding the rent of which is payable in kind, no arrears of rent can be held to exist and the landlord's remedy is to sue in the proper Court for damages for breach of the contract which such a tenant is implied to have made to cultivate the holding as well as his capacities and resources permit.

Sections 124C and 124D of the Oudh Rent Act apply only when the suit has been instituted in a wrong Court and not when the plaintiff has sued in the right Court upon a cause of action upon which he cannot succeed. SRI KRISHNA LAL *v.* GHULAM SUBHANI, 17 O. C. 55; 1 O L. J. 147 **460**

——— ——— **s. 124C and D** **460**

Panchayat, power of—Ex communication **301**

Pardanashin lady, complaint by—Examination of complainant—Issue of process—If complainant is *pardanashin* lady, whether she may be examined by Commission—Complainant, whether witness **700**

——— ——— ———, conveyance by—Document—Execution of document—Document read over after execution and receipt of considertion—Inclusion of property not agreed to be sold objected to **10**

——— ——— ———Dispensing with personal attendance of accused -Permission to appear by Pleader—Transfer of criminal case **489**

——— ——— ———Independent advice—*Gosha* not observed—*Marcayers* of Southern India—Gift—*Mushra*—Transfer of Property Act (IV of 1882), s. 123—Registration **547**

——— ——— ———Mortgage executed of her house in favour of husband's creditor—Undue influence of husband—Document, if fairly taken—Onus, on whom **401**

——— ——— ———*Pleader and client—Mortgage by lady and her brother—Property solely of lady—Pleader securing mortgage in name of another—Benami transaction—Deed not explained to lady—Burden of proof—Extortionate bargain—Gross advantage taken of unprotected position of lady—Void deed—Mortgaged property—Condition—More property to be considered subject to mortgage after partition of mortgagor's share—Such condition, whether operative.*

Where a legal adviser to a *pardanashin* woman, acting the part of money-lender to her, procures the execution by her of a mortgage-bond to secure its re-payment, the Court would be entitled, and indeed obliged, to examine the transaction with closer scrutiny, or to insist more sternly on the mortgagee supporting the heavy onus of showing that the lady was fully aware of the meaning and effect of the deed and that the transaction was a fair and honest one.

A *pardanashin* lady and her younger brother were engaged in family litigation to recover their shares of inheritance in the property of their father. A decree of partition was passed in their favour but before the time for appeal expired, their Pleader got a mortgage-bond executed *benami* in favour of another person. The property mortgaged belonged solely to the lady and by the transaction of mortgage her brother obtained the discharge of debts for which he alone was liable. The interest stipulated in the mortgage-deed was compound interest at the rate of one per cent. per month (with half-yearly rests). In addition a clause was inserted in the mortgage-bond that after the partition the whole of the property allotted to the lady shall be substituted for the property mortgaged, the effect of this clause would be to quadruple the amount of property mortgaged. It was further established that the other relatives of the lady were also taking gross advantage of her unprotected state by refusing to give consent to her marriage unless she surrendered the whole of her share in the family property. It was also proved that the terms of the mortgage-bond had not been adequately explained to the lady and she did not understand the terms of the deed:

Held, that the terms of the mortgage-bond were extortionate and, therefore, the deed, which was void, could not be enforced against her.

Held, also, that if the mortgage-bond had been held valid, the clause relating to the substitution of the whole of the lady's share for what had been originally mortgaged would have been operative and would have subjected the whole of her share to the mortgage. MAHABIR PRASAD *v.* TAJ BEGAM, 27 M. L. J. 13 **642 P. C.**

Parsi Marriage and Divorce Act (XV of 1865), s. 31—*Parsis—Maintenance, suit for—Jurisdiction—Original Side of High Court—Matrimonial Court.*

The Bombay High Court has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation which admittedly by itself it has no jurisdiction to grant.

It is within the exclusive jurisdiction of the Parsi Matrimonial Court to entertain suits concerning matrimonial disputes amongst the Parsis and when the Court grants a decree for judicial separation, it can order the husband to provide his wife with permanent alimony. BAI GULBAI *v.* BEHRAMSHA, 16 BOM. L. R. 211 **441**

Partition. *See* HINDU LAW.

——— ———Objection to partition filed beyond time fixed by Revenue Court, whether entertainable, if partition not yet granted—Partition, complete, effect of **965**

——— ———, suit for—*Ijmali* lands—Previous partition—Lands jungle or submerged in three *mauzas*—Separate suits for partition, maintainability of **442**

Patni Taluks Regulation (VIII of 1819), s. 13, cls. (2) and (4)—Patni Taluks—Zemindar—Patnidar—Dar-patnidar—*Their rights and duties—Tenure saved from sale—Lien—Bengal Tenancy Act (VIII of 1885), ss* 65, 148, *cl.* (*h*), 163, 165, 195—*Permanent tenure—Ex-landlord, rights of, against tenure—Execution—Sale — Money-decree — Hypothecation - Construction of Statute.*

A Patni Taluk is a permanent heritable and transferable tenure, which a Zemindar may

Patni Taluks Regulation – contd.

create over the whole or part of his estate, whilst a Patni Talukdar has a similar right to let the entire property held by him in Patni or in parcels to subordinate Talukdars called Dar-patnidars. And this process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the Zemindar has a right to apply to the Collector to sell the Patni Taluk for arrears of rent, and the sale has the effect of cancelling all under-tenures; but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent, and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the Zemindar possesses for the realisation of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession

There are many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of the Patni Regulation VIII of 1819 and which have no relation to Patni Taluks. The incidents of these tenures are governed by the Bengal Tenancy Act (VIII of 1885). The former Regulation is a self-contained Statute which in express terms is excluded from the operation of the latter Act (section 195). The governing idea throughout the multifarious provisions contained in Chapter VIII of the Bengal Tenancy Act is the subsistence of the relationship that gives rise to those rights and obligations.

Where at the instance of the Zemindar a Patni Taluk is advertized for sale for arrears of rent and a Dar-patnidar pays the arrears to save the Patni Taluk from sale, he acquires on the Taluk so preserved a special lien expressly created by sub-section 4 of section 13 of the Patni Regulation, which may well be called a statutory salvage lien, arising not from any implication of the law but under the express directions and declarations of the Regulation.

The prohibition contained in section 148, clause (*h*), of the Bengal Tenancy Act refers to decrees obtained by the landlord under section 65 of the Act; and to acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists.

The right to bring the tenure or holding to sale under section 65 appertains exclusively to the landlord, and a person, to whom certain rents are due and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. In short, the existing landlord alone can execute his decree for arrears of rent, the ex-landlord is an outsider and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself.

From the nature of the debt being arrears of rent or the decree being for arrears of rent, the tenure does not become *ipso facto* hypothecated for the debt and a total stranger to the property, with which the landlord's rights and obligations are inseparably connected, cannot avail of the special remedy given to the landlord alone to recover arrears attached to the tenure.

Therefore, the special right created in favour of the landlord under section 65 cannot be claimed also by one who has parted with the property which gives this right and to which it is attached. ARTHUR HENRY FORBES *v.* MAHARAJ BAHADUR SINGH, 18 C. W. N. 747; (1914) M. W. N. 397; 15 M. L. T. 380; 12 A. L. J. 653; 27 M. L. J. 4 **632 P. C.**

Pattah, when comes into force – *Pattah* under old Act – Land cess – Tenant, whether liable to pay full cess – Rent, whether charge on produce in hand of purchaser **576**

Pauper suit – Defendant entitled to adduce evidence in disproof of plaintiff's pauperism – Opportunity to be given to defendant to prove allegations – Plea that part of property in suit is in possession of plaintiff – Defendant to be allowed to prove his plea **974**

Penal act. *See* PENAL CODE, ss. 482, 486.

Penal Code (Act XLV of 1860), ss. 11, 34, 294A – *Committee of club – Person – "Keeps," meaning of – Common object – Liability of members – Purpose, double, effect of – Official Acts – Presumption – Government, Collector assessing income-tax, whether – Assessing income-tax, whether tantamount to authorization – 'Not authorized,' meaning of – Exception – Onus of proof – Evidence Act (I of 1872), ss. 105, 114 – Proposal – Drawing list, whether proposal.*

The members of the Committee of a club who exercise full control over club matters, inclusive of the premises, 'keep' the premises of the club within the meaning of that expression as used in section 294A of the Indian Penal Code.

Where a house is kept open for a double purpose, *viz.*, as an honest social club for those who do not desire to play as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery.

Where the common object is the keeping of a place for the purpose of drawing a lottery not authorized by Government, all who engage in such an object are individually guilty and can be prosecuted jointly or severally.

The presumption is that official acts are regularly performed.

A Collector who is a Revenue Officer is not authorized to sanction a lottery, nor would the mere act of taking income-tax from the club on the profits of the lotteries constitute authorization.

The words 'not authorized' in section 294A, Indian Penal Code, mean no more and no less than 'unless authorized, or not having been authorised or without authority,' and are in the nature of an exception or proviso and under section 105 of the Evidence Act, the burden of proof lies on the accused to show that the lottery was authorized by Government.

A drawing list which set out on the first page the list of the winners drawn on a certain day in the month of May, and on its back contained the descrip-

Penal Code - contd.

tion: "The sweep for June is now open. It will close on the 20th June 1913. Settling day 23 June 1913. All tickets must be taken in the name of a member, etc," was *held* to be a proposal within the meaning of section 294A, Indian Penal Code. EMPEROR *v.* A. J. COOKE, 15 CR. L. J. 243; 7 BUR. L. T. 187 **195**

——— ——— **s. 34** **195**

——— ——— **s. 52** **661**

——— ——— **s. 98** — *Right of private defence of property—Owner entering upon tenant's land to remove fallen tree—Assault—Possession follows title.*

When a tree is blown down in the wind, the *mal-guzar* who is the owner of it becomes entitled to remove it and for this purpose he has a right of ingress over the tenant's land and a right of private defence of property in the fallen tree.

Possession is presumed to follow the title. PUSU *v.* EMPEROR, 10 N. L. R. 38; 15 CR. L. J. 352 **704**

——— ——— ——— **ss. 109, 379** — *Theft, abetment of—Charge of theft of wood without pass—Claim of accused to take wood without pass—Decision of claim necessary before conviction.*

Where a person alleges his right to a property, he cannot be convicted of theft for removing it unless it has been found as a matter of fact that he is not entitled to it. HARENDRA NARAYAN DAS *v.* RAMJAN KHAN, 18 C. W. N. 397; 15 CR. L. J. 298; 41 C. 433 **506**

——— ——— ——— **s. 141, cl. 4** — *Unlawful assembly—Maintenance of existing peaceful possession with or without title—Enforcement of right by person out of possession*

Persons merely acting in maintenance of an existing peaceful possession, no matter whether the possession was with or without title, cannot be said to enforce any right or supposed right and, therefore, cannot be held to form an unlawful assembly within the meaning of section 141, clause (4), Indian Penal Code.

A person who is out of possession must enforce his right, if any, in the way prescribed by law and he cannot be permitted to vindicate it by the use of criminal force. SARABDAWAN SINGH *v.* EMPEROR, 17 O. C. 21; 15 CR. L. J. 232 **184**

——— ——— **s. 147** **203**

——— ——— **s. 182** **728**

——— ——— **s. 193** **726, 727**

——— ——— ——— **s. 196** — *Prosecution to exclude all explanation consistent with innocence of accused—No fabrication of false evidence, if evidence not admissible—Public document—Production of copy of false document—Attempt to use the original.*

The prosecution must in a criminal case exclude all explanation of the facts which is reasonably consistent with the innocence of the accused.

The weight of authority is in favour of the view that there can be no fabrication of false evidence within the meaning of section 192, Indian Penal Code, if the evidence is not admissible in itself.

A report by a village *nikahkhwan* to the *moharrir* in charge of the central office in which entries in the village registers are copied into another register, informing him that on the day after the entry of the marriage of *A* and *B*, the former husband of the woman had come to the writer and stated that he had not divorced her and accordingly desiring the *moharrir* not to take action upon the writer's report of the marriage, is not a public document within the meaning of section 74, Indian Evidence Act, and no secondary evidence of its contents can be given under section 65 of the Evidence Act.

The production of the copy of a report (a forged document) is an attempt to use the original.

The word 'corruptly' in section 196, Indian Penal Code, is intended to connote a motive not necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence, and an intention to procure a false conviction is a corrupt intention. FAZL AHMAD *v.* EMPEROR, 1 P. R. 1914 CR; 1 P. L. R. 1914; 15 CR. L. J. 344 **696**

——— ——— ——— **s. 210** — *Decree-holder mis-stating decretal amount—Duty of executing Court to find out proper amount.*

Where a decree-holder drew the executing Court's attention to the final decree both in the heading and at the foot of his application for execution, but misdescribed its precise terms:

Held, that he could not be made criminally liable under section 210, Indian Penal Code, for such a mistake, particularly as it was a business of the executing Court to verify the amount due to him in terms of the decree sought to be executed. DAYA RAM *v.* EMPEROR, 11 P. W. R. 1914 CR.; 64 P. L. R. 1914; 15 CR. L. J. 263 **471**

——— ——— ——— **s. 211** **728**

——— ——— **s. 211** — *Burden of proof—Duty of prosecution to establish charge—Failure of accused to examine witness, if implies guilt.*

The duty of the prosecution in a case under section 211 of the Indian Penal Code is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge.

It is for the prosecution to establish their case, and if they fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter to examine any particular person as a defence witness will not imply the guilt as having been proved.

Where the petitioner, on learning from his wife that the complainant who was living in the house had disappeared with valuables, lodged an information to the Police charging him with theft which was afterwards found to be false, it was *held* that he could not be convicted under section 211 of the Indian Penal Code unless the prosecution established that there was, as a matter of fact, no theft, or that the petitioner knew that there was no theft. HASSAN MIRZA *v.* EMPEROR, 18 C. W. N. 391; 15 CR. L. J. 355 **723**

——— ——— **s. 216** — *Harbouring proclaimed offender—Criminal Intelligence Gazette, publication*

Penal Code—contd.

in, whether sufficient notice—Offender adopting false name—Harbourer misdescribing offender as his relation—Knowledge.

In order to establish an offence under section 216, Indian Penal Code, it must be proved that a public servant in the exercise of his lawful authority ordered a certain person to be apprehended for an offence and that the person charged with harbouring him did so, knowing of such order, with the intention of preventing his apprehension.

Such knowledge cannot be presumed from the mere publication of the name of the offender in the Criminal Intelligence Gazette nor can it be inferred from the offender's adopting a false name and the harbourer's misdescribing him as his relation. BALWANT SINGH v. EMPEROR, 1 O. L. J. 30; 15 CR. L. J. 319 **701**

——— ——— **s. 294A** **195**

——— ——— **s. 299**—*Savage attack — Dangerous wounds followed by blood poisoning and fever—Murder.*

A person was savagely attacked with murderous weapons and was dangerously wounded in consequence of which he was detained in hospital for over 40 days where he developed symptoms of blood poisoning followed by brain fever and eventually died:

Held, that the wounds were the cause of death and the accused were guilty of murder. NURO v. EMPEROR, 7 S. L. R. 83; 15 CR. L. J. 376 **744**

——— ——— ——— **s. 349**—*Criminal force—Raising lathi to strike.*

Where the accused raised their *lathis* to strike a particular person with the result that he had to flee to save himself:

Held, that they were guilty of using criminal force as defined in section 349 of the Penal Code JAI RAM v. EMPEROR, 12 A. L. J. 154; 15 CR. L. J. 231 **183**

——— ——— **s. 353** **203**

——— ——— **s. 354** **734**

——— ——— **ss. 361, 362, 366**—*Minor girl leaving her husband's house of her free will—Abduction or kidnapping.*

A girl under sixteen years of age left the guardianship of her husband and her father-in-law out of her own free will. On the way she met the accused and stayed with him for a few days quite voluntarily, without any force or fraud having been practised upon her:

Held, that the accused was neither guilty of abduction nor of kidnapping. EMPEROR v. RAMCHANDER, 12 A. L. J. 265; 15 CR. L. J. 265 **473**

——— ——— **s. 362, 366** **473**

——— ——— **s. 376** **734**

——— ——— **s. 379** **506**

——— ——— **s. 395**—*Dacoity—Circumstantial evidence—Pointing out place where stolen property found.*

Where the sole evidence against a person charged with an offence under section 395, Indian Penal Code, consisted of the fact that the accused had pointed out the place where some remains of the stolen property were found:

Held, that the above circumstantial evidence was not sufficient to show that the accused had committed the offence, inasmuch as it did not exclude other theories compatible with his innocence. SURAT SINGH v. EMPEROR, 1 O. L. J. 38 **1004**

——— ——— **ss. 399, 402,** distinction between **985**

——— ——— **ss. 399, 402**—*Acquittal under s. 399, if involves acquittal under section 402, Indian Penal Code—Nature of defence which accused can set up—Duty of Court—Prosecution evidence, deficiency in, defence not bound to fill up—Right of defence to comment on such deficiency—Case of fraud set up by defence—Prosecution, opportunity of explanation to—Verdict of assessors, in answer to questions by Judge, impropriety of—Repugnancy in judgment, conviction, if can be set aside on such ground—Tendency of modern legislation—Power of High Court to alter acquittal on one of two alternative charges into conviction—Distinction between sections 399 and 402, Indian Penal Code—Criminal Procedure Code (Act V of 1898), s 47, meaning and scope of—Section 103, clause (2)—Search—Right of "occupant to be present at search"—Denial of this right, effect of—"Occupant of the place," meaning of—Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings—Finding of incriminating articles in a house, presumption of law arising from.*

Woodroffe, J. (Beachcroft, J., concurring).—An accused person is entitled to put forward any defence open to him, technical or otherwise, and to have the Court's judgment on it.

It is no affair of the defence to supplement or explain deficiencies or suspicious circumstances appearing on the face of the prosecution evidence. It is open to it say that the prosecution has not proved its case and to refer to such deficiencies in proof of the submission or to other circumstances appearing on the face of the prosecution evidence which show that it is so open to suspicion that it would be unsafe to accept it. If, however, the defence puts forward a case of fraud or if the evidence for the prosecution is not ambiguous, the defence should give notice of the point they intend to take so that the prosecution may have an opportunity of explanation.

If any charge of fraudulent practice was going to be based on a circumstance which standing by itself was not necessarily suspicious, the defence should have cross-examined witnesses on the point

Where the Sessions Judge in taking the verdict of the assessors put a large number of questions to them and then recorded their opinion on those questions:

Held, that the Judge should have allowed the assessors in the first instance to have given their opinion in their own language and way, and then when they had completed what they had to say it would have been open to him to put to them such questions as were necessary to elucidate or supplement their opinion.

Where the charge against the accused was of two separate offences laid in an alternative form, *viz.*, one under section 399 and another under section 402,

Penal Code—contd.

Indian Penal Code, but it appeared that the charges were treated not alternatively but as additional and the Sessions Judge acquitted them of the charge under section 399, Indian Penal Code, and convicted them of the charge under section 402, Indian Penal Code:

Held, that the acquittal under section 399, Indian Penal Code, did not involve an acquittal under section 402, Indian Penal Code, and the conviction under the latter section was not wrong and the judgment of the Sessions Judge was not vitiated by repugnancy;

(2) that even if there was any repugnancy it was open to the High Court to alter the finding of acquittal under section 399, Indian Penal Code, into one of conviction maintaining the sentence;

(3) that the offences of commission of dacoity, preparation for it and assemblage for the same purpose have this in common that they presume an intention or agreement to commit dacoity by five or more persons. A mere assembly without further preparation is not a preparation within the meaning of section 399, Indian Penal Code, for if it were, section 402, Indian Penal Code, would be redundant. Section 402, Indian Penal Code, applies to the case of mere assembling without proof of other preparation. A person can thus be not guilty of dacoity yet guilty of preparation and not guilty of preparation yet guilty of an assembly.

Beachcroft, J.—The tendency of modern legislation in general and of the Criminal Procedure Code in particular is to avoid technicalities and there is no provision in that Code which would justify interference with a conviction on the ground of repugnancy in the record.

Woodroffe, J. (*Beachcroft, J.*, concurring).—Where the Police searched a hut on suspicion and incriminating evidence was found, and after the search was over the Additional District Magistrate came to the spot and saw what had been found and a search list was prepared which the Additional District Magistrate signed, and the accused were subsequently placed before another Magistrate who held an inquiry and committed the accused to the Court of Session for trial:

Held, (1) that the fact that the Additional District Magistrate did not take cognizance of the case at once, did not render the subsequent proceedings before another Magistrate bad, nor could such subsequent proceedings be held to be prejudicial to the accused;

(2) that it was not the duty of the Additional District Magistrate to take cognizance of the case on the basis of what he found at the spot.

Where the accused persons who were inside the room searched by the Police were, after the discovery in their presence of a gun and after search of their persons, sent out of the room and the search was continued:

Held, that the Code of Criminal Procedure permits the occupants of the place searched to be present at the search and there was, therefore, a violation of this rule which is one not merely of technicality but of substance, in that it is enacted to guarantee the reality of the search and the discoveries made thereat.

Penal Code—contd.

That this was an irregularity which the accused were entitled to ask the Court to consider and which made it incumbent on the Court to scrutinise the evidence carefully.

Beachcroft, J.—The spirit of section 103, sub-section 3, is that the occupant of the place searched shall be present and it means that he is to be given the option of being present and not that he is to be allowed to be present only if he demands it. But the right of presence given by section 103 applies only to the occupant of the place searched or some person in his behalf, and the words "occupant of the place" are not intended to cover every person who may happen to be in the place at the time, but they refer back to the person mentioned in section 102, *i. e.*, a person residing in or being in charge of the place.

Woodroffe, J.—Where after searching a hut arms were found under a *machan* inside the hut and in the ceiling of the hut:

Held, that the knowledge of the existence of the arms would not without other evidence be imputable to any other than the lessee of the hut, nor would the presumption operate even against him if it were shown that the circumstances were such that arms might be in his place without his knowing it.

Beachcroft, J.—Where an article is found in a man's house, the ordinary presumption is that he as owner of the house is aware of its contents. This is subject to the qualification that no other person has access to that particular place. It follows that if the house is in the occupation of more persons than one having access to the particular place, there is no presumption against them individually that they have put the article where it is found; though if it be proved that an article has been for a considerable period of time in a place to which all have frequent access, it might reasonably be presumed that all were aware of its existence.

Section 47, Criminal Procedure Code, is not intended to restrict the powers of the Police to enter the place to be searched: on the contrary it is a provision compelling householders to afford the Police facilities in carrying out their duties, and section 48 provides that if difficulties are placed in the way of a Police officer he may use force to obtain ingress. ROMESH CHANDRA BANERJEE *v.* EMPEROR, 18 C. W. N. 498; 41 C. 350 **985**

——— ——— **s. 402** **985**

——— ——— **ss. 403, 404** **743**

——— ——— **s. 406**—*Criminal breach of trust.*

The complainant gave money to the accused on condition that he would purchase a motor car and sell it and return her the money with half the profits. The accused applied the money to other purposes:

Held, that the accused was not guilty of criminal breach of trust. WILLIAM CECIL KEYMER *v.* EMPEROR, 15 CR. L. J. 281; 12 A. L. J. 730 **492**

——— ——— ——— **ss. 417, 418, 419, 420** **743**

Penal Code—contd.

——— ——— — **ss. 420, 511**—*Cheating—Attempt—Definition of "attempt"—Spurious trinkets—False representation—Untrue statement to support.*

A manufactured spurious trinkets, and took them to *N* saying they were of gold and that they were stolen property (which was also not true) and that he (*A*) did not like to sell them in bazar and asked him to buy. *N* did not buy, but *A* was arrested.

It was argued that no attempt to cheat had been proved, because more had to be done by *A*, such as, weighing the articles etc, etc, before wrongful loss would fall upon *N*:

Held, that the act of *A* amounted to an attempt of cheating punishable under sections 420/511, Indian Penal Code.

Held, also, that in cases of cheating the essential thing is the deception of the victim, the dishonest causing to arise in the victim's mind of an impression, the reverse of truth, calculated to induce him to give up something he would not otherwise give up, or to do, or refrain from doing something, he would not otherwise do or refrain from doing, or to enter into a bargain he would not enter into, if he knew the real facts.

Held, further, that definitions in such matters are dangerous things, and the only safe way of deciding in any particular case, whether an "attempt" to commit a crime has been made or not, is to consider the facts of that particular case, and to decide in accordance with the dictates of common sense. ABDULLAH *v.* EMPEROR, 13 P. W. R. 1914 CR.; 14 P. R. 1914 CR.; 66 P. L. R. 1914; 15 CR. L. J. 265 **473**

——— ——— **s. 424** **503**

——— ——— ——— **s. 426**—*Mischief—Wrongful loss—Mortgagee cutting trees to repair house, whether guilty.*

A mortgagee openly cutting a few trees on the land mortgaged to him in order to repair another part of the mortgaged premises is not guilty of mischief C. M. RAMASAMIAR, *In re*, 1 L. W. 274; 15 CR. L. J. 290 **498**

——— ——— **s. 451** — *House trespass with intent to commit adultery—Husband's possession of house essential—Connivance or consent of husband, effect of.*

If the entry in a house is made with the consent of the owner and possessor of the house, no offence under section 451, Indian Penal Code, can be deemed to have been committed.

Where in a case under section 451, Indian Penal Code, the husband appeared neither as a complainant nor as a witness, and there was nothing to show that the house was in his possession or that he had not consented to or connived at the entry of the accused:

Held, that the charge under section 451, Indian Penal Code, could not be sustained. JAGGANNATH *v.* EMPEROR, 1 O. L. J. 48; 15 CR. L. J. 351 **703**

——— ——— **ss. 467, 468, 469, 470, 471** **194**

——— ——— **s. 471** **726**

——— ——— **ss. 482, 486** — *Merchandise Marks Act (IV of 1889), ss. 6, 7—Person—Limited Company—Liability of, to be convicted and punished*

Penal Code—contd.

—Words "he" and "whoever", meanings of—Mens rea—Innocence—Proof—Interpretation of Statutes—Ambiguous language—Penal act.

A body corporate can be lawfully prosecuted and on conviction punished for an offence under section 482 or section 486 of the Indian Penal Code.

The word "he" in sections 6 and 7 of the Indian Merchandise Marks Act includes "she" and "it".

Per *Hartnoll, Offg. C. J.*—The word "whoever" in sections 482 and 486, Indian Penal Code, does not refer only to a definite individual or definite individuals and can apply to a corporate body.

Where the language of a Statute is not clear, to ascertain the real meaning the cause or necessity of the law being made should be considered.

Every clause of a Statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole Statute or series of Statutes relating to the subject-matter.

Under sections 482 and 486, Indian Penal Code, the prosecution has not to prove the *mens rea*; and, as the burden of proving innocence is thrown on the accused under those sections, when once a *prima facie* case has been established, a Limited Company, when accused, can prove its innocence by the evidence of its agents or servants or otherwise as it thinks fit.

Per *Ormond, J.*—The word "whoever", with which sections 482 and 486 begin, means the same thing as "every person who" in section 2 (2) of the English Merchandize Marks Act and shows that the provisions of the sections apply to persons generally.

The scope of a penal section in an Act would (so far as the language is concerned) be the same whether it began with the words "every person who" or with the word "whoever", unless the word "person" is defined so as to have a more restrictive or a more extended meaning than it in fact has. Limited Companies are not excluded from the operations of sections 482 and 486, Indian Penal Code, and there is nothing inherent in the nature of a Limited Company which would prevent it from proving its innocence either by showing that it acted without intent to defraud under section 482, or under section 486 in any of the ways prescribed in that section. SEENA M. HANIFF & CO. *v.* LIPTONS LIMITED, 15 CR. L. J. 357; 7 BUR. L. T. 116 **689**

——— ——— **s. 486** **689**

——— ——— **s. 499**—*Defamation—Privileged—Imputation contained in petition to higher authorities for redress of grievances.*

A statement made by a villager casting imputation on the character of a co-villager in a complaint to the higher authorities is privileged *only* if the imputation is *substantially true* and made in good faith. PARVATANENI KAMAYYA *v.* KASINADUNI TRIPURANTAKAM, 1 L. W. 239; 15 CR. L. J. 281 **489**

——— ——— ——— — **s. 499**—*Defamation—Statement contained in newspaper, when defamatory—"Aggrieved person," meaning of—Criminal Procedure Code (Act V of 1898), s. 198.*

Where a statement in a newspaper is true as regards the complainant, though untrue as

regards others, the complainant is not an "aggrieved person" within the meaning of section 198 of the Code of Criminal Procedure.

An article in a newspaper which is a fair comment on public affairs and is merely an expression of opinion cannot be said to be defamatory, unless it is proved that it was the outcome of a dishonest or corrupt motive. SUBROYA AIYAR *v.* ABDUL KADAR, (1914) M. W. N. 351; 15 Cr. L. J. 357 **725**

——— ——— **ss. 499, 52** —*Criminal Procedure Code (Act V of 1898), ss. 297, 342, 407—Evidence Act (I of 1872), s. 105—Good faith—Freedom of Press—Privilege of Journalist—Privilege of other subjects—Privilege of Judge—Criticism—Fair comment—Truth—Reasonable grounds—Defamation—Gross libel—False imputations—Justification—Absence of due care and attention—Bail—Charge to Jury—Misdirection—Privy Council practice—Criminal appeal—Royal prerogative—Constitutional and administrative reason—Court of Criminal Appeal in England, rules and procedure of, how far binding on Privy Council.*

The distinction between the first and the second exception to section 499, Indian Penal Code, is that the former deals with an expression of opinion, while the latter deals with allegations of fact.

No privilege attaches to the profession of the Press as distinguished from the members of the Public. The freedom of a journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. In other words, the range of a journalist's assertions, criticisms, or comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

On the other hand, no privilege or protection attaches to a Judge, which exempts his public acts from free and adverse comments. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comments.

A declaration or an opinion expressed in his judgment by a Magistrate or Judge is open to searching and severe observations, and may be freely criticised and commented upon by the Editor of a newspaper. But where the criticism is converted into an attack upon the Judge or Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who has manœuvered his procedure so as to defeat truth and protect an associate, it is for the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believes them to be true, and that on reasonable grounds.

One McCormick, a planter, was charged with having abducted and committed rape upon a girl of about 11 years of age. Mr. Buchanan, the Sub-Divisional Magistrate, thought that there was a case for committal. But Mr. Andrew, the District Magistrate, released McCormick on bail and after holding an enquiry into the matter discharged the accused.

The appellant Mr. Arnold, the Editor of a newspaper, published two articles which contained a series

of libels of the grossest character against Mr. Andrew. These libels were at least seven in number. *First*, of conspiracy with a Police Officer, Captain Finnie, to prostitute justice by saving McCormick. *Secondly*, of having, apparently knowingly and as part of the partisanship, bailed out McCormick for a non-bailable offence. *Thirdly*, of having misled the girl, her parents and friends, by leaving them without professional advocacy. *Fourthly*, of having perverted the course of truth by employing an interpreter who was a paid parasite of the accused. *Fifthly*, of having tried the case *in camera*. *Sixthly*, of not having called certain witnesses in the enquiry. *Seventhly*, of having heard the case knowing that certain people objected to his doing so.

The appellant when charged with defamation of Mr. Andrew pleaded that although the imputations made by him were false, yet his case fell under exception 9 to section 499, Indian Penal Code, because he believed those imputations *bona fide* and had given due care and attention to their truth. In support of his defence, the appellant put forward three points: *first*, a letter containing a long narrative incriminating McCormick and also Mr. Andrew and others, had appeared in another newspaper some months before the appellant's articles were published; *secondly*, Mr. Buchanan, the Sub-Divisional Magistrate thought that there was a case for committal; *thirdly*, the admitted conduct of McCormick himself towards the girl; and justification of his belief in the truth of the libels was also claimed on the ground that Mr. Andrew had released McCormick on bail, though the offence was a non-bailable one.

Against the said defence the prosecution maintained (1) that to the appellant's knowledge the Government had found on enquiry that the allegations made in the letter on which he relied were without foundation.

(2) That the appellant re-opened the old incident after some months without receiving any fresh information and without discovering any fresh facts.

(3) That the appellant neither defended the article as true nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs, nor upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

(4) That when the appellant was asked by the Magistrate whether he wished to make any explanation of his position in the case as to his *bona fides*, etc., he simply answered that he had nothing to say.

(5) That in the course of his trial when the appellant discovered the truth that far from refusing to provide an Advocate to prosecute McCormick, Mr. Andrew had done his very best to secure one and that he had also anxiously endeavoured to employ an "interpreter trusted by all parties," that is to say, when the appellant had discovered his gross mistake, he should not have adhered to the libel but should have acknowledged his mistake and tendered an apology:

Held, (1) that although the appellant had made a fair and statable case in support of his defence, yet the answer with which he was met gave a severe shock to his plea of *bona fides* and established

Penal Code—contd.

that in publishing the libels, which he admitted to be false, he did not act in good faith believing those libels to be true, after giving due care and attention to seeing that they were so;

(2) that it was no valid excuse for a belief in gross slander that an incriminating letter had already appeared in another newspaper;

(3) that Mr. Andrew had exercised a proper discretion in releasing McCormick on bail, at any rate this point could not be viewed as a substantial element weighing with the appellant as a reasonable writer in justification of his belief in the truth of the libel;

(4) that it was the duty of the appellant to have explained his position, when questioned by the Magistrate, as to his good faith after due care and attention.

A charge to a Jury must be read as a whole. If there are salient propositions of law in it, these should be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the Jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or good practice to treat such cases as cases of misdirection, if upon the general view taken, the case has been fairly left within the Jury's province.

The power of His Majesty under his Royal Prerogative to review proceedings of a criminal nature, unless such power has been parted with by Statute, is undoubted, but this power, for reasons both constitutional and administrative, should not be lightly exercised.

The Judicial Committee is not a Court of Criminal Appeal. It is not guided by its own doubts of an appellant's innocence or suspicion of his guilt. It will not interfere with the course of Criminal Law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, *first*, that the result arrived at was opposite to the result which their Lordships would themselves have reached and, *secondly*, that the same opposite result would have been reached by the local tribunal if the alleged defect or misdirection had been avoided.

The Judicial Committee would not advise the interposition of His Majesty, the King, with the course of Criminal Justice in the Colonies or dependencies, except in the extreme case where it is established demonstrably that justice itself in its very foundation has been subverted, and that it is, therefore, a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

The Privy Council will not interfere in the region of fact unless something amounting to a complete misdescription of the whole bearing of the evidence has occurred. Therefore, a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the Jury's mind, would not justify a miscarriage of justice

Penal Code—concld.

to be affirmed or assumed and thus convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Even if upon a meticulous examination of a Judge's charge or conduct of a case certain flaws can be discovered, it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases, as the advisers of the King.

The authority of the decisions of the Court of Criminal Appeal in England, which apply to a different system, a different procedure and a different structure of principles, must stand out of the reckoning of any body of authority on the matter of the procedure of the Judicial Committee of the Privy Council in advising His Majesty. CHANNING ARNOLD *v.* EMPEROR, 18 C. W. N. 785; 26 M. L. J. 621; 15 CR. L. J. 309; 1 L. W. 461; 7 BUR. L. T. 167; (1914) M. W. N. 506; 16 M. L. T. 79; 12 A. L. J. 1042; 20 C. L. J. 161; 16 BOM. L. R. 544 **661 P. C.**

—— —— —— **s. 511** **473, 734**

Penal provisions not exclusive **503**

Penalty. *See* CONTRACT ACT, s. 74.

Perjury, *charge of – Contradictory statements – Presumption.*

Where a charge for perjury is based on two contradictory statements, every possible presumption in favour of the reconciliation of the statements should be made. IMAMBUX *v.* EMPEROR, 7 S. L. R. 96; 15 CR. L. J. 379 **747**

Permanent tenure – Ex-landlord, rights of, against tenure **632**

Plaint, amendment of. *See* AMENDMENT OF PLAINT.

Plea of ignorance of law. *See* COMPANIES ACT, 1882, ss. 48, 50.

Pleader accepting engagement in Court not authorized to practise – Duty **750**

Pleader and client—*Pardanashin* lady—Mortgage by lady and her brother—Property solely of lady—Pleader securing mortgage in name of another—*Benami* transaction—Deed not explained to lady—Burden of proof—Extortionate bargain—Gross advantage taken of unprotected position of lady—Void deed—Mortgaged property—Condition—More property to be considered subject to mortgage after partition of mortgagor's share – Such condition, whether operative **642**

Pleadings – Erroneous statement in pleadings, if can overcome fact apparent on record or admitted **25**

—— ——, hesitating and non-committal character of **771**

—— —— Rectification of mistake **637**

—— —— —— Suit by decree-holder against judgment-debtor – Defence that decree was collusively obtained, whether available to defendant—Insolvency—Adjudication – Creditor of insolvent, if can enforce claim, without leave of Court **755**

Police officer, invested with powers under section 44, whether Excise Officer for purposes of section 57 **688**

Poona Cantonment Taxation Regulations, 1881—*Increase in rate, not according to Regulations—Illegal—Payment under protest—Suit to recover—Jurisdiction of Civil Court—Payment by cheque effected when cashed—Limitation runs from date cheque is cashed—Limitation Act (IX of 1908), Sch. I, Art.* 64.

A Cantonment Magistrate disregarding the Cantonment Taxation Regulations increased the tax of a club which was paid under protest and an appeal to the Cantonment Committee was rejected:

Held, that the Civil Court had jurisdiction to entertain a suit to recover the money as the money was claimed and received from the club without the shadow of a right.

Where money is paid by cheque the limitation to recover the money runs from the date of the receipt of the money by the payee and not from the date of the delivery of the cheque. SECRETARY OF STATE *v.* MAJOR J. E. HUGHES, 16 BOM. L. R. 121; 38 B. 293 **779**

Possession. *See* CO-OWNER.

Poverty and other sufficient cause—Burden of proof—"Some part thereof," meaning of—Civil Procedure Code (Act V 1908), O. XXI, r. 40 **833**

Power of agent. *See* AGENCY.

Power-of-attorney. *See* AGENT.

——————Construction **516**

————————, construction of **235**

Practice. *See* APPEAL—SECOND.

————Appeal—Execution proceedings—Second appeal—Party not allowed in second appeal to contest order setting off decree **923**

————Assignment—Transfer of decree to one creditor—Consideration—Arrangement — Absence of *bona fides*—Validity **714**

————*Bombay High Court—Admission Court excusing delay—Order subject to objection.*

An order of the Admission Court excusing delay in the payment of deficient Court-fees on an appeal is, according to the practice of the High Court of Bombay, made subject to objection before the Court hearing the appeal and its decision thereon. ACHARATH PARAKKAT KUNHAMMAD *v.* ACHARATH BAPPAM KARNAVAN, 1 L. W. 440 **946**

————*Deterrent sentence—Authorities desiring deterrent sentence, duty of.*

Where it is desired by the authorities that an example should be made or that a specially deterrent sentence should be imposed, it is their duty to bring that desire to the notice of the trying Court and to inform the trying Court of the reasons for the suggestion. EMPEROR *v.* RAGHA JAGA, 16 BOM. L. R. 200; 15 CR. L. J. 362 **730**

————*Deterrent sentence—Prosecuting authorities, duty of.*

It is very undesirable to trust to the High Court's power of correcting sentences of the lower Courts where the sentences ought to be deterrent.

Where the prosecuting authorities want that a sentence ought to be deterrent, they ought to put before the trying Court those circumstances on

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which they rely and they ought to ask the trying Court to impose a sentence which will serve the purpose that they think should be served. EMPEROR *v.* SHINVAR BIRSHA, 16 BOM. L. R. 203; 15 CR. L. J. 367 **735**

————Documents put into evidence for defence in cross-examination of prosecution witnesses—Right of reply **193**

————Order of acquittal—Right of appeal—High Court, power to interfere in revision **512**

————Sanction to prosecute given—Complaint not filed within time owing to proceedings in appeal—Application for extension of time—Hight Court's power to grant **727**

————*Sentence, enhancement of.*

Enhancement of sentence is a very serious proceeding and where there is a proposal to that effect, it must be supported by the Government Pleader with cogent reasons. EMPEROR *v.* SHAMJI RAMCHANDRA GUJAR, 16 BOM. L. R. 202; 15 CR. L. J. 365 **733**

————Seychelles Penal Code, section 216—Embezzlement—Civil and Criminal liability—Distinction between invasion of liberty and just rights of citizen—Grave and injurious miscarriage of justice—Leave to appeal to Privy Council **657**

————Witnesses—Magistrate's discretion in summoning—Expenses of witnesses to be realised before summons **731**

Pre-emption—*Custom*—Wajib-ul-arz, *whether custom*—Wajib-ul-arz *entry ambiguous, effect of.*

The record in the *Wajib-ul-arz* is not the custom. It is a mere record of the custom; and if its language is ambiguous, it may, when unsupported by other evidence, be insufficient either to prove the custom as a whole or any particular incident of that custom. JAHANGIRA *v.* AMIR SINGH, 12 A. L. J. 19 **245**

————Muhammadan Law—Right of pre-emption, when arises—Whether right arises before transfer to stranger is completed **385**

————*Plaintiff to succeed by reason of superiority at date of sale and retention of status.*

A pre-emptor must succeed by reason of the superiority of his position at the date of sale and his retention of the status on which his suit is based. AMIR SHAH *v.* JETHA, 26 P. R 1914; 152 P. L. R 1914 **908**

————Presumption, statutory—*Wajib-ul-arz*, interpretation of—Claim for pre-emption relating to village decreed in absence of any defence as to non prevalence of such custom, whether establishes custom in village **943**

————*Sale—Perpetual lease—Plenary proprietary rights transferred—Nominal* malikana *reserved.*

A deed, whereby all the proprietary rights in certain land have been transferred in consideration of the payment of a substantial sum of money, is in reality a deed of sale, although it purports to be only a

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perpetual lease creating occupancy rights in the transferee and although a small amount of *malikana* has been nominally reserved by the deed as being payable by the so-called lessee to the so-called lessor. AMAR SINGH *v.* SADHU SINGH, 187 P. L. R. 1914 **970**

——— ——— ——— *decree set aside—Sale price attached and its part paid to creditor of pre-emptor—Pre-emption decree affirmed on appeal—Execution—Whether pre emptor can get possession without re-paying the amount drawn by his creditor.*

In pursuance of a pre-emption decree the pre-emptor deposited the sale price in Court. On the vendee's appeal the decree was set aside. About a month after this one of the creditors of the pre-emptor attached the sale price, which was still in Court, and was paid out a portion of it in satisfaction of his decree. Subsequently, on the pre-emptor's appeal the decree of the primary Court was affirmed, but when he applied in execution for possession he was met by the plea that the full sale price was not in Court for the payment of the vendee:

Held, (1) that after the decree of the Court of first instance had been set aside, the money, if it belonged to any one, belonged to the pre-emptor;

(2) that it was quite wrong of the Court to attach and pay out a part of the money which was in Court before a final decree had been made in the suit;

(3) that as the Court had paid money to the pre-emptor's creditor without any fault on the part of the vendee, that as the latter could not be dispossessed of the property without receiving the full sale price and that as the pre-emptor had benefited by payment of his debt due to one of his creditors, he must make up the deficiency before he could be given possession. SHEOGOPAL *v.* NAJIB KHAN, 12 A. L. J. 732 **869**

Preliminary inquiry. *See* CRIMINAL PROCEDURE CODE, ss. 195, 476.

Prescription—*Person claiming limited interest entering upon land—Prescription cannot confer better title—Hindu Law—Succession—Daughter-in-law.*

When a person enters on land under a title as heir, which is necessarily a limited title, very cogent evidence is necessary to show that the said person afterwards asserted a title as absolute owner.

A person in the position of a Hindu widow may claim only a limited interest, and when she does so, the interest claimed is all that is acquired by prescription.

A Hindu daughter-in-law in Bombay does not succeed as an absolute owner nor does she in Berar. SHEO LAL *v.* SHEORAJIA, 10 N. L. R. 35 **719**

Presentation of plaint, *out of office hours, to officer of Court authorized to receive within office hours, whether proper presentation—Ratification.*

A presentation, out of office hours, of a plaint to an officer of a Court authorized to receive plaints within office hours only is not a proper presentation, unless ratified by the Court on that very day. APPAVU PILLAI *v.* AMIR SAHIB **360**

Pre-settlement Inams—*Madras Estates Land Act (I of 1908), s. 3—Inam granted prior to Permanent Settlement, whether "estate"—Suit by Inamdar for recovery of rent—Jurisdiction—Civil or Revenue Court.*

An *Inam* granted by a *zemindar*, prior to the Permanent Settlement, is not an "estate" as defined in the Estates Land Act, nor is such an *Inamdar* a "landholder" within the meaning of this expression in that Act.

A suit by such an *Inamdar* to recover rent is, therefore, not cognizable by a Revenue Court. BILA SANYASI NAIDU *v.* AGNIHOTRAM VENKATACHARYULU, 16 M. L. T. 258; 1 L. W. 241; (1914) M. W. N. 318 **96**

Presidency Small Cause Courts Act (XV of 1882), s. 6 **977**

——— ——— ——— ——— **s. 41** **572, 977**

Presidency Small Cause Courts Act (I of 1895) **572**

Press Act (XXV of 1867), ss. 4, 5 **505**

Press Act (I of 1910), ss. 3, cl. (1), 23—*Exemption from security—Cancelment of exemption—Order for security for Newspaper—Newspaper stopped—Press used—Conviction, whether sustainable—Press Act (XXV of 1867), ss. 4, 5.*

The accused, who owned a printing press and printed a newspaper, made declarations under sections 4 and 5 of Act XXV of 1867 after the coming into force of Act I of 1910. The Magistrate made an order under clause (1) of section 3 of Act I of 1910 dispensing with the deposit of any security. Later on the Magistrate required security for the newspaper. The accused stopped publishing the newspaper but used the press. For this use of the press the accused was convicted under clause (1) of section 23 of Act I of 1910:

Held, that the conviction could not be upheld for clause (1) of section 23 of Act I of 1910 covers the disobedience of an order under section 3 and section 5 of the Press Act and the order disobeyed was not such an order. PANDURANG BALKRISHNA PATHAK *v.* EMPEROR, 16 BOM. L. R. 87; 15 CR. L. J. 297 **505**

——— ——— **s. 23** **505**

Presumption—Adverse possession—*Burden of proof*—Limitation **521**

——— ——— ——— ——— Assertion by tenant of certain rent more than twenty years before suit—Same rent claimed in present suit—Presumption that rent has not been altered for twenty years—Ancient document—Proper custody—Interference with discretion as to custody by Appellate Court—Evidence Act (I of 1872), ss 13, 48, 90—Assertions of right—Admissibility in evidence **773**

——— ——— ——— ——— Contradictory statements—Perjury, charge of **747**

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——— ——— *Khatri* traders of *Mauza* Khairabad, Jullundur District—Hindu Law or custom, test for applying **154**

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——— ——— Rate and amount of rent—Relationship of landlord and tenant **244**

——— ——— Rent suit—Entry in Record of Rights—Entry not conclusive even on failure of tenant to take proceedings to rebut presumption **615**

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Privy Council Appeal—Certificate for leave to appeal to Privy Council, when granted **793**

——— ——— High Court dismissing appeal on appellant's failure to furnish security for costs—Substantial question of law **532**

——— ——— *Practice—Order in Council, 1853, rule 5—Dismissal for non-prosecution—Order of His Majesty in Council—Limitation Act (XV of 1877), Sch. II, Arts. 179, 180—Execution.*

Where an appellant or his agent does not take effectual steps for the prosecution of his appeal before the Privy Council, the appeal stands dismissed for non-prosecution under rule 5 of the Order in Council of 13th June 1853; there is no order of His Majesty in Council dismissing the appeal, nor is it necessary that any such order should be made in the appeal. Therefore, where a Privy Council appeal is dismissed for non-prosecution, the executable decree is that of the lower Court and the period of limitation for execution is that prescribed by Article 179 of the second Schedule of the Indian Limitation Act, 1877. BATUK NATH *v.* MUNNI DEI, 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 BOM. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 36 A. 284 **644 P. C.**

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——— ——— (**Criminal**)—Grounds for interference—Consideration of evidence **678**

——— ——— Leave to appeal to—Practice **657**

Privy Council practice—Criminal appeal—Royal prerogative—Constitutional and administrative reason—Court of criminal appeal in England, rules and procedure of, how far binding on Privy Council **661**

Probate—*Caveat, if may be entered by widow of predeceased son—Maintenance of widow of predeceased son, if may be affected by probate proceedings—Obligation of heir—Sufficient interest.*

The widow of a predeceased son of the testator has in fact no interest sufficient to enable her to appear on probate proceedings. Her right to maintenance will not be affected by anything that may take place on the hearing of an application for probate. *In the goods of* GOBINDA CHANDRA, 17 C. W. N. 1141 **539**

Probate and Administration Act (V of 1881), s. 23 **296**

——— ——— ——— s. 83 **325**

Profession tax, payment of **398**

Promissory note—*Consideration to induce witness to give evidence—Contract Act (I of 1872), s. 23—Public Policy.*

The consideration for a promissory note executed by the defendant to the plaintiff was that the former should induce a third person to give evidence in latter's favour in a pending suit:

Held, that the promissory note could not be enforced as the consideration for it was opposed to public policy. ADIRAJA SHETTY *v.* VITTIL BHATTA, 1 L. W. 300; (1914) M. W. N. 322 **540**

——— ——— *Endorsement for collection, what constitutes—Negotiable Instruments Act (XXVI of 1881), s. 78.*

Where from the terms of an indorsement on the promissory note, no accountability can be inferred between the indorser and indorsee, it is not an indorsement for collection merely, and the holder alone can bring a suit on the note. PATOJU SANGAYYA *v.* PATOJU SANYASI **545**

——— ——— *invalid for want of stamp—Antecedent oral agreement—Plaintiff, whether entitled to fall back on oral agreement.*

The plaintiff and the defendant were partners. On the partnership accounts being taken some money was found due to the plaintiff from the defendant who paid a portion of the sum due and executed a pro-note for the balance. The pro-note was not properly stamped and, therefore, could not be sued upon. Under these circumstances the plaintiff based his suit for recovery of the balance on the original cause of action:

Held, (1) that the payment of a part of the money due after the settlement of accounts was evidence of an agreement to pay the balance;

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(2) that, as the agreement to pay was prior to the execution of the pro-note, the plaintiff could sue on that agreement. SAMINATHA PATHAN v. RADHA KRISHNA PATHAN, 15 M. L. T. 243 **85**

——— ——— ——— ———*Payee dying leaving widow —Joint family—Suit by surviving members, whether maintainable.*

Where the payee of a promissory-note dies leaving a widow, the surviving member or members of his joint family cannot maintain a suit on the same if it is found that it was not taken for the benefit of the family. GOPALA AIYANGAR v. VENKATAKRISHNA AIYANGAR, 26 M L. J. 224 **612**

——— ——— ———*Pro-note insufficiently stamped—Suit not on pro-note—No independent cause of action—Plaintiff not to succeed—Admission of defendant as to execution of pro-note immaterial—Stamp Act (II of 1899), s. 35—Evidence Act (I of 1872), s. 91.*

Where a plaintiff has no cause of action apart from an insufficiently stamped pro-note, he cannot succeed at all, although he does not profess to sue on the pro-note and although the defendant admits the execution of the document. BALLY SINGH v. BHUGWAN DASS KALWAR, 7 BUR. L. T. 95 **975**

——— ——— ——— ———*signed by one out of several persons intended to be jointly liable—Liability of person signing—Material alteration, effect of.*

Where one person signs a promissory-note on the condition that another person who was to be jointly liable with him should join in the execution and the latter does not, the former is not liable.

A material alteration invalidates a whole note. This principle applies to a case where although there has been no alteration after the note came into existence, the note was *created* in the first instance itself with a forged signature of a material character. AMIRTHAM PILLAI v. NANJAH GOUNDEN, 26 M. L. J. 257; 15 M. L. T. 205; (1914) M. W. N. 250; 1 L. W. 243 **454**

——— ——— ——— written on impressed stamp paper of insufficient value—Blank impressed sheet added to make up the deficiency—Pro-note, whether duly stamped **110**

Proof. *See* EVIDENCE ACT, s. 3.

———, oral testimony of person who may have heard it—Dying declaration, not bearing signature of deceased, whether admissible **195**

Prosecution to exclude all explanation consistent with innocence of accused—No fabrication of false evidence, if evidence not admissible **696**

Provincial Insolvency Act (III of 1907), ss. 15 (1), 16 (1)—*Debtor's petition—Court bound to adjudicate him insolvent.*

Where a debtor presents a petition to be declared insolvent, the Court is bound to adjudicate him insolvent under section 16 (1) of the Insolvency Act, unless the petition amounts to an abuse of the process of the Court.

Section 15 (1) deals entirely with a creditor's petition and does not apply in any way to a debtor's petition. TIRLOKI NATH v. BADRI DAS, 12 A. L. J. 355; 36 A. 250 **4**

——— ——— ———**s. 16 (1)** **4**

——— ——— ———**s. 30** **927**

——— ——— ———**s. 36**—*Transfer by insolvent made two years before adjudication—Order—Jurisdiction.*

Under section 36 of the Provincial Insolvency Act, a Judge has jurisdiction only in respect of transfers made within two years of the date of his order of adjudication, and cannot annul a transfer made within two years preceding the date of presenting the petition in insolvency. JOKHAN SINGH v. DEPUTY COMMISSIONER, FYZABAD **924**

——— ——— ———**s. 37**—*Sale before adjudication—Evidence given at insolvency proceedings, whether admissible against purchaser in proceedings under section 37.*

Where a sale made by an insolvent is impugned under section 37 of the Provincial Insolvency Act, evidence given at the insolvency proceedings can be used against the purchaser, though not a party to the insolvency proceedings, to prove that the insolvent was unable to pay his debts at the time of the sale. GANGALA RAMOKOTTAYA v. BHIMAVARAPA GURUVA REDDY **597**

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—*Suit for recovery of money based on account—Jurisdiction.*

A suit for the recovery of a sum of money, the precise amount of which cannot be ascertained unless the accounts of the parties have been examined, is cognizable by a Small Cause Court. INDAR MAL v. BALDEO DAS, 12 A. L J. 230 **424**

Public Demands Recovery Act (I B. C. of 1895), s. 7 **782**

Public document. *See* EVIDENCE ACT, s. 74.

——— ——— ——— ———Production of copy of false document—Attempt to use the original **696**

Public Policy—Promissory note—Consideration to induce witness to give evidence **540**

Public record: *See* NETHERSOLE SETTLEMENT KHASRA.

Puja miras, meaning of **72**

Punjab Alienation of Land Act (XIII of 1900), s. 21A (2)—*Limitation, whether Chief Court can extend.*

It is not open to the Chief Court to extend in any way the time prescribed for an application under section 21A (2) of the Punjab Alienation of Land Act.

Obiter: It is doubtful whether a decree under section 9 of the Specific Relief Act, which settles no question of title, can be revised under section 21A (2), Punjab Land Alienation Act. PHUMAN SHAH v. CHHANGA, 7 P. R. 1914; 135 & 153 P. L. R. 1914 **299**

Punjab Courts Act (XVIII of 1884), s. 40 817

——— ——— ——— ———s. 40 (1) (a) (ii) —*Further appeal—Small Cause suit of value less than Rs. 2,500—Divisional Court confirming decree of first Court - No further appeal—Section 70 (1) (b) repealed before date of hearing—Court incompetent to exercise powers under it.*

Plaintiff sued to recover Rs. 1,450 principal and interest on a bond, and obtained a decree for the principal amount, Rs. 1,258, payable by half-yearly instalments of Rs. 50 each. On his memorandum of appeal to the Divisional Court, plaintiff affixed a Court-fee stamp of Rs. 25, calculating the amount as follows: (1) Rs. 15 on account of *ad valorem* Court-fee payable on Rs. 192 interest which was disallowed by the first Court, and (2) Rs. 10 in respect of the prayer for the cancelment of that part of the decree which related to instalments. The Divisional Judge, however, ordered plaintiff to pay *ad valorem* Court-fee on Rs. 975 instead of the fixed fee of Rs 10. The plaintiff failing to pay the required Court-fee his appeal was rejected under Order VII, rule 11 (*b*), read with section 107 (2) of the Civil Procedure Code.

On further appeal to the Chief Court,

Held, that under section 40, sub section 1 (*a*) (*ii*), of the Punjab Courts Act, as it stood before it was amended by Act I of 1912, no further appeal lay in the case; and

that section 70 (1) (*b*) of the Punjab Courts Act, as it stood at the date of the institution of the appeal, having been repealed, the Court's powers under that section had been taken away, and hence it could not treat the petition as one of revision under that section. SURJU MAL *v.* ASRAM, 160 P. L. R. 1914 **451**

——— ——— ——— ———s. 70 (1) (b)—*Act I of 1912—Revision—Chief Court, powers of, under amending Act.*

The power of entertaining a second appeal in a land suit below Rs. 1,000, under section 70 (1) (*b*) of the Punjab Courts Act, as it stood before its amendment by Act I of 1912, has been withdrawn from the Chief Court by the Amending Act of 1912. NUR DIN *v. Musammat* JHANDO, 44 P. L. R. 1913; 89 P. W. R. 1914 **85**

——— ——— ——— ——— (as amended by Acts I and IV of 1912), s. 40—*Appeal on question of custom without certificate - Granting permission to appeal—Revision.*

Under section 40 of Act XVIII of 1884, as amended by Acts I and IV of 1912, no appeal regarding the validity or existence of any custom or usage is allowed from an Appellate decree without a certificate mentioned therein, even if questions of law are involved or material errors of procedure have occurred, so far as the finding on the question of that custom or usage is concerned.

It is not proper to interfere in revision with such an appellate decree as to the validity or existence of a custom. ARURA *v.* IMAM BAKHSH, 4 P. W. R. 1914; 28 P. L. R 1914 **352**

Punjab Courts Act—concld.

——— ——— ——— ——— (as amended by Act IV of 1912), s. 40—*Second appeal—Necessity—Previous mortgage.*

Where a lower Appellate Court has found as a fact, after discussing each item of consideration, that no necessity has been proved, the Chief Court will not interfere with these findings on second appeal.

The fact that a previous mortgage is more than twelve years old is of no importance, unless it is shown that mutation with regard to it was effected more than 12 years before suit. DIWAN SINGH *v.* BISHNA, 31 P. W. R. 1914; 111 P. L. R. 1914 **940**

——— ——— ——— before amendment of 1912, s. 40—*Unclassed suit—Same question involved in two decrees—Each decree less than Rs. 2,500—Both decrees combined exceeding Rs. 2,500—Further appeal, whether lies.*

Where in two decrees in unclassed suits for Rs. 2,243-10-0 and Rs. 600 respectively, the same question of inheritance was involved and it was, therefore, contended that each decree directly involved a question respecting property valued at Rs. 2,243-10-0 *plus* Rs. 600, *i. e.*, over Rs. 2,500:

Held, overruling the contention, that whatever each suit may directly involve, each decree directly involves only a question respecting the property dealt with in it and that, therefore, no further appeal was competent under section 40 of the Punjab Courts Act, as it stood before amendment by the Act of 1912. HUKAM CHAND *v. Musammat* JINDO BAI, 129 (*a*) P. L. R. 1914; 90 P. W. R. 1914 **109**

——— ——— ———s. 70 **950**

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Punjab Municipal Act (XX of 1891), s. 38—*Declaratory suit against Municipal Committee—No notice necessary.*

The previous notice of one month, required under section 38 of Act XX of 1891, is not necessary for bringing against a Municipal Committee a suit for a declaration that the plaintiff is the owner of a certain plot of land, and the Municipal Committee who refused the plaintiff permission to build on it alleging that it was their property had no right to do so. ISHAR *v.* MUNICIPAL COMMITTEE, LAHORE, 1 P. W. R. 1914; 24 P. L R. 1914; 32 P. R. 1914 **317**

Punjab Pre-emption Act (II of 1905), s. 12 (b) (3), (4), (c) (2)—*Widow, right of—Proprietary holding—Occupancy-holding—Heir—Co-sharer.*

A mother or a widow not being 'heirs' within the meaning of Customary Law cannot exercise a right of pre-emption as such under sub-clause '*thirdly*' of clause (*b*), section 12, but can do so as co-sharers, under sub-clause '*fourthly*' of clause (*b*).

The mother of an occupancy tenant has no right whatever to succeed on the latter's death to occupancy rights held by him and her claim to pre-empt can only fall under clause (*c*), sub-clause '*secondly*'. FATEH NISHAN *v.* AHMAD SHAH, 55 P L. R. 1914; 46 P. R. 1914; 103 P. W. R. 1914 **532**

Punjab Pre-emption Act—concld.

——— ——— ——— s. 12 (c), secondly – *"Sub division," meaning of*—Thulla *Hari Singh, of* Mauza *Burj Hari Singh, Jagraon Tahsil, Ludhiana District, whether sub-division—Vendee joining stranger, whether can resist pre-emption.*

Thulla Hari Singh of *Mauza* Burj Hari Singh, Tahsil Jagraon, District Ludhiana, is a sub-division within section 12 (c), *secondly*, of the Punjab Pre-emption Act.

The intention of the Legislature in enacting clauses (c) and (d) of section 12 of the Punjab Pre-emption Act was not only to recognise the main or primary sub-divisions of a village but also any further divisions of such sub-divisions as may be well marked and authenticated by the Settlement Record and the history of the village.

A vendee who associates with himself in the purchase a stranger co-vendee loses his right to resist a pre-emptor's claim. BASAWA SINGH v. NATHA SINGH, 128 P. L. R. 1914; 60 P. R. 1914; 83 P. W. R. 1914 **151**

Railway accident — *Damage to plaintiff's carriage—Gate at level crossing left open—Damage by defendant's train—Negligence of defendant—Contributory negligence of plaintiff.*

The plaintiff sued for damages on the allegation that a train of the defendant-company ran into and damaged the plaintiff's carriage as it was crossing the defendant-company's line. The evidence showed that there was a gate at this level crossing where the accident occurred and that this gate was left open:

Held, (1) that there was an invitation to all comers that the line could be crossed with safety:

(2) that there was, therefore, ample evidence to support the finding of negligence against the defendant, and

(3) that there was no contributory negligence on the part of the plaintiff. BENGAL PROVINCIAL RAILWAY v. GOPI MOHAN SINGH, 18 C. W. N. 325; 41 C. 208 **788**

Railways Act (IX of 1890), ss. 3 (4), 7, 122 (2), 138—*Right of owner to eject trespaser—Civil wrong may be criminal offence if attended with force and violence—Possession lawful, when becomes unlawful—Railway employee, how to be ejected from staff quarters.*

Section 122 (2) of the Indian Railways Act (IX of 1890) cannot be applied to eject a Railway employee from the staff quarters occupied by him while under employment of the Railway Company. Staff quarters or any building of a residential character cannot be deemed to be part of a Railway "within the meaning of section 3 (4) of the Act"

Possession of the staff quarters lawfully obtained by a Railway employee, while under the service of the Railway, can be lawfully determined only by steps taken under section 138 of the Railways Act, and the fact of his dismissal does not, by itself, put an end to his right of possession.

In order to render such possession unlawful, there must be an interruption of possession, and a re-entry after such interruption.

It cannot be said that a true owner may, at all times, enter his own premises and use force and violence to eject a trespaser; such an act, though not tortious and actionable, may still give rise to criminal liability if attended with force and violence. MARGAM AIYAR v. S. J. MERCER, (1914) M. W. N. 124; 15 CR. L. J. 225 **177**

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——— ——— ——— s. 7—*Words "Notwithstanding anything in any other enactment for the time being in force," effect of—Streets, laying of Railway lines upon—Land Acquisition Act (I of 1894), whether to be resorted to—City of Bombay Municipal Act (Bom Act III of 1888), ss. 289, 293—Permission under s. 293—Effect of s. 289.*

The words 'notwithstanding in any other enactment for the time being in force,' in section 7 of the Railways Act, empower a Railway Company to do certain acts specified in the section regardless of the provisions of other enactments.

Therefore, where a Railway Company wishes to lay a line of Railway upon and across a Bombay Municipal street, it is neither necessary nor appropriate to proceed under the Land Acquisition Act or to obtain permission under section 293 of the City of Bombay Municipal Act.

The effect of section 289 of the Bombay City Municipal Act is only to vest in the Corporation such property as is necessary for the control, protection, and maintenance of the street as a highway for public use. G. I. P. RAILWAY v. MUNICIPAL CORPORATION, 16 BOM. L. R. 104 **765**

——— ——— ——— ss. 77, 140 – *Notice to District Traffic Superintendent, whether notice to Agent.*

A notice to a Railway Company's District Traffic Superintendent is not a notice to the Agent within the terms of section 140 of the Railways Act, 1890. EAST INDIAN RAILWAY COMPANY v. RAMGATI RAM, 19 C. L. J. 180 **142**

——— ——— s. 80—*Carriage of goods by different Railways—Loss of goods—Liability of particular Railway—Proof that loss occurred on that Railway.*

The plaintiff consigned to the Bengal and N.-W. Railway Company certain goods for delivery at Howrah. The Railway Company gave the usual receipt and invoice and forwarded the forwarding note to the East Indian Railway Company. Certain goods were received by the last named Company who offered them to plaintiff, but he declined to accept on the ground that these were not the goods consigned. The plaintiff sued both the Companies for his loss:

Held, that, in order to render the East Indian Railway Company liable, there must be evidence under section 80 of the Railways Act showing that the loss, injury, destruction or deterioration occurred on the line of the East Indian Railway Company. EAST INDIAN RAILWAY CO. v. NOPE CHAND MAGNIRAM, 19 C. L. J. 434 **22**

——— ——— ——— s. 122 (2)—*Right of owner to eject trespasser—Railway employee how to be ejected from staff quarters.*

Railways Act—concld.

Section 122 (2) of the Indian Railways Act (IX of 1890) cannot be applied to eject a Railway employee from the staff quarters occupied by him while under employment of the Railway Company. MARGAM AIYAR v. S. J. MERCER, (1914) M. W. N. 124; 15 CR. L. J. 225 **177**

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Ratification—Presentation of plaint out of office hours to officer of Court authorized to receive within office hours, whether proper presentation **360**

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References—Power of District Magistrate to make reference to High Court in cases tried by Sessions Judge **1007**

Registration Act (III of 1877), s. 17—Equitable mortgage—Registration **129**

——— **s. 26** **23**

——— **s. 49, cls. (2), (7)**—*Unregistered lease cannot be used as evidence even of agreement to lease.*

An agreement to lease is a transaction affecting immoveable property and should be registered.

An unregistered lease deed cannot be used as evidence of even an agreement to lease. VASUDEVA REDDY v. NALLAPPA REDDY, 15 M. L. T. 220; 1 L. W. 296 **336**

——— **ss. 71, 77** **23**

Registration Act (XVI of 1908), ss. 17, 28—*Mortgage-deed - Fictitious entry—Property not in existence—Entry made to obtain registration at a certain place— Decree— Concurrent findings —No evidence - Decision of law—Mistake—Evidence —Rectification of mistake - Pleadings.*

If the parties to a mortgage-deed fictitiously describe therein certain non-existent properties to be situate in a certain District and thus obtain registration of the mortgage-deed in that District, they commit a fraud upon the Registration Law and the registration of the deed is invalid as without jurisdiction. Similarly a Court, which would have had jurisdiction to entertain a suit based on a mortgage if the mortgaged property were really in existence and situate within its jurisdiction, acts without jurisdiction if it grants a mortgage-decree on the basis of the mortgage containing such a fictitious entry.

Registration Act—(1908)—contd.

The principle of concurrent findings of fact does not apply to a case of no evidence. A decision that there is no evidence to support a finding is a decision of law.

A mistake means that parties intending to do one thing have by unintentional error done something else.

Where both parties to a transaction intentionally make a fictitious entry there is no question of mistake.

Where mistake is pleaded, it must be strictly proved and the fact, that the party who could give evidence in support of the suggestion of the mistake has abstained from giving any evidence whatever on the subject, would go against that party.

Where property is misdescribed in a mortgage-deed, the misdescription cannot be directed by a Court to be amended unless there is a suit for rectification before it HARENDRA LAL ROY v. HARI DASI DEBI, 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C W. N. 817; 19 C. L. J. 484; 16 BOM. L. R. 400; 12 A. L. J. 774 **637 P. C.**

——— **ss. 17, 49**—*Out and out sale—Unregistered letter written next day to convert sale into mortgage or to deprive it of its legal effect, whether admissible in evidence.*

An unregistered letter is inadmissible in evidence to show either that the sale executed the previous day is in effect a mortgage or that it conveys no title. In either view the unregistered letter "affects immoveable property," within the meaning of section 17 of the Registration Act, and is not admissible in evidence without registration. PYDAH VENKATACHALAPATHI GARU v. MUTHU VENKATACHALAPATHI, 26 M. L J. 151; (1914) M. W. N. 178; 1 L. W. 157 **409**

——— **s. 17 (1) b), (d)**—*Lease of palmyra trees for enjoyment of toddy fruits, etc.—Registration - Immoveable property—Moveable property.*

Where a document stated that the lessee "had taken for lease for two years ..for enjoyment for toddy, palmyra fruit, etc, the palmyra trees" in a certain garden, that he had paid the amount of the lease for two years (*i e.*, Rs. 140) and that he would not cut the leaves of any of the trees on which he climbed except those whose leaves had to be cut:

Held, that the document in question was neither a lease of immoveable property nor did it create an interest in immoveable property:

Held, also, that a lease for drawing toddy does not create an interest in "immoveable property" within the meaning of section 17 (*b*) of the Registration Act and does not require registration. NATESA GRAMANI v. TANGAVELU GRAMANI, 15 M L. T 237; (1914) M. W. N 527 **102**

——— **s. 28** **637**

——— **s. 49** **409**

——— **s. 77**—*Document — Execution of document*—Pardanashin *lady, conveyance by —Document read over after execution and receipt of consideration—Inclusion of property not agreed to be sold objected to.*

Registration Act—(1908)—concld.

Two *pardanashin* illiterate women agreed to sell certain property to the plaintiff, who thereupon wrote out a *kobala* purporting to convey not only the property which the women had agreed to sell but also certain other properties. The brother of one of the women signed the *kobala* on their behalf without reading it himself or reading it over to the women. The consideration money was handed over by the plaintiff to the brother. The *kobala* was then read out. The women, who were behind the *parda*, at once protested saying that the *kobala* contained properties which they did not intend to sell. The document not having been registered, the plaintiff brought this suit under section 77 of the Registration Act for the registration of the document:

Held, that there was no execution of the document and the suit was rightly dismissed. ABDUL HAKIM *v.* JAMILA KHATUN **10**

Regulation (XVII of 1806), ss. 7, 8—*Foreclosure—Notice—Defect—Misdescription of mortgaged property.*

Where, in a notice issued under section 7 of Regulation XVII of 18 6, the property mortgaged instead of being described as one-half of a certain land was described as the whole of it, the words used being *mabligh kata hojawegi* instead of *bai katai hojawegi*:

Held, that the first error was fatal to the validity of the notice.

Obiter.—The second defect is also fatal to the validity of the notice. SHAMBU RAM *v.* JAMITA, 43 P. L. R. 1914; 85 P. W. R. 1914 **97**

——— ——— **s. 8** **97**

Regulation (Bengal) XI of 1825—*Alluvion and diluvion—Riparian owners in Fyzabad District—Custom of* dhar-dhura *(deep stream boundary)*—Iqrarnamas *or declarations filed by riparian owners.*

In the year 1866 at the time of the first Regular Settlement of Fyzabad District an inquiry with respect to the rule of alluvion and diluvion was made and it was found that the custom of *dhar-dhura* (deep stream boundary), by which the main channel of the Gogra was treated as the constant boundary between the villages abutting on the opposite sides of the river, prevailed generally in the locality. *Rubkars* or orders were issued that those landholders who accepted the custom should file *iqrarnamas* or declarations acknowledging the custom, while those who disputed it should give proof of the rule of alluvion and diluvion which they set up. The *iqrarnamas* were accordingly filed. They wound up with a declaration that the parties to them of their own free will and accord accepted the usage of *dhar-dhura* and that they and their successors-in-interest would in furture act in accordance with it. But no entry relating to such custom was made in the Record of Rights prepared at the time

Held, that the *iqrarnamas* or declarations were not adequate proof of the custom laid down therein. JANKI KUNWAR *v.* NARENDRA BAHADUR PAL SINGH **224**

Regulation (Bombay) IV of 1827, cl. 99 **617**

Regulation (Bombay) XIII of 1830, cl. 5 **617**

Relevancy. *See* EVIDENCE.

Religious office. *See* HINDU LAW.

Relinquishment—Assignment—Waiver **835**

Remand—Suit originally heard by Disirict Judge—Remanded to him by High Court—Transfer by him to Sub-Judge—Trial by Sub-Judge with consent of parties—Jurisdiction of Sub-Judge to try suit—Onus of proof—Suit for possession—Defendant setting up tenancy—Defendant found to be tenant of plaintiff—Onus, on whom lies **69**

——— ——— to Police custody—Magistrate—Jurisdiction—Action under Chap. VIII, Criminal Procedure Code, when justified **496**

Rent, whether charge on produce in hand of purchaser **576**

Res judicata—Co-defendants **944**

——— ——— ——— Contentious probate proceedings—Suit—Conclusive judgment **325**

——— ——— ——— *Decree of Revenue Court in rent suit—Subsequent title suit—Acceptance of decretal amount under protest—Non-acceptance of rent subsequent—Creation of relationship of landlord and tenant—Decision of Revenue Court as to extent of holding.*

The present defendants instituted a suit for rent in a Revenue Court against the present plaintiffs in respect of the holding of one *R. G.* which the present plaintiffs had purchased. In the plaint of that suit, the then plaintiffs (the present defendants) did not include the land now in controversy. The then defendants thereupon contended that although they did not dispute the amount of rent payable by them as purchasers of *R G.*'s holding, yet they were entitled to the land now in dispute as included in that holding. The Court found that the disputed land was part of the holding of *R.G.* The suit ended in a decree which was satisfied by the present plaintiffs (the then defendants), and t e then plaintiffs (the present defendants) accepted the decretal amount under protest, and since that date they have not accepted rent from the present plaintiffs in respect of the land now in controversy. The plaintiffs have now brought this suit for recovery of possession of the disputed land:

Held, that, (1) the decision of the Revenue Court in the suit for rent did not operate as *res judicata* in the subsequent suit for recovery of possession;

(2) the relationship of landlord and tenant was not created between the parties, although the defendants accepted rent from the plaintiffs. MUKUNDA LAL CHAKRAVARTI *v.* KALI PROSONNA CHATTERJEE, 19 C. L. J. 244 **592**

——— ——— Fraud—Impugning previous decree on ground of fraud—Mere general allegations, whether sufficient—Nature of fraud to be proved **337**

Res judicata—concld.

——— Mortgage-decree—Preliminary decree executed—No objection by judgment debtor—Not open to parties to plead subsequently that there was no executable decree **390**

——— *Question decided against a* pro forma *defendant, when not* res judicata.

When in a previous suit, there was no contest between those defendants who were merely joined *pro forma* and the plaintiffs of that suit in regard to the claim made by the latter, the decision in that suit does not operate as *res judicata* in a subsequent suit brought by the *pro forma* defendants of the first suit against the real defendants as well as the plaintiffs of that suit, when in the subsequent suit there is no contest between the plaintiffs of the first suit, who thus assume the role of *pro forma* defendants in the subsequent litigation, and the *pro forma* defendants of the first suit, who are the plaintiffs of the subsequent suit. MIR KHAN *v.* RAHMAN, 17 P. W. R. 1914: 35 P. L. R. 1914 **381**

Restitution of conjugal rights, suit for—Marriage ceremony, admitted—Coercion and non-consent, pleaded—Right to begin **242**

Reversionary heirs. *See* HINDU LAW.

Reversionary right, transfer of. *See* CUSTOM.

Review, ground for **514**

——— Jurisdiction—Application for review entertained by Judge who passed decree but disposed of by his successor—Grounds for review **394**

Revision (Civil). *See* CIVIL PROCEDURE CODE, 1908, s. 115.

——— Appeal from acquittal **188**

——— Appeal on question of custom without certificate—Granting permission to appeal **352**

——— Chief Court, powers of, under amending Act **85**

——— Commission refused—Discretion—Abuse of process **522**

——— District Judge exercises appellate jurisdiction under Bengal Tenancy Act—High Court's power of revision **844**

——— Ex parte *decree set aside—Conditional on payment of costs—Costs taken and replication to defendants' pleas put in by plaintiff—Acquiescence—Revision of order by plaintiff—Discretion of Chief Court.*

An *ex parte* decree was set aside on the condition of payment of costs, which were paid and written statement in answer to the plaintiff's claim was filed. The plaintiff recieved the costs without protest and put in his replication to the defendants' pleas. About two months subsequent to this, the plaintiff filed a petition for revision of the order setting aside the *ex parte* decree:

Held, that the petitioner's conduct after the order, in accepting the costs without protest and in filing his replication to the pleas and in otherwise acquiescing in the orders subsequently passed by the Court in

Revision—concld.

the course of the suit, showed that he did not consider himself materially prejudiced by the said order and, therefore, the Chief Court would not exercise its revisional jurisdiction. PUNNA LAL *v.* COWSJI, 25 P. R. 1914; 157 P. L. R. 1914 **919**

——— High Court's power to interfere—*Shahnas* delivering attached property without permission—Remedy **907**

——— High Court's power of revision—Landlord and tenant—Lease for fixed term—Six months' notice given before expiry of term—Jurisdiction—Presidency Small Cause Court, when can pass order under section 41—Presidency Small Cause Courts Act (XV of 1882), s. 41—Presidency Small Cause Courts Act (I of 1895) **572**

——— Misappreciation of evidence **493**

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——— **(Criminal).** *See* WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859), s. 2.

——— High Court, power of—Case exclusively triable by Court of Session—Discharge by Magistrate—Commitment by District Magistrate **741**

——— Omission to record preliminary order before summoning opposite party—Omission to affix copy on the property in dispute, effect of parties to **487**

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——— Penalty of Rs. 1,000 is *fixed* and irreducible—Enhancement of sentence **468**

Right of Government to minerals—*Shrotriam* tenure Grant made by pre-British Government—Confirmed by British Government **144**

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——— Adverse possession, whether incumbrance—Assam Land and Revenue Regulation I of 1886, section 70 **119**

——— Declaratary suit to set aside sale—Jurisdiction of Civil Courts—Bengal Tenancy Act (VIII of 1885), s. 119 **524**

——— Hire-purchase agreement—Conditions not fulfilled **801**

——— Perpetual lease—Plenary proprietary rights transferred—Nominal *malikana* reserved **970**

———, setting aside of, on ground that judgment-debtor had no saleable interest in part of property **383**

——— **Certificate**—Amendment—Jurisdiction of Court to amend **811**

——— **or Gift**—Transfer—Ostensible sale for no consideration—Gift—Test to be applied—Intention of parties **813**

Salvage - Damages, illegal levy of—Rules framed by Government under G. O. No. 586 Rev, dated 3rd November 1896, validity of—Proprietary rights of Government—Floating drift-wood—Common law right of Crown **371**

Sanction. *See* CRIMINAL PROCEDURE CODE, s. 195.

—— —— Preliminary inquiry—Notice—Materials, which authority granting sanction may consider—Revision—Grounds on which High Court should interfere **479**

—— —— to prosecute once availed of—Fresh sanction necessary for fresh complaint—Case of non-compoundable offence "struck off" for complainants's absence—Discharge—Jurisdiction—Cognizance **182**

—— ——, whether necessary—Forgery committed by person not party to proceedings **194**

Second appeal. *See* APPEAL, SECOND.

Security. *See* CRIMINAL PROCEDURE CODE, s. 110.

Security for newspaper—Exemption from security—Cancelment of exemption—Order for security for Newspaper—Newspaper stopped—Press used—Conviction, whether sustainable **505**

Seigniorage fees, levy of, legality of **144**

Self-acquired property. *See* CUSTOM.

Sentence, enhancement of—Practice **733**

Service land—*Inalienability—Family custom—Effect—Service land remaining in family for long period of years and descending by rule of primogeniture—Presumption as to nature of tenure—Last holder, whether can put an end to tenure based upon family custom—Summary Settlement Act (Bom. Act II of 1863)—Settlements—Hereditary Offices Act (III of 1874)—Will—Probate—Findings of Probate Court conclusive—Evidence Act (I of 1872), s. 41.*

Settlements which have been effected under, and are within the purview of, Act II of 1863, prevent the *Inam* lands to which they relate from being subject to the provisions of Vatan Act of 1874, because the holders of those settlements are no longer hereditary officers holding for service.

Service land is usually inalienable, and evidence that service land has remained in a family for a long period of years and descended by the rule of primogeniture is more consistent with the fact of its being held for service than with the theory of any special family custom. If the service has come to an end, the last holder, if he have no sons or co sharers, can put an end to the tenure, if any, based upon family custom.

The *Inams* of the Desais of Navalgund should be treated as the property of an ordinary Hindu landowner, subject to the payment of the agreed quit rent to Government.

Where in regard to a Will it was contended in a Probate Court that the testator had revoked his Will twenty-four hours before his death and that he had given authority to his widow to adopt, but the Probate Court found against the contentions and its decision was affirmed on appeal:

Service land—concld.

Held, that the decision of the Probate Court on the contentions raised was conclusive and that it was not open to a District Court in a subsequent suit to re-try those issues. BRENDON *v.* SHRIMANT SUNDERABAI, 16 BOM. L. R. 164; 38 B 272 **221**

Set-off, doctrine of—Insolvency—Fraudulent claim—Notice of available act of bankruptcy committed by debtor **927**

Settlement. *See* MUHAMMADAN LAW.

Seychelles Penal Code, s. 216—*Embezzlement—Civil and Criminal liability—Distinction between invasion of liberty and just rights of citizen—Grave and injurious miscarriage of justice—Leave to appeal to Privy Council—Practice.*

Section 216 of the Seychelles Penal Code does not refer alone to the failure to restore or replace goods, money, etc., in *forma specifica*, and, therefore, is not inapplicable to a position like that of the ordinary breach of agency or trust, in which money, in the sense of the actual notes, sovereigns, or the like, does not fall to be returned, but only its equivalent.

Upon the other hand, no countenance can be given to the view that the language of the Statute can be used to rank within the category of crime, conduct or actions which do not essentially partake of the nature of embezzlement in the sense in which that term is ordinarily and properly understood. Although the term 'embezzle' is supplemented by the terms "squander away or destroy," the whole context and the view of the section show that the latter expressions are amplifications or exemplifications of the operations which are of the nature of embezzlement, in the sense that the conduct which is libelled has been a wilful appropriation by the accused of the property of another, or after possession of the same has been acquired, of the wilful squandering or destruction of it to his prejudice.

The mixture of the funds of another with one's own fund may be in many cases natural and proper and in another case convenient but irregular and in the third both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility, which may be imposed by Statute, a Court of Justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him was moved by the guilty mind.

In criminal cases the Judicial Committee of the Privy Council does not lightly interfere, it only does so where justice has been gravely and injuriously miscarried even although the proceedings are taken to have been unobjectionable in form.

The appellant on being empowered by the guardian of a minor to act for the guardian in the ingathering and the investment of the property of the minor opened a regular account and received the minor's funds and made advances, sometimes far in excess of the receipts. In 1910, a large sum having become payable to the minor from a third person the latter credited the amount to the appellant's overdrawn

Seychelles Penal Code—concld.

account with the bankers. No concealment of any kind was practised, accounts were regularly kept and advances were made as before out of this money. In 1911 the appellant, being called upon to show what cash he had in hand belonging to the minor, stated fully and exactly how the matter stood, and on being required by the friends of the minor to invest or pay the amount or to give a guarantee therefor, at once gave the requisite guarantee.

Upon this the appellant was prosecuted, convicted and sentenced to 18 months' imprisonment with hard labour for having wilfully, fraudulently and unlawfully embezzled the minor's money which had been delivered to him as agent or proxy of the minor's guardian:

Held, quashing the judgment and sentence appealed against, that the Court below had lost sight of the distinction between a civil and a criminal liability and that the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of just rights as a citizen that their Lordships felt called upon to interfere. LOUIS EDOUARD LANIER *v.* THE KING, 18 C. W. N. 93; (1914) A. C. 221: 26 M. L. J. 1; 83 L. J. P. C. 116; 15 CR. L. J. 3 5 **657 P. C.**

Shrotriam tenure—*Grant made by pre-British Government—Confirmed by British Government—Inam deed and its terms—Absolute title—Right of State to minerals—Levy of seigniorage fees, legality of—Enfranchisement of inam confers absolute title—Right of Government to minerals also passes.*

Where the terms of an *inam* title-deed are absolute and confer a free hold in the village, the right of the State to the minerals also passes with the grant.

Sadasiva Aiyar, J.—On enfranchisement, the full free hold interest in a village passes and the estate so vesting is not liable to any further imposition of burden in the shape of revenue assessment by the Government other than the burden of the enhanced quit rent imposed by the *Inam* Commissioner.

Spencer, J. dissenting—A Shrotriam grant gives no right over the lands.

A grant made by Government means only grant of revenue unless the terms of the grant expressly and clearly convey anything else.

Even where Government have, from time to time, expressed varying views in regard to their right to share in the minerals found in the village covered by an *Inam* grant, those views will not debar Government from claiming such right, unless they have, by express words, surrendered such right.

Nor will such right become extinguished by the law of limitation.

The term "mineral" includes freestone, limestone, gratine, clay and stone used. SECRETARY OF STATE FOR INDIA *v.* SRINIVASA CHARIAR, 15 M. L. T. 277 **144**

Sir land. *See* AGRA TENANCY ACT.

Slander—*Truth of imputation complete defence—Special damage—Loss of caste—Material disadvantage—Malice—Damages, measure of.*

Slander—concld.

To prove the truth of a slanderous imputation is a complete answer to the slandered person's claim for damages.

Losing the general good opinion of one's neighbours is not special damage. There must be loss of some material advantage.

Malice in this connection signifies only the absence of just cause or excuse.

A Hindu woman was called by defendant a "prostitute" and in consequence of this slander was outcasted:

Held, (1) that the membership of caste being a material advantage in the eye of a Hindu, the loss of caste was clear proof of special damage;

(2) that the cost of a journey to Jagannath and back and of the customary proprietary offerings at that shrine may fairly and conveniently be taken as the measure of damages for the loss of caste, even though, as a matter of fact, no journey to Jagannath was performed by the outcasted plaintiff. CHANGARAM *v.* RAYA, 7 L. B. R. 86 **3**

Sonthal Parganas Act (XXXVII of 1855), s. 2 **876, 883**

Sonthal Parganas Justice Regulation (V of 1893, ss. 7, 9—*Sonthal Parganas Act (XXXVII of 1855), s. 2—High Courts Charter Act (24 & 25 Vict., C. 104), s. 15—Sonthal Parganas—Courts of Deputy Collectors, Sub-Divisional Officers and Deputy Commissioners—High Court's power of superintendence over these Courts.*

The Courts of the Sub Deputy Collector, the Sub-Divisional Officer and the Deputy Commissioner in the Sonthal Parganas are not subject to the appellate jurisdiction of the High Court.

Therefore, it is not competent to the High Court to interfere with the proceedings before these Courts in the exercise of the power of superintendence conferred on it by section 15 of the Indian High Courts Act, 1861. DARBARI PANJIARA *v.* BHATHI ROY, 18 C. W. N. 515; 19 C. L. J. 294 **883**

——— ——— ——— **s. 9** **883**

Special appeal lies to High Court—Vinchur Court's decision **617**

Specific performance. *See* CONTRACT ACT, s. 2; SPECIFIC RELIEF ACT, s. 22.

——— ——— ——— ———*Agreement to grant permanent lease "hereafter"—Whether vague and uncertain—Postponement of grant of lease until promisor had paid off his debts—Whether putting off of execution of deed is refusal to perform contract—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 113—Allegation of new contract being substituted for old—No proof of new contract—Whether old contract may be enforced—Limitation not pleaded—Limitation not question of law—Suit, whether to be dismissed on that ground.*

An agreement to grant a permanent lease "hereafter" of a certain property to the plaintiffs was executed by the defendant's predecessor, who also issued a notice on the day the agreement was executed to his tenants to pay their rents to the plaintiffs, stating therein that he had "let out the property in *ijara*" to the plaintiffs. Some time,

Specific performance—contd.

about a year after this, he approached the plaintiffs to agree to the postponement of the grant of the lease, until after he had paid off his debts. The plaintiffs made no objection, as they had confidence in him and fully believed that he would act up to his words. The lease not having been granted by the defendant's predecessor, the plaintiffs brought a suit for the specific performance of the contract:

Held, (1) that the putting off of the execution of the deed could not be taken as a refusal to perform the contract, nor could the arrangement come to between the parties that the grant of the lease should be postponed until after the defendant's predecessor had paid up his debts be looked on as a rescission of the contract to grant the lease, nor did the plaintiffs give up their rights under the contract, the highest that it could be put to was that the plaintiffs gave the defendant's predecessor a reasonable time within which to execute the deed;

(2) that the plaintiffs' right to claim specific performance of the contract to grant a permanent lease was not barred by limitation under Article 113, Schedule I, of the Limitation Act of 1908:

(3) that because the contract to grant the lease provided that the lease should be executed "hereafter" the contract was not vague and uncertain, the word "hereafter" only meaning after the date of the contract.

The mere fact of one party alleging that a new contract had been substituted for an old one does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true.

Where the question of limitation is not merely a question of law and the point is not raised by the defendant, the Court ought not to dismiss the suit on the ground of limitation. KALI DAS BHANJA v. GIRIBALA DASI **330**

——— ——— ——— *Agreement to sell—Subsequent purchaser—Notice—Valuable consideration—Bona fides—Burden of proof—Party to agreement—Hindu Law—Right of son to contest liability under father's agreement.*

After a plaintiff has established a prior agreement to sell immoveable property, it is for the subsequent purchaser to prove (a) that he paid valuable consideration, (b) that he acted *bona fide*, and (c) that he had no notice of the prior agreement.

If a party to an agreement to sell is a Hindu and, in a suit for the specific performance of the agreement, the son of such party raises any question as to his liability to fulfil the obligations of his father, the Court will go into and decide such questions. TIRUVENKATACHARIAR v. VENKATACHARIAR, 26 M. L. J. 218 **621**

——— ——— ——— of contract to sell—Failure of vendor to perform his part—Laches or delay in instituting suit—No ground for refusing specific performance—Discretion **560**

——— ——— ——— *of contract to sell—Variation between contract set up and contract proved—No wilful omission or concealment—Suit for the items proved maintainable.*

Specific performance—concld.

A Court has discretion to refuse specific performance of a contract to sell, where the plaintiff fails to establish in full the agreement set up by him in his plaint; but that rule does not apply where the plaintiff does not deliberately put forward a false claim.

Where the agreement was to sell four items of property and subsequently one of the items was mortgaged to the plaintiff and in consequence the plaintiff was not in a position to state what items were sold to him, the fact that he claimed in these circumstances a larger number of items than he was found entitled to would not put him out of Court NAZARETH v. JAFFER MEGHJI SHET, (1914) M. W. N. 339 **523**

Specific Relief Act I of 1877, s. 9

—*"Possession", meaning of—Joint possession—Dispossession from whole—Co-sharer suing for possession of his share only, whether suit maintainable.*

The words of section 9 of the Specific Relief Act refer to exclusive possession and a Court has no jurisdiction to grant joint possession under that section. Consequently a party entitled to an eight-annas share in a property is not entitled to proceed under the section when the dispossession is in respect of the whole. HARI NARAIN DAS v. ELEMJAN BIBI, 19 C. L. J. 117 **618**

——— ——— ——— **s. 9**—*Suit for possession—Inference therefrom—Also from the fact that suit was for possession only and not declaration of title—Appeal lies.*

The second paragraph of section 9 clearly shows that no one, though entitled to sue under that section, is bound to do so, and that he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section.

A person by seeking his remedy early does not thereby alter the nature of his suit.

Where the plaintiff set up a title as mortgagee in possession of certain land of which defendants had taken possession and the defendants alleged that they had redeemed the mortgage and so extinguished the plaintiff's title on which his claim to possession was based and the Court of first instance held after framing issues on the question of title and taking evidence that the defendants had not redeemed the mortgage and that there was abundant evidence to prove the plaintiff's title to the land as mortgagee in possession:

Held, that both from the frame of the plaint and the course which the case took it was intended to be a suit based upon title and was never a suit under section 9 of the Specific Relief Act and that the plaintiff could not be heard to assert the contrary and that, therefore, an appeal lay to the Divisional Court MG. LU YG v. MAUNG PU, 7 BUR. L. T. 10; 7 L. B. R. 88 **367**

——— ——— ——— **s. 22**—*Specific performance of contract to sell—Failure of vendor to perform his part—Laches or delay in instituting suit—No ground for refusing specific performance—Discretion.*

Where under the terms of an agreement to sell

Specific Relief Act—contd.

the vendor is bound to execute and register a proper conveyance before he can call upon the vendee to pay the balance of the purchase-money, he commits a breach of contract if he demands such payment without executing a conveyance.

As mere laches or delay short of the period of limitation is not always evidence of waiver or abandonment of claim, even where it is up to the hilt of the limitation period, that is no ground for refusing specific performance.

A decree for specific performance of an agreement to sell should direct the person in whom the property vests, on the date of the decree, to execute a conveyance. CHAMARTI SURYAPRAKASARAYADU *v.* ARARDHI LAKSHMINARASIMACHARYULU, 26 M. L. J. 518 **560**

—— —— —— —— **s. 22, cl. (ii)**—*Specific performance - Vendor and purchaser—Contract for sale of immoveable property - Non-production of essential document of title by vendor Delay of one month in bringing suit—Hardship—Honest mistake.*

On April 22, 1910, the defendant No. 1 entered into an agreement with the plaintiff to transfer to him certain immoveable property and received the earnest money. Under the contract, the transaction was to be completed within three months and the vendor had agreed to satisfy the purchaser that she had a valid saleable interest in the property by showing him a copy of the Will of her mother. Neither the original Will nor a certified copy thereof nor the Probate was shown to the purchaser. On August 30, 1910, the defendant No. 1 sold the property to the defendant No 2 and the plaintiff brought this suit on November 5, 1910, for specific performance of the contract. The defendant No. 2 was aware of the prior contract but, believing that it had ceased to be operative upon the expiry of the time limited for its performance, he spent some money on the improvement of the property after his purchase:

Held, (1) that the plaintiff was entitled to insist upon the production of a certified copy of the Will, as that document constituted a very important and essential element in the investigation of the vendor's title;

(2) that the vendor had not carried out one of the essential terms of the agreement, namely, to satisfy the plaintiff as to her title to the property by productions of the Will of her mother;

(3) that the non performance of the agreement within the three months prescribed thereby was not attributable to any default on the part of the plaintiff;

(4) that, therefore, on July 22, 19.0, that is, at the end of three months from the date of the contract, there was a valid and subsisting contract between the plaintiff and defendant No. 1 which was enforceable at the instance of the plaintiff;

(5) that as the subsequent transferee purchased the property with full knowledge of the prior agreement with the plaintiff, he could not claim to be a *bona fide* purchaser for value without notice, and,

(6) that the plaintiff was entitled to have the contract specifically enforced not only against the vendor but also against the transferee.

Specific Relief Act—contd.

A delay of month in the institution of a suit is not sufficient to justify a refusal of relief by way of specific performance.

Clause (*ii*) of section 22 of the Specific Relief Act contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances. Mere improvidence or inadequacy is no hardship within the meaning of the clause, but the bargain must be so hard as to be unconscionable so that its actual performance would, in the circumstances, be inequitable But where the hardship has been brought upon a party by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance.

A person who entertains a doubt as to the existence, present or future, of a certain fact but deliberately omits to make an inquiry which any prudent man under the circumstances would have made and which could have afforded him protection, cannot be said to be the victim of an honest mistake.

The defendants, therefore, are not entitled to be re-imbursed for the improvement made on the property. HARADHAN DEB NATH *v.* BHAGABATI DASI, 19 C. L. J. 420 **214**

—— —— —— **s. 42** **705**

—— —— —— —— —— **s. 42**—*Discretion - Suit for declaration—Suit by remote reversioner against Hindu widow—Declaration that deed of sale by widow void against plaintiff—Widow's daughter, immediate reversioner, living—Suit, whether maintainable—Where plaintiff old man of 50, daughter aged 18, whether suit should be decreed.*

A decree under section 42 of the Specific Relief Act is only discretionary and the exercise of discretion must depend upon the peculiar circumstances of each case.

A suit by a remote reversioner, for a declaration that a deed of sale executed by a Hindu widow is without any legal necessity and, therefore, void and ineffectual as against the plaintiff, is maintainable even during the life-time of the immediate reversioner, the widow's daughter.

But where the plaintiff is an old man of 50 and the widow's daughter, that is, the immediate reversioner, is aged 18 or 19 years, and there is no chance of the plaintiff's getting the property, the Court would be exercising a wise discretion if it dismissed the suit refusing to grant the declaration prayed for. BALDEO DUBE *v.* SHAMDHUR PANDE **809**

—— —— —— —— **s. 42**—*Widow in possession—Dispute as to nature of her possession—Declaration.*

Where the possession of the defendant, a widow, was admitted by the plaintiff and a declaration was sought to the effect that she was in possession of the property, not as heir of a separated Hindu, but as a widow of a deceased member of a joint Hindu family in lieu of maintenance, and as such not entitled to obtain partition of the property.

Held, that the real dispute between the parties being as to the nature of the possession of the lady and the plaintiff not being entitled to an immediate possession of the property, section 42 of the Specific Relief Act was no bar to the suit. RAM MANOHAR SINGH *v.* DILRAJI KUNWARI, 12 A. L. J. 66; 36 A. 126 **252**

Specific Relief Act—concld.

——— ——— ——— **s. 42, proviso**—*Suit for declaration—Plaintiff not in possession—Possession not claimed—Suit, whether maintainable*

A declaratory suit is barred by the proviso to section 42 of the Specific Relief Act where the plaintiff is out of possession and still does not sue for recovery of possession of the property in suit. ISHWARI SINGH *v.* NARAIN DAT, 12 A. L. J. 403; 36 A. 312 **555**

Stamp Act (II of 1899), s. 2 (15), Sch. I, Art. 45 (3)—*"Final order," meaning of.*

The words "final order" in section 2, clause 15, and Article 45, clause (c), of Schedule I of the Stamp Act II of 1899, refer to the final order of the lowest Court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed. STAMP REFERENCE BY THE BOARD OF REVENUE, *In re*, 12 A. L. J. 113; 36 A. 137; 1 O. L. J. 190 **98**

——— ——— **s. 13**—*Statutory Rules, r. 7—Promissory note written on impressed stamp paper of insufficient value—Blank impressed sheet added to make up the deficiency—Pro note, whether duly stamped.*

Where the terms of a promissory note were written on an impressed stamp sheet of Rs. 1-8 and another blank impressed sheet of Re. 0-12 0 was attached to make up the deficiency in the value of the stamp required for the pro-note:

Held, that under section 13 of the Stamp Act and rule 7 of the Statutory Rules, made in pursuance thereof, the promissory note was not duly stamped and, therefore, was inadmissible in evidence. MOHANLAL KUNIALAL *v.* KESARIMULL CHORDIYA, 15 M. L. T. 203 **110**

——— ——— **s. 35** **975**

——— ——— **Sch. I, Art. 45 (3)** **98**

Statement contained in newspaper, when defamatory—"Aggrieved person", meaning of **725**

Statements, copies of—Right of accused to get copies of statements to Police—Refusal—Reason—Statements under section 162, Criminal Procedure Code **497**

Statute, construction of **499, 632, 743**

——— . ———, interpretation of **649, 689, 888**

Step-in-aid of execution. *See* EXECUTION.

Sub-Divisional Officer acting under s. 2 of Sonthal Parganas Act (XXXVII of 1855)—Revision—Commissioner or High Court—Jurisdiction **876**

Substantial question of law. *See* PRIVY COUNCIL APPEAL.

Sub-tenant. *See* LANDLORD AND TENANT.

Succession. *See* BUDDHIST LAW; CUSTOM; HINDU LAW

——— ——— ——— ———Daughter's son—Agra Tenancy Act (II of 1901), s. 22—Daughter succeeding to her father's holding while Rent Act of 1881 was in force **100**

Succession Act (X of 1865), ss. 35, 87—*Gift to mistress and her sons by unmarried person—Provision that property "shall be no concern of mine"—Illegitimate sons, whether meant—"Intimation to the contrary"—Man, whether father of illegitimate children.*

One *T* who was unmarried gave certain property to his mistress *S* and to her sons by him in these terms: "The property is given to *S* for her life and after her death, the sons and heirs of me shall come in possession of the said property. It shall be no concern of mine":

Held, that (1) under section 87 of the Succession Act, there must be an intimation that the illegitimate sons were meant, and that such an intimation existed in the provision that the property was to be no concern of *T*; (2) the intention of *T* was that after the death of his mistress, the property should go to her illegitimate sons; and (3) the English view that a man is not the father of his illegitimate children applies also under the Succession Act. UDIT SINGH *v.* AMAR KUAR **348**

——— ——— ——— ——— **s. 87** **348**

——— ——— ——— ——— **ss. 111, 116** **597**

Succession Certificate Act (VII of 1889)—*Application for certificate—Question as to whether debt belongs to deceased, whether relevant.*

In an application for a succession certificate under Act VII of 1889, the question whether the debts in respect of which the certificate is applied for belong to the deceased or not, is irrelevant and cannot be gone into. SRINIVASACHARIAR *v.* GOPALAN, 26 M. L. J. 365; (1914) M. W. N. 323 **424**

Succession Certificate—*Certificate for portion of debt, if may be granted—Appeal—Final order—Order declining to grant application.*

A person may apply for a certificate under the Succession Certificate Act to enable him to recover a portion of a debt due to the deceased.

In an application under the Succession Certificate Act, the District Judge declined to make the grant prayed for but ordered that if another application was made in a different form he would consider it:

Held, that the order was a final order and appealable. ANNAPURNA DASYA *v.* NALINI MOHAN DAS, 18 C. W. N. 836 **556**

Suit *brought in wrong name—Amendment of plaint—Limitation.*

Where a plaintiff, intending to sue one person, by mistake enters the name of another, an amendment of the name, even if made after the period of limitation, does not bar the suit.

But where under some mistake or error the plaintiff intends to sue the wrong person, an amendment will not make the suit within time against the right person if it is already barred against him. NARAYANA SASTRIGAL *v.* MANGALATHAMMAL, 1 L. W. 336 **764**

——— to compel registration—Time expired when Court closed Suit filed immediately on opening of Court—Extension of limitation on general principles—Refusal to register, mere return of document, amounts to—Order of refusal not endorsed on returned document, effect of **23**

——— for ejectment by *raiyat* against under-*raiyat*—Whether jurisdiction of Civil Court barred **407**

Suit—concld.

—— by minor after attaining majority for possession of land sold by his guardian during his minority **406**

—— for partnership and accounts—Amount due to one defendant ascertained and Court-fee paid thereon—Withdrawal of suit by plaintiff—Defendant's right to claim trial **392**

—— for recovery of money based on account—Jurisdiction **424**

——, *right of*—Lambardar, *customary agent of proprietary body, whether can sue alone—Custom.*

A *Lambardar*, as the customary agent of the proprietary body, is entitled to sue to set aside a voidable transaction. MURLIDHAR *v.* JAGANNATH, 10 N. L. R. 5 **20**

—— to set aside revenue sale—Compromise—Suit for declaration—Limitation **240**

——Valuation—Interest claimed by plaintiff—Value of suit is value of interest claimed in suit—Jurisdiction **964**

——, value of **345**

—— for declaration by land-holder that lease granted by his Agent was without authority—Jurisdiction of Civil or Revenue Court—*Res judicata* **705**

—— for declaration—Plaintiff not in possession—Possession not claimed—Suit, whether maintainable **555**

—— for declaration—Suit by remote reversioner against Hindu widow—Declaration that deed of sale by widow void against plaintiff—Widow's daughter, immediate reversioner, living—Suit, whether maintainable—Where plaintiff old man of 50, daughter aged 18, whether suit should be decreed **809**

—— for possession—Certificate sale of land—Auction purchase by defendant—Right of plaintiff **622**

—— to recover—Increase in rate, not according to Regulations—Illegal—Payment under protest—Jurisdiction of Civil Court—Payment by cheque effected when cashed—Limitation runs from date cheque is cashed—Limitation Act (IX of 1908), Sch. I, Art. 64 **779**

Suits Valuation Act (VII of 1887), s. 8 **964**

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Summons case—Acquittal of accused obtained by improperly procuring complainant's absence **188**

Supreme Court of Hong Kong—Jurisdiction—Foreigner—English rules of evidence, how far binding on Supreme Court of Hong Kong **678**

Sureties for appearance of judgment-debtor on the day the time for appeal expires—Surety's bond not in accordance with Court's order—Construction—Court's intention in asking for sureties—Responsibility of sureties—Its extent **349**

————, qualifications of—Good behaviour—Conditions, validity of **476**

————Guarantee—Agent's power to give guarantee or sign negotiable instruments—Burden of proof **516**

————Restriction to local men—Jurisdiction **206**

Survivorship. *See* HINDU LAW.

Temporary Settlement under Government—Permanent sub-lease to plaintiff—Plaintiff granting sub-lease to defendant—Renewal of Settlement from time to time by Government, effect of, upon defendant **16**

Theft, abetment of—Charge of theft of wood without pass—Claim of accused to take wood without pass—Decision of claim necessary before conviction **506**

Torts, *suit on joint.*

A suit on joint torts, in which the plaintiff alleges that the torts of malicious arrest and prosecution and trespass were committed by the three defendants acting in conspiracy, instead of by one, is governed by the one-year rule of limitation contained in Articles 19 and 23 of the Limitation Act, 1877.

D. Chatterjee, J.—A tort, committed by several persons acting in concert, is not different from the same tort committed by a single individual. A trespass is a trespass, whether it is committed by one person or by more, and so is a malicious prosecution or false imprisonment. The combination in such cases may be an element of aggravation in the assessment of damages, but it does not suffice to make it a different tort. D. WESTON *v.* PEARY MOHUN DAS, 40 C. 898; 18 C. W. N. 185 **25**

Transfer, causes of—Preponderance of convenience **345**

————, grounds for **735**

————Magistrate putting questions to witnesses prejudicial to accused—Sufficient ground for transfer **186**

————, powers of—District Court—Subordinate Judge's Court—Inherent power—Jurisdiction **425**

———— *Sale or Gift—Ostensible sale for no consideration—Gift—Test to be applied—Intention of parties.*

In the case of a transfer where there was no gift, but an ostensible sale for no consideration, and the transfer was, in essence, never intended to take effect, the test to be applied is, was the transaction intended to transfer title? If it was intended to be operative, the mere fact that the payment of consideration was postponed, would not affect the validity of the transaction; on the other hand, if the operation of the transaction was intended to be postponed till the consideration money had been paid, the transfer would become complete and operative only upon such payment. The essence of the matter is consequently the intention of the parties. KASHI DAS GOSAIN *v.* CHAITHRU PATRAS URAON, 19 C. L. J. 239 **313**

———— Sub-Divisional Magistrate, whether empowered to transfer case referred to him for trial **1006**

————Weak Magistrate—Proceedings unduly prolonged—Witnesses—Magistrate's discretion in summoning—Expenses of witnesses to be realised before summons—Practice **731**

———— **of case**—Fair and impartial trial not expected **736**

————Practice **725**

———— **of criminal cases.** *See* CRIMINAL PROCEDURE CODE, ss. 205, 526.

———— Impartiality of Magistrate not doubted **205**

Transfer of Property Act (IV of 1882), ss. 2 (c), 108 (j)—*Homestead land—Transferability—Tenancy created before Transfer of Property Act.*

Section 108 *(j)* of the Transfer of Property Act has no application to a tenancy created before the passing of that Act.

Therefore, when at the time the parties entered into contractual relations for the lease of certain land for dwelling purposes there was no right of transferability, that right could not be acquired by the operation of section 108 *(j)* of the Transfer of Property Act. UMAKANTA SAHA *v.* KASHIRAM BANIA **246**

——— ——— ——— **s. 53**—*Fraudulent transfer—Suit to avoid—Frame of suit—Intent, must be to defraud creditors generally—One creditor securing payment of his debt—Purchaser for present consideration—Difference in their liability—Proof, required of each—Relationship—Presumption.*

A suit founded on section 53 of the Transfer of Property Act must be framed as for or on behalf of all the creditors generally. An objection on this ground to prevail, must be taken in the first Court, but if not so taken, cannot avail in the Appeal Court.

The intent which gives a creditor the right to have a transfer by his debtor of immoveable property avoided, must be an intent to defeat or delay his creditors *generally*. Therefore, a transfer made with intent to defeat or delay any one particular creditor, cannot be avoided against that particular creditor provided that there has been good consideration and the transaction is not a mere sham.

A transfer, with intent to defraud creditors generally, made in favour of a creditor securing payment of the debt due to himself by superior diligence cannot be set aside, even if he was aware of the vendor's intention to defeat his other creditors. In other words, in the case of such a creditor proof of valuable consideration is ordinarily sufficient, but not so in the case of a purchaser for present consideration who must prove, not only valuable consideration, but also the further fact that he was not aware of the vendor's fraudulent intent and that he did not enter into the transaction for the purpose of aiding the fraudulent transfer.

Relationship alone between the transferor and the transferee is not sufficient to establish such aiding, but it is a circumstance giving rise to suspicion and one that must, therefore, be very carefully considered. V. R. M. V. A. CHETTY FIRM *v.* MAUNG PO SIN **341**

——— ——— ——— **s. 54**—*Transfer of mortgage-debt, whether sale—Registration Act (III of 1877), s. 17—Equitable mortgage—Registration.*

A transfer of a mortgage by the deposit of title-deeds does not require registration under either the Transfer of Property Act or the Registration Act.

A transfer of a mortgage is a transfer of the mortgage-debt with its attendant securities and not a sale of the immoveable property, therefore, no registration is required by the Transfer of Property Act of such a transfer. DWARKA DOSS *v.* DANAKOTI AMMAL, 15 M. L. T. 198 **129**

——— ——— ——— **ss. 54, 106, 107, 116**—*Lease from year to year—Successive leases for one year each, difference between—Oral lease for one year accompanied with delivery of possession—Subsequent one year's oral leases, if valid—Possession, when lessee already in possession, transferable—Registration.*

In 1313 a valid lease was given to the plaintiffs, being an oral lease for one year accompanied by delivery of possession. After the expiry of the year temporary settlements for one year each were given for some years including 1316. The plaintiffs brought a rent suit against certain *raiyats*:

Held, that although the result of the successive leases may be very similar to the ultimate effect of a lease from year to year for the whole period, yet a series of successive leases for one year each is quite different from a lease from year to year, inasmuch as successive leases for one year each are terminable without notice and are not registrable while a lease from year to year is only terminable by six months' notice and registrable; that if the subsequent leases are invalid owing to possession not having been given to the lessees as they were already in possession, yet the lessees remaining in possession with the assent of the lessor after the expiry of the valid lease for 1313 became lessees from year to year under section 116 of the Transfer of Property Act; and that the plaintiff would be entitled to recover. FAKIRA MAHTON *v.* LEAKUT HOSSAIN, 18 C. W. N. 858 **818**

——— ——— ——— **s. 55**—*Vendor and purchaser—Sale—Title, covenant for—Implied covenant—Vendee obtaining possession under voidable sale—Sale subsequently set aside—Suit to recover consideration money—Cause of action.*

In the absence of any express covenant to the contrary, the statutory guarantee for good title is always implied in every contract of sale under section 55 of the Transfer of Property Act, and discovery of defects in title does not take away purchaser's right to be indemnified.

Where a conveyance is *prima facie* unimpeachable, a knowledge of the defects in title should not be imputed to the vendee for the mere circumstance that he had knowledge of a deed of release, which, when legally construed, would throw a cloud on the vendor's title, and the principle of *caveat emptor* would not apply to such a case.

Where a sale is only voidable at the instance of a third person and possession is taken by the purchaser under such sale, the case of action for a suit to recover the consideration money arises when the possession of the purchaser is disturbed and not till then.

Obiter.—The same principle applies even where possession is taken under an invalid sale, but where no possession is delivered the cause of action arises on the date of sale. SUBBARAYA REDDIAR *v.* RAJAGOPALA REDDIAR, 15 M. L. T. 24?; (1914) M. W. N. 376 **570**

——— ——— ——— **s. 59**—*Equitable mortgage—Facts to be proved—Deposit of title-deeds—Property outside Bombay—Proof of intention.*

An equitable mortgage under section 59 of the Transfer of Property Act needs three facts to be proved (1) a debt, (2) deposit of title-deeds and (3) an intention that the latter should be security for the former.

Transfer of Property Act—contd.

No writing is necessary to create an equitable mortgage. It is of the very essence of such mortgage that it comes into being without any writing by mere conjunction of certain facts.

The intention must be clearly proved as a question of fact. Where to prove such intention the mortgagee offered as evidence a contemporaneous written agreement whereby (1) the mortgagor acknowledged the equitable mortgage, (2) agreed to the property being a further security for the loan, and (3) also agreed to execute upon demand a proper legal mortgage of the property covered by the title-deeds deposited:

Held, (1) that as the agreement created a charge on the property for more than Rs. 100 it was compulsorily registrable, and that not being registered, it was inadmissible in evidence, and consequently there was no evidence of intention to connect the deposit of title-deeds with the loan;

(2) that the mere fact that there was a subsequent or contemporaneous loan is insufficient in law to warrant a presumption, apart from any other evidence, that the contemporaneous or antecedent deposit of title-deeds was necessarily made as a security for the loan.

Per *Macleod, J., Beaman, J.*—(dubitante).—

Where title-deeds are deposited in the towns mentioned in section 59, an equitable mortgage is effected irrespective of the situation of the property to which the title-deeds refer. BEHRAM RASHID IRANI *v.* SORABJI, 16 BOM. L. R. 35; 38 B. 372 **140**

——— ——— ——— **s. 59** —*Mortgage - Immoveable property—Rights and interests of grove-holder in grove—Registration.*

Rights and interests of a grove-holder in a grove are rights and interests in immoveable property and a mortgage of these rights requires registration. SHEO NAIK RAM *v.* SHEO RAM **963**

——— ——— ——— **s. 72**—*Mortgagee in possession, right of, to recover expenses incurred in suit to recover in arrears of rent—Act of management.*

In the absence of any foundation for a suggestion of bad faith, the filing of suits to recover arrears of rent by a mortgagee in possession, is an act of management and any expenses incurred in connection therewith are recoverable by the mortgagee under section 72 of the Transfer of Property Act. BASANT SINGH *v.* MATA BAKSH SINGH, 17 O. C. 47 **456**

——— ——— ——— **s. 82**—*Rateable contribution, principle of—Determination of proportionate liability by Court—Mortgage*

Where several properties belonging to different persons are liable under the same mortgage and the owner of one of the properties discharges the mortgage, the owners of all the properties liable under the mortgage are bound to contribute their *quota* of liability for the mortgage-debt. The Court ought to determine the value of the several items of property belonging to different owners. The value to be so ascertained should be the value at the date of the mortgage. After ascertaining the value of the different properties, the Court should determine what is the rateable liability of each of the properties for the total amount of the mortgage-debt. The Court must then ascertain how much each party has contributed to the payment of the debt. In making this inquiry it ought to disregard the purchase-money which any of the purchasers have paid or retained. Having ascertained the amount each party has contributed, the Court should proceed to apportion the liability between the different properties. In so apportioning the liability, each property must be debited with its own share of liability. BHAGWAN SINGH *v.* MUHAMMAD MAZHAR ALI KHAN, 12 A. L. J. 394; 36 A. 272 **339**

——— ——— ——— **s. 100** — *Will creating charge by way of annuity— rge upon immoveable property, whether enforceable inst bona fide transferee for value without notice—Mortgage and charge, distinction between—Registration of charges not compulsory—Document, creation of charge by, not compulsory—Lien, legal and equitable, admission of.*

Where a charge upon an immoveable property was created by a Will, the registration of which was not compulsory and of the terms of which a stranger, the auction-purchaser, could not have been congnizant:

Held, that the charge could not be enforced as against the auction-purchaser, he being a *bona fide* purchaser for value without notice.

A charge does not operate to transfer to the charge-holder any interest in a specific immoveable property as a mortgage does. PARBHU DAYAL *v.* BABBAN LAL, 1 O. L. J. 43 **867**

——— ——— ——— ——— **s. 101** **393**

——— ——— ——— ——— **s. 101**—*One mortgagee holding two mortgages over same property—Property sold in decree based on first mortgage—Sale subject to second mortgage—Property purchased by mortgagee himself—Second mortgage, whether extinguished.*

Where a mortgagee, holding two different mortgages over the same property, sues on foot of the first mortgage, and on obtaining a decree, purchases the property himself "subject to his second mortgage", his second mortgage is extinguished and he becomes an absolute owner of the property. LAXMAN GANESH RAJENDRA *v.* MATHURABAI, 16 BOM. L. R 26; 38 B. 369 **121**

——— ——— ——— **ss. 106, 107** **318**

——— ——— ——— **s. 108 (h)**—*Estoppel—Mortgage suit—Defendant setting up permanent tenure created before mortgage—Decree that defendant, subsequent incumbrancer, could redeem—Defendant, if estopped from setting up tenancy before mortgage—Improvement by tenant—Fixtures—Right to remove after determination of tenancy—Equitable right—Benamidar defendant in mortgage suit, estoppel against, whether binds beneficiary.*

In a mortgage suit the mortgagor's tenants were made defendants on the allegation that they had taken their tenancies from the mortgagor after the date of the mortgage The tenants pleaded that they held a permanent tenure created prior to the mortgage The Court held that the tenants were subsequent incumbrancers and could redeem the mortgage within a time fixed. They having failed to redeem, the property was sold by order of the Court and the sale certificate was not made subject to any tenancies whatsoever:

Transfer of Property Act—concld.

Held, that the tenants were estopped from saying subsequently that their tenancy was prior to the interest of the auction-purchaser.

The right of a tenant to remove buildings, if he has not removed them before the determination of his lease, is an equitable one, and in accordance with the usages and customs of the country.

Where a lease was not determined by any notice to quit and the decree in the suit, under which the tenant lost his right, did not give him any opportunity to remove the buildings, the High Court allowed three months' time to remove them.

A *benamidar* defendant in a mortgage suit represents the interest of the person beneficiary entitled, and an estoppel created against the *benamidar* by the judgment and decree in the suit binds the beneficiary. KANAI LAL JALAN *v.* RASIK LAL SADHUKHAN **762**

——— ——— ——— ——— **s. 108(j) 246, 395**

——— ——— ——— ——— **s. 111 (d)**—*Merger—Leases created prior to passing of Transfer of Property Act—Vesting of superior and lease-hold interests in one person after passing of Act—Doctrine of merger in* Mofussil—Sikmi taluq—*Specified boundaries—Creation of new* taluq

Section 111 *(d)* of the Transfer of Property Act is applicable to leases created prior to the passing of the Act when the vesting of the superior and lease-hold interests in one and the same person occurs subsequent to the passing of the Act.

Where a document purports to convey to the plaintiff lands within specified boundaries to be held by him at a specified rent on a *sikmi taluq* tenure, it may have the effect of either reviving an old *sikmi taluq* or of creating a new *sikmi taluq* on the same terms.

Obiter dictum:—Prior to the Transfer of Property Act, the doctrine of merger did not apply to property in the Mofussil. ABDUL KARIM *v.* AHAMMAD ALI MEAJI **612**

——— ——— ——— ——— **s. 111 (g) 395**

——— ——— ——— **s. 116 318**

——— ——— ——— ——— **s. 123 547**

Trees, planted by tenant on his cultivatory holding before accrual of tenancy, effect of, ejectment decree upon **957**

———, transferability of **962**

Undue influence. *See* CONTRACT ACT, s. 16.

United Provinces Land Revenue Act (III of 1901), ss. 111, 114—*Jurisdiction of Civil and Revenue Courts—Compromise, petition of, filed in mutation proceedings—Estoppel—Mutation proceedings, whether evidence of title—Consent to entry of one's name in revenue papers, effect of—Admission, gratuitous, withdrawal of—Revenue Court's decision on questions of title raised in partition proceeding bars Civil Court from re-opening those questions—Procedure, proper, not adopted by Revenue Court in deciding titular questions, effect of—Objection to partition filed beyond time fixed by Revenue Court, whether entertainable, if partition not yet granted—Partition, complete, effect of—Appeal from order of Revenue Court disallowing objection to partition on ground of opposite party being recorded co-sharer,* Ramm *v.*

U. P. Land Revenue Act—contd.

Where in a mutation proceeding the parties had filed a petition of compromise whereby the plaintiffs agreed to the substitution of the defendants' names in respect of a certain property:

Held, that the petition did not estop the plaintiffs from subsequently suing the defendants for recovery of possession of the property, because it did not purport to convey any title to the defendants or to induce them to alter their position on the strength of the mutation proceeding.

There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it, and a mere consent to the entry of the name of another in the revenue papers does not create any such obligation.

A Revenue Court being competent under section 111 of the U. P. Land Revenue Act to decide a question of title raised in the course of a partition proceeding, its decision upon such question, on becoming final, operates as a bar to the re-opening of the same matter in the Civil Court. The mere fact that the Revenue Court did not adopt the procedure as laid down in the said section, does not detract from its value as a decision of a competent Court.

A Revenue Court acting under section 114 of the U. P. Land Revenue Act is not precluded from dealing with an objection filed beyond the time fixed by it for filing objections, if it has not up to that time taken any action under that section.

A complete partition has the effect in law of vesting title in the party in whose favour partition has been carried out, and a Civil Court has no jurisdiction to go behind it.

Where a Revenue Court disallowed an objection raising a question of title merely on the ground that the opposite party was a recorded co-sharer in possession:

Held, that the order was appealable to the District Judge or to the Judicial Commissioner, although it did not specifically deal with the question of title in the right spirit. KALU PERSHAD *v.* THAKUR DEI, 1 O. L. J. 81 **965**

——— ——— ——— **ss. 111, 112**—*Order of Assistant Collector referring parties to Civil Court—Not decree—No appeal.*

An order of an Assistant Collector referring the parties to the Civil Court is not a decree within the meaning of sub-section 3 of section 111 of the U. P. Land Revenue Act, III of 1901, and hence no appeal lies to the District Judge from such an order. BABU RAM DUBE *v.* RAMJAS DUBE **656**

——— ——— ——— ——— **s. 112 656**

——— ——— ——— ——— **s. 114 965**

——— ——— ——— **s. 233, cl. (k)**—*Partition of* mahal—*Jurisdiction of Civil and Revenue Courts—Suit for declaration that plaintiff is entitled to land allotted to defendants in partition—Civil Court, power of, to rectify errors in partition by Revenue Court—Revenue Court, order of, referring objector in partition proceedings to Civil Court, effect of—Second appeal, fresh case set up, entertainability of—Practice—Pleadings.*

A suit for possession by a declaration that the plaintiff is entitled to a portion of the land wrong-

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allotted to the defendants in partition by the Revenue Court, does not lie in the Civil Court in view of the exclusive provisions of section 233 (*k*) of the U. P. Land Revenue Act. It is clearly a matter relating to the partition of a *mahal*, for the plaintiff's claim cannot be decreed without affecting the partition come to by the Revenue Court.

When on an objection being raised in a partition proceeding, the Revenue Court referred the objector to the Civil Court for his relief:

Held, that it could not be argued therefrom that the partition was made subject to the decision of the Civil Court upon the point objected to.

A case not set up in the Courts below cannot be allowed to be raised in second appeal. SANWAL SINGH *v.* BHIKHARI, 1 O. L. J. 38 **860**

United Provinces Municipalities Act (I of 1900), s. 147—*Disobedience of notice—Validity of notice to be considered before conviction.*

A conviction cannot be had under section 147 of the Municipalities Act for the disobedience of a notice issued by a Municipal Board, unless the Court is satisfied that the notice was lawfully issued by the Board. EMPEROR *v.* PIARE LAL, 12 A. L. J. 254; 36 A. 185; 15 CR. L. J. 377 **745**

——— ——— ——— **s. 147**—*Masonry edging added to* chabutra, *whether material alteration—Conviction.*

The mere addition of a masonry edging to a *chabutra* attached to a house within the Municipality is not a material alteration of it so as to furnish ground for conviction under section 147 of the Municipalities Act. RADHA BALLABH *v* EMPEROR, 12 A. L. J. 227; 15 CR. L. J. 240 **192**

Unlawful assembly—Maintenance of existing peaceful possession with or without title—Enforcement of right by person out of possession **184**

Usufructuary mortgage—Notice to landlord **213**

——— ——— ——— ———*Terms—Mortgagor resuming possession upon abandonment by mortgagee—Personal covenant to pay, becomes operative—Interest.*

Where in a usufructuary mortgage the net profits, after payment of the land revenue, were agreed to be taken as equivalent to the annual interest:

Held, (1) that the mortgagees were bound by the terms of the contract to pay the land revenue, whether there was profit or loss; (2) that an inquiry whether the land remained fallow through their negligence or not, was precluded by the very terms of the contract; (3) that whether the mortgagees are to bear the enhancement of revenue made at a periodical resettlement is a question of fact dependent upon the intention of the parties to the contract; (4) that upon the mortgagees' abandonment of the possession and the mortgagors' taking back the same, the personal covenant to pay the debt and interest became operative and the mortgagees are entitled to interest from such date. HARI *v.* SHRIDHAR, 10 N. L. R. 9 **131**

Usufructuary mortgagee, if can sue tenants for rent as landlord—Co-sharer landlords—Interest of each, whether should be in same degree—"Rent due," in section 148 A, Bengal Tenancy Act, 1885, meaning of—Effect of order of District Judge—Jurisdiction of first Court **981**

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Waiver. *See* APPEAL; CUSTOM; LIMITATION ACT, 1908, SCH. I, ART. 75.

——— ———*Acceptance of overdue instalment, whether amounts to.*

The question whether the acceptance of an overdue instalment amounts to waiver of the lateness in payment, is one to be determined by the circumstances of each case.

In the course of proceedings in execution of a money decree for the sum of Rs. 782, a compromise was executed by the parties under which the decree-holder was to accept Rs. 650 in full satisfaction of the judgment-debt, provided that the judgment-debtor paid Rs. 100 at once, Rs 250 in October 1908 and the balance of Rs. 300 in October 1909. In case of default, the decree holder was to be entitled to execute his decree for Rs. 782. The judgment-debtor paid Rs. 100 on the spot, but he did not tender the sum of Rs. 250, which was due in October 1908, at the stipulated time. The decree-holder demanded payment of the entire balance remaining due on the footing of the original decree, but he subsequently accepted the payment of Rs. 250. Subsequently, the decree-holder sought to execute his decree for Rs. 782 giving the judgment-debtor credit for what he had paid:

Held, (1) that the acceptance of the overdue instalment of Rs. 250 under the compromise was sufficient to constitute a waiver; and

(2) that by accepting it, the decree-holder condoned the default and could execute his decree only on the footing of its being a decree for Rs. 650 in accordance with the compromise. PITAMBAR SAHA *v.* KRISHNA MOHAN DAS **391**

Wajib-ul-arz—*Instances—Widow's rights in absence of collaterals*—Patti, *owners of.*

The entry in the *wajib-ul-arz*, that a widow is not allowed to make a gift to any of her paternal relations, was inserted in the interests of the collaterals, but has no effect where there are none who might challenge the alienation made by the widow. In the absence of any instance, the entry in the *riwaj-i-am* is not sufficient proof of a custom entitling the proprietors of the *patti* to succeed. ALLAH DITTA *v.* GAUHRA, 3 P. R. 1914; 129 P. L. R. 1914 **127**

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Will. *See* HINDU LAW.

——*Bequest—Gift over if minor legatee do not attain full age, whether valid—Failure of prior bequest, not as contemplated—Validity of gift—Succession Act (X of 1865), ss. 111, 116.*

A gift over to a person in the event of a minor legatee not having attained full age is valid. The specified uncertain event in this case, under section 111 of the Succession Act, is the failure of the minor to attain his majority.

Section 116 of the Succession Act, which merely incorporates the rule of the English Law, provides that a gift over shall take effect on the failure of a prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Where a testator contemplated that if his son died a minor and his widow survived him, she would acquire the property before the two daughters:

Held, that this would not deprive the two daughters of the benefit of the legacy if the widow predeceased the son. DURGA PROSAD *v.* RAGHU NANDAN LAL **597**

——*Construction—Intention of testator—Costs.*

A Will must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by the testator's words. It may be that if the words he employs are *voces signatæ* they must be so accepted whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole Will, that is, the whole of the words employed by the testator, must be looked at together so as to determine the whole intention. It is not legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply.

Where, therefore, a Hindu executed a Will in the Mofussil in favour of his two sons with the provision that in the event of the death of one of the sons the survivor would take the whole of the property, after undertaking to defray the expenses of the maintenance of the widow and the minor daughters of the deceased, and the event happened after the death of the testator:

Held, that the surviving son was entitled to the estate conveyed by the Will with the correlative obligation.

In view of the special difficulties in the construction of the Will the respondent was held entitled to all her costs from the appellants. CHUNILAL PARVATISHANKAR *v.* BAI SAMRATH, 25 M. L. J. 647; 18 C. W. N. 844; 19 C. L. J. 563, 16 BOM. L. R. 365; 12 A. L. J. 742; 16 M. L. T. 59 **645 P. C.**

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——Construction, rule of **166**

——*Executor—Power of executor to settle claims in respect of testator's property—Legatee, right of.*

Executors acting *bona fide* have power to settle claims in respect of the estate of their testator, and this power cannot be disputed by the legatees. HERBERT ARCHIBALD POCOCK *v.* DELHI AND LONDON BANK, LTD., 12 A. L. J. 274; 36 A. 217 **143**

——*Legatee—Enlargement of devised estate by legatee—Lease, determination of—Possession of heir after determination—Full proprietary right acquired by heir—Sale of property—Remainder-man, right of—Occupancy right acquired in land by vendee before purchase—Re-emergence of occupancy right.*

In 1844 *T* got from Government a farming lease of waste land for the fixed term of twenty years. In 1851 *T* executed a Will under which he left the land to his wife, *R*, for her life and on her death to his daughter, *J*, for her life, with reversion to the temple of Jagannath. *T* died in 1852 and after his death *R* continued in possession of the land till 1871 when the Government bestowed on her full proprietary title in the property. *R* then sold the land to the defendant *D*. *R* died and later on *G* died in 1904. *J*, the trustee of the temple of Jagannath, brought this suit for possession of the land as the remainder-man under the Will. *D* pleaded that *R* was the absolute owner of the property and had as such full power to transfer the same and that in case *J* was entitled to the estate, *D* was entitled under section 51 of the Transfer of Property Act to the expenditure incurred on improvements. *D* also pleaded that he had before the date of sale occupancy rights in the lands and if absolute title did not pass to him, he was entitled to retain actual physical possession of the land as occupancy tenant or *khaikar*:

Held, (1) that the estate of *T*, whatsoever it may have been in the village, came to an end in 1864 and the possession of *R* from that time onwards was in her own right and as such the sale-deed operated to transfer full proprietary title to the vendee;

(2) that assuming the plaintiff's case to be a good one and he being entitled to possession, *D* could not rely upon section 51 of the Transfer of Property Act in such a case;

(3) that *J* as reversioner under the Will would be entitled only to proprietary possession and that any occupancy right previously acquired by *D* could not be affected in any way.

Where a legatee under a Will gets the enlargement of the estate, the enlargement would operate as an enlargement of the estate of the testator and enure for the benefit of the remainder-man under the Will. RAJ KISHORE DAS *v.* JAINT SINGH, 12 A. L. J. 717 **364**

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Workmen's Breach of Contract Act (XIII of 1859)—*Contract to perform higher services than manual labour not within Act.*

An agreement to render services far higher than those of manual labour is not a contract within the meaning of Workmen's Breach of Contract Act. RAMZAN *v.* NOOR MAHOMED YACUB, 7 S. L. R. 100; 15 CR. L. J. 383 751

——— ——— ——— ——— *Contract to work for twelve years.*

A contract to work 8 hours a day for 12 years, for wages not shown to be above the market-rate, and to live in any house that may be provided, being otherwise a form of slavery, is illegal.

Where an advance made to a workman is merely a loan, Act XIII of 1859 does not apply. AMBU, *In re*, 15 CR. L. J. 384 752

——— ——— ——— ——— **s. 1**—*"Artificer", whether includes head-artificer or supervisor.*

It is not necessary for a prosecution under Act XIII of 1859 that an artificer should work with his own hands. Section 1 of the Act covers the case of a head-artificer or workman who undertakes to get certain work done by other artificers, workmen or labourers under his own supervision and direction. SEIN YIN *v.* AH MOON SHOKE, 7 L. B. R. 82; 15 CR. L. J. 235 187

——— ——— ——— ——— **s. 2**—*Sentence—Appeal—Revision.*

Where under the Workmen's Breach of Contract Act a person is sentenced to imprisonment for failing to comply with the order of re-payment of advance, he has no right to appeal; his remedy is by way of an application in revision. THAIRIO *v.* EMPEROR, 7 S. L. R. 80; 15 CR. L. J. 372 740

——— ——— ——— ——— **ss. 2, 3**—*Agreement by workman to work for fixed period of 50 months in lieu of advance made to him by his employer, whether enforceable under the Act.*

A workman, agreeing to work in a factory for a period of 50 months, took an advance from his employer;

Held, that the contract fell under Act XIII of 1859 and the workman was bound to work till the expiration of the period fixed in the contract, after which he could re-pay the balance of the advance money and get himself free. LUCAS, C. J. *v.* RAMAI SINGH, 12 A. L. J. 152; 15 CR. L. J. 233 185

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